

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
State Employment Relations Board,

Complainant,

and

Findlay Education Association,

Intervenor,

v.

Findlay City School District Board of Education,  
Respondent.

CASE NUMBER: 85-UR-04-3558

ORDER

(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;  
February 18, 1988.

On April 26, 1985, an unfair labor practice charge was filed by the  
Findlay Education Association (Charging Party) against the Findlay City  
School District Board of Education (Respondent).

Pursuant to Ohio Revised Code (O.R.C.) §4117.12, the Board conducted an  
investigation and found probable cause to believe that an unfair labor  
practice had been committed. Subsequently, a complaint was issued alleging  
that the Respondent had violated O.R.C. §4117.11(A)(1) and (A)(5) by  
unilaterally revising the school calendar to provide for an additional  
classroom day at the end of the school year and by distributing surveys to  
the teachers in the bargaining unit. The case was heard by a Board hearing  
officer. The Board has reviewed the record, the hearing officer's proposed  
order, and exceptions.

For the reasons stated in the attached opinion, incorporated by  
reference, the Board adopts the Admissions, the Findings of Fact, and  
Conclusions of Law Nos. 1, 2, and 4; rejects Conclusion of Law Nos. 3 and 5;  
concludes that with regard to the unilateral revision of the calendar to  
provide for a make-up day, the Respondent had a duty to bargain, but no  
violation of O.R.C. §4117.11(A)(1) and (A)(5) occurred since the Charging  
Party sat on its rights; dismisses the complaint on this issue; and  
concludes that with regard to the survey of the teachers, the Respondent  
violated O.R.C. §4117.11(A)(1) and (A)(5) by direct dealing with its  
employees.

The Respondent is ordered to cease and desist from such direct dealing.  
Because of the circumstances of this case, no posting will be required.

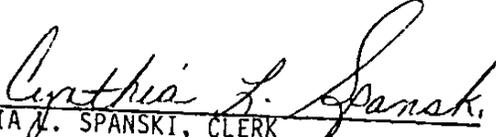
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It is so ordered.

SHEEHAN, Chairman; DAVIS, Vice Chairman; and LATANE, Board Member,  
concur.

  
WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party  
on this 13<sup>th</sup> day of May, 1988.

  
CYNTHIA L. SPANSKI, CLERK

1664b:LSI/jtb

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OPINION

Davis, Vice Chairman:

This case raises the issue of whether the Findlay City School District Board of Education (Respondent) violated Ohio Revised Code (O.R.C.) §4117.11(A)(1) and (5) when it (a) unilaterally revised the school calendar to provide for an additional classroom day at the end of the 1984-85 school year and (b) polled teachers to determine their preference as to the scheduling of the additional day. The facts and admissions set forth in the hearing officer's report are adopted by the board and incorporated herein by reference.

Critical facts worthy of restatement are these: The Respondent is bound by O.R.C. §3317.01, which requires Ohio school districts to have students in attendance a minimum of 175 days per school year. Due to the occurrence of six (6) "calamity days" during the 1984-85 school year, however, there were only 174 student attendance days under the established calendar. This necessitated the addition of one make-up day of classroom instruction. (Hearing Officer's Finding of Fact #3; findings of fact hereinafter will be referenced as "F.F. #\_\_".)

The Respondent's Superintendent prepared and on February 19, 1985, distributed to the District's more than 400 teachers a survey inquiring as to their preference for scheduling. (F.F. #4.) The Superintendent did not consult with the exclusive representative, the Findlay Education Association ("FEA"), in developing the survey. As to whether the Superintendent discussed with the FEA his general plan to distribute the survey, the FEA President testified that the Superintendent had mentioned, without

specificity, that a survey "might be sent out." The Superintendent testified that he was not sure whether there was such a conversation prior to the distribution of the survey. Viewing the evidence in the light most favorable to the Respondent, the most that transpired was a passing reference to a possibility that a survey might be used. (F.F. #4 and transcript pages 16-19, 32, and 62.) The FEA's only definitive knowledge that the survey was being used and its only opportunity to examine the contents of the survey occurred when the survey form was distributed to the teachers by the Superintendent.

The Superintendent on February 21, 1985, did talk with the FEA President about the partial results of the survey and his intention to recommend that the make-up day be added at the end of the school year. This discussion, however, occurred prior to the deadline for the survey responses, and, at the time of the discussion, only 137 responses had been received. Ultimately, 358 were received and reviewed by the Respondent. (F.F. #5 and transcript page 62.)

The Respondent School Board at its regularly scheduled meeting on February 25, 1985, voted to revise the calendar to provide for the additional day to be held at the end of the school year, which was consistent with the majority preference as expressed in the survey. (F.F. #7 and 9.) At no time during this process had the FEA asked to bargain on the change. The FEA membership met in March, after the decision was made, and the survey was discussed. However, at the next meeting between the Superintendent and the FEA President, held March 21, the President did not raise the issue of the Respondent's unilateral action. (F.F. #11 and transcript pages 45 and 62.)

The collective bargaining agreement in effect at the time between the parties did not address the scheduling of make-up days. It did address the initial development of the calendar and provided for FEA input prior to the Respondent School Board's adoption of the calendar.

I

It is beyond question that the Respondent had a legal obligation to schedule an additional day of classroom instruction. Whether to schedule a make-up day is not a matter available for bargaining. However, when to hold the make-up day is a subject that requires bargaining with the exclusive representative.

