

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

In the Matter of  
State Employment Relations Board,  
Complainant,

v.

Swanton Local School District Board of Education,  
Respondent.

CASE NUMBER: 86-ULP-10-0407

ORDER

Before Chairman Sheenan, Vice Chairman Davis, and Board Member Latané;  
March 30, 1989.

On October 28, 1986, the Swanton Education Association (Charging Party) filed an unfair labor practice charge against the Swanton Local 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 adopting and implementing a progressive discipline policy.

The case was heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions and responses.

The Board adopts the Hearing Officer's Admissions and Stipulations, Findings of Fact, Conclusions of Law and Recommendations. The Board also adopts the Hearing Officer's Analysis and Discussion in its entirety. Pursuant to Ohio Administrative Code Rule 4117-1-15, the Hearing Officer's full report is adopted as an opinion of the Board with the inclusion of the following footnote to be inserted at the end of the fourth paragraph of the Hearing Officer's Analysis and Discussion:

Respondent argues in its exceptions that, under this analysis, 'a public employer could not act upon its decision to discipline without bargaining with the Union in each instance!' Respondent's Exceptions, filed February 24, 1989, page 11. This is a wholly inaccurate and contorted reading of the analysis and discussion.

The Respondent is ordered to:

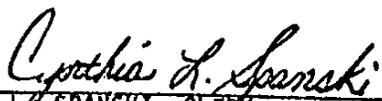
- a. CEASE and DESIST from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Chapter 4117, or refusing to bargain collectively with the employees' representatives, and from otherwise violating 94117.11(A)(1) and (A)(5).
- b. Take the following affirmative action:
  - (1) Post for sixty (60) days in the usual and normal posting locations where the bargaining unit employees work, the Notice to Employees furnished by the Board stating that the Swanton Local School District Board of Education shall cease and desist from the actions set forth in paragraph a. and shall take the affirmative action set forth in paragraph b.
  - (2) Immediately engage in collective negotiations with the Swanton Education Association regarding its decision to adopt and implement a progressive discipline policy.
  - (3) Immediately rescind the unilaterally adopted progressive discipline policy.
  - (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the issuance of the Order of the steps that have been taken to comply therewith.

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 12<sup>th</sup> day of April, 1989.

  
CYNTHIA L. SPANSKI, CLERK

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HEARING OFFICER'S PROPOSED ORDER

On January 21, 1988, upon due notice to all parties, an evidentiary hearing was conducted in the above-styled case before State Employment Relations Board Hearing Officer Chester C. Christie. The parties were represented as follows:

For the State Employment Relations Board:

Robert E. Ashton, Esquire  
Assistant Attorney General  
30 East Broad Street, 15th Floor  
Columbus, Ohio 43266-0410

For the Intervenor:

Christine A. Reardon, Esquire  
Gallon, Kainiz and Iorio  
3161 North Republic Boulevard  
Toledo, Ohio 43615

For the Respondent:

Thomas J. Gibney, Esquire  
Eastman and Smith  
800 United Savings Building  
Toledo, Ohio 43604-1141

I. STATEMENT OF THE CASE

On October 28, 1986, the Swanton Education Association (Union or Intervenor) filed an unfair labor practice charge against the Swanton Local School District Board of Education (Respondent or Employer). On July 23, 1987, subsequent to an investigation, SERB found probable cause to believe

an unfair labor practice had been committed and directed that a Complaint be issued. On November 21, 1987 SERB issued a Complaint alleging violations of §§ 4117.11(A)(1) and (A)(5).<sup>1</sup> The Complaint alleged, in essence, that effective the first day of the 1986-87 school year, Respondent unilaterally adopted a progressive discipline policy without notice to or bargaining with the Union. Subsequent to the granting of a Continuance, the matter was scheduled for hearing on January 21, 1988. Respondent filed its Answer to the Complaint on November 30, 1987. All parties filed prehearing statements on or before January 20, 1988.

On January 21, 1988, an evidentiary hearing was conducted and the parties were afforded the opportunity to present testimony and documentary evidence in support of their respective cases. At the outset of the record hearing, the Hearing Officer, pursuant to Intervenor's motion, amended the Complaint to include an allegation that on at least one occasion following the unilateral adoption of the progressive discipline procedure, Respondent implemented the procedure against a bargaining unit member. Posthearing briefs were timely filed on or before March 1, 1988.

## II. ISSUE

1. Whether Respondent's unilateral adoption and implementation of its progressive discipline procedure violated §§4117.11(A)(1) and (A)(5).

## III. ADMISSIONS AND STIPULATIONS

1. The Swanton Local School District Board of Education is a "public employer" as defined by §4117.01(B).
2. The Swanton Education Association is an "employee organization" as defined by §4117.01(D).
3. The employee organization is the exclusive representative of a bargaining unit of Respondent's certificated teaching employees.
4. At all times relevant to the Complaint, a collective bargaining agreement was in effect between the Union and the Respondent.
5. Respondent implemented its progressive discipline policy on February 17, 1987. To date, the following bargaining unit employees have been disciplined pursuant to that policy: Joe Kahl; Harold Ridgeway; Jeannette Campesino; Betty Jