

SUPREME COURT MAKES IT DIFFICULT FOR UNIONS TO SEEK INJUNCTIVE RELIEF

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The Ohio Supreme Court issued an opinion this year dealing with the issue of whether a party may ask a court to intervene in a matter that is otherwise within the exclusive jurisdiction of the State Employment Relations Board. Unions may often want to obtain a court order preserving the *status quo* while the union challenges an unlawful act by the employer, either through an unfair labor practice charge with SERB or through negotiations with the employer. While the Court's opinion does not change existing law, it does demonstrate the difficulty unions have in preventing irreparable harm to their members when courts can not intervene and halt the illegal acts of public employers.

On May 1, 2019, the Supreme Court of Ohio issued an opinion in *State ex rel. Cleveland v. Russo*, Slip Opinion No. 2019-Ohio-1595, ordering Judge Nancy M. Russo of the Cuyahoga County Court of Common Pleas to vacate orders she had previously entered in *Assn. of Cleveland Fire Fighters, Local 93 v. Cleveland* and to cease exercising jurisdiction over that case. *Assn. of Cleveland Fire Fighters, Local 93 v. Cleveland*, dealt with an unfair labor practice charge filed by Local 93 regarding a change in shift start times.

Facts of the Case

Traditionally, Cleveland fire fighters work 24-hour shifts beginning at 8:30 a.m. However, in December 2018, Cleveland's fire chief decided to change the shift start time to 7:00 a.m. On December 26, 2018, the president of the International Association of Fire Fighters, Local 93, emailed the fire chief objecting to his decision to modify the shift start times and argued that the chief's actions "violated the current contract and the contract negotiations that [we]re underway." The chief responded in writing and reiterated the change in shift times. On January 8, 2019, the chief issued the shift-change-order notification to the fire fighters, with an effective date of February 11, 2019.

On or about January 31, 2019, the union filed an unfair labor practice charge with the State Employment Relations Board (SERB). The union alleged that the chief's actions were unfair labor practices in violation of R.C. 4117.11(A)(1) (interfering with employees' selection of a representative for collective-bargaining purposes) and (5) (refusing to bargain collectively with employees' representative). Under R.C. 4117.08, public employers must bargain over "All matters pertaining to wages, *hours*, or terms and other conditions of employment" (emphasis added).

Additionally, on February 6, 2019, the union filed a complaint for declaratory judgment, asking for a temporary restraining order (TRO) and injunctive relief in the Cuyahoga County Common Pleas Court against the city of Cleveland, the Fire Chief, and the Director of Public Safety (the Defendants), alleging that the shift time order was subject to collective

bargaining under R.C. 4117.08(A) and (C)(9). The union asked the trial court to declare that the shift-time order violated R.C. 4117.08 because it involved a matter subject to collective bargaining. The union also sought to enjoin the Defendants from enforcing the time change order until the mandatory collective-bargaining negotiation process had been completed. Basically, the union wanted to preserve the *status quo* while the negotiations proceeded. Without such an order, the firefighters would be continually harmed by the change in shift times, and even if SERB were to ultimately rule in their favor, there might be no way for SERB to fashion a remedy that could adequately address the harm sustained by the firefighters in the meantime.

Judge Russo held a hearing on February 7, 2019, and Defendants filed a motion to dismiss for lack of subject-matter jurisdiction, arguing that SERB had exclusive statutory authority over matters pertaining to R.C. 4117. Judge Russo denied the Defendants' motion to dismiss, instead entering a TRO staying the shift-time order until March 30, 2019, and scheduling a pre-trial hearing for March 14, 2019.

On February 15, 2019, the Cleveland Defendants filed a complaint in the Ohio Supreme Court, arguing that Judge Russo patently and unambiguously lacked jurisdiction due to the General Assembly's granting SERB "exclusive jurisdiction over all matters arising from rights created by [R.C.] Chapter 4117." Cleveland asked for a writ of prohibition, stopping the judge from taking any action in the lawsuit filed by the firefighters.