The Respondent argues that calendar establishment is reserved to management. The FEA counters that the collective bargaining agreement provides for FEA participation. Neither argument is on point. The instant situation is not a simple matter of scheduling or of basic calendar establishment. The contractual provision cited by the FEA, Article III Section D, relates to the initial creation of the calendar and not to subsequent adjustments. The issue involves alteration of a planned work program upon which teachers relied. The alteration is unavoidable, but the manner in which the existing calendar is altered is a question of hours, terms and other conditions of employment. These are subjects for which collective bargaining is mandatory under O.R.C. §4117.03, 4117.08(A), and 4117.11(A)(1) and (5). The Respondent acknowledged the critical importance

of the issue to the employees when it chose to evaluate employee preferences prior to reaching a decision. The Respondent, however, failed to use the legislatively designed procedure for determining employee desires on such issues: collective bargaining with the elected representative of the employees. Through this action, the Respondent breached its duty to bargain.

There is no absolution from this duty to bargain. There is, however, a question as to whether the FEA's inaction in this case relieves the Respondent from a finding that it committed an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and (A)(5). The FEA had ample advance awareness of the Respondent's legal obligation to establish a make-up day, yet at no time did the FEA assert a desire to bargain. Ideally, the Respondent would have invited FEA to bargain. In the case at hand, however, it is undisputed that the FEA was aware of the need to provide for a make-up day well before the decision was made. The matter was raised in meetings between the Superintendent and the FEA President on two occasions (F.F. #4 and 5.), and at either time the FEA President could have asserted the FEA's desire to bargain on the issue. When the Respondent School Board took action to provide for the additional day, the matter was considered in a public meeting which the FEA President attended. She did not address the Respondent on the matter, even though the Respondent School Board routinely provided on their agenda an opportunity for the FEA to raise matters of interest or concern. (F.F. #7, 8 and 9.) There was no reason for the FEA's failure to assert its desire to bargain on the issue. Thus, in this case we conclude that the FEA slept on its rights, and, in failing to exercise its rights when presented with ample opportunity and adequate time, the FEA's "reaction, or its lack of reaction, to the announced ... change ... was sufficient to confuse the Respondent's obligations to bargain." Pickaway Ross Joint Vocational School District, SERB 87-027 (11/18/87), at 3-98 and 3-99.

The Board holds that the Respondent had a duty to bargain on the make-up day but that, in view of the FEA's inaction, the failure to bargain does not constitute an unfair labor practice. On this point, the complaint is dismissed.

II

The second allegation raised in this case is that the Respondent committed an unfair labor practice when, prior to establishing the make-up day, it surveyed the teachers as to their preference for setting the make-up day during spring break or at the end of the school year. It is alleged that this conduct constituted circumvention of the exclusive bargaining representative and therefore was a violation of O.R.C. §4117.11(A)(1) and (5) commonly referred to as "direct dealing."

It has been established above that the question of when to hold the make-up classroom day is a mandatory subject of bargaining. The Respondent, then, in polling the employees without prior consultation with or participation by the FEA, by-passed the FEA to ascertain the desires of the employees on an issue reserved for resolution only through bargaining. This direct communication on a mandatory subject of bargaining is an action in derogation of the Respondent's duty to bargain with the FEA.

The employees have chosen the FEA to represent them for purposes of collective bargaining, and that choice and the concomitant structure and procedures must be respected. The FEA is the exclusive representative of all teachers in the unit. The term "exclusive representative" is especially instructive in this context. "Representative" means that the FEA has been selected by the employees to speak for them when dealing with the Respondent on issues of wages, hours, terms, or other conditions of employment. Moreover, the FEA is not just a representative. It is the "exclusive" representative. The FEA is the only source to which Respondent may turn when seeking to ascertain the desires of the unit employees on mandatory subjects of bargaining.

By dealing directly with the employees and circumventing their representative, the Respondent not only breached the rules and terms of the relationship, but also undercut the status of the exclusive representative, potentially impairing the FEA's relationship and effectiveness with the employees it represents. This action is inconsistent with the Respondent's duty to bargain and interferes with the employees' basic rights to representation and collective bargaining. Therefore, it is a violation of O.R.C. §4117.11(A)(1) and (5).<sup>1</sup>

Because of the specific circumstances of this case, the measures conventionally ordered to remedy an unfair labor practice are altered. Ordinarily, the Board would order the Respondent to cease and desist from the unlawful activity and would require the Respondent to post a Board-provided notice stating the Board's holding and the Respondent's commitment to desist from the unlawful activity. In the instant case, the school year for which the make-up day was scheduled elapsed nearly four years ago. This unusually long passage of time and other circumstances of the case indicate that a posting is unnecessary. The Respondent is ordered to cease and desist from direct dealing, but no posting will be required.

Sheehan, Chairman, and Latané, Board Member, concur.

<sup>1</sup> This analysis of the nature of direct dealing is also found in the established bodies of labor law in both the public and private sectors. See, e.g., Ross Crane Rental, 267 NLRB No. 50; 114 LRRM 1079 (1983); Medo Photo Supply Corp. v. NLRB, 321 U.S. 678, 14 LRRM 581 (1944). Specifically with regard to surveys distributed to employees without the participation of the exclusive representative, the National Labor Relations Board in Bob's Big Boy Family Restaurants, 264 NLRB No. 63, 111 LRRM 1411, 1413 (1982), found that "such direct dealing constituted individual bargaining in derogation of the employer's bargaining obligation." A similar conclusion was reached by the Michigan Employment Relations Commission in Grand Rapids Public Schools, Case No. C84 G-184 (slip opinion), 1986 CCH Para. 44,584 (1986), wherein a school board was found to have committed an unfair labor practice by distributing a survey to teachers soliciting views on mandatory subjects of bargaining.