Issue before the Court

Generally, in order to be entitled to a writ of prohibition, the Cleveland Defendants had to establish that (1) Judge Russo was about to exercise or had exercised judicial power, (2) Judge Russo lacked authority to exercise that power, and (3) denying the writ would result in an injury for which Cleveland would lack an adequate remedy in the ordinary course of law. However, if Judge Russo patently and unambiguously lacked jurisdiction in the underlying case, then Cleveland did not need to establish the lack of an adequate remedy of law. Thus, in this case, the question before the Supreme Court was whether Judge Russo patently and unambiguously lacks jurisdiction. To answer that question, the Supreme Court had to determine whether the relief that the union was seeking fell within the exclusive jurisdiction of SERB.

Argument

Cleveland argued that a determination whether a public employer's unilateral action affects employees' work hours "is generally a factual question...properly determined by SERB, which was designated by the General Assembly to facilitate an amicable, comprehensive, effective labor-management relationship between public employees and employers." In fact, SERB "has exclusive jurisdiction to decide matters committed to it pursuant to R.C. Chapter 4117," and if "a party asserts claims that arise from or depend on the collective bargaining rights created by R.C. Chapter 4117, the remedies provided in that chapter are exclusive." However, "[i]f a party asserts rights that are independent of R.C. Chapter 4117, the party's complaint may properly be heard in common pleas court."

Judge Russo claimed that she did not patently and unambiguously lack jurisdiction, because

the union's complaint includes claims that may be independent of the collective bargaining rights set forth in R.C. 4117. According to Judge Russo, fire fighters with child-custody decrees and preexisting family-care arrangements and fire fighters who "would be personally affected [and harmed] by the structural change to their work schedule" made claims independent of the claim that Cleveland engaged in unfair labor practices.

The Supreme Court's Analysis

However, the Ohio Supreme Court noted that the union was not really alleging independent claims. The union was seeking a declaration that the shift-change order violated R.C. 4117.08(A), which lists matters that are subject to collective bargaining, including "hours." The union was also seeking injunctive relief to prevent Cleveland officials from changing shift start times "without adhering to the statutorily mandatory collective bargaining negotiation process." The union did not assert any claims that fell outside the scope of the collective-bargaining rights created by R.C. 4117. While the complaint referred to fire fighters with child-custody decrees and pre-existing family-care arrangements and fire fighters who "would be personally affected [and harmed] by the structural change to their work schedule," the Supreme Court held that those claims were inherent in the union's allegation that the chief's actions were unfair labor practices in violation of R.C. 4117.11(A)(1) and (5), and did not fall outside the scope of the collective-bargaining rights set forth in R.C. 4117.

Decision

The Court noted that the only issue presented in this case was whether Judge Russo patently and unambiguously lacked jurisdiction to preside over the union's complaint. The Supreme Court held that she did lack jurisdiction.

The Court found that the union's claims arose out of rights that are set forth in R.C. Chapter 4117 relating to hours and the allegation that as a public employer, Cleveland is required to negotiate changes in hours and shift times. Additionally, the union did not assert any claims that fell outside the scope of the collective-bargaining rights created by R.C. Chapter 4117. As a result, the Supreme Court granted the peremptory writ of prohibition to prevent Judge Russo from "exercising jurisdiction over a case which is within the exclusive jurisdiction of SERB."

Impact

This case shows the difficulty unions have in preventing the continued illegal acts of public employers while a case is pending before SERB or while the parties are negotiating a contract. Here, the City unilaterally made a change to shift hours, a change clearly contemplated under Ohio law as being subject to bargaining. While the union filed an unfair labor practice with SERB, and was also involved in negotiations with the employer, neither of those avenues could prevent the change unilaterally made by the employer from being implemented or continuing. Although a final resolution, such as a SERB ruling or completion of the negotiations, might occur several months later, bargaining unit members would continue to be harmed during the entire time the ULP charge was being considered and the negotiations were proceeding.

The only way to stop the harm would be to obtain a TRO from a court, maintaining the *status quo* until the ULP charge and/or the negotiations were resolved. Unfortunately, under the *Cleveland* decision, courts do not have jurisdiction to entertain a request for a TRO or injunction if the issue is determined to be within the exclusive jurisdiction of SERB (which is almost always going to be the case).

There is a provision in state law that would allow SERB to go to court to obtain a TRO or preliminary injunction while the ULP charge is being processed by SERB. However, SERB probably will not entertain a request by a union to file a court action until it has first found probable cause (which may take several months) and, even then, as far as we know, SERB has never actually filed a lawsuit in court to obtain injunctive relief while it is still in the process of deciding the ULP charge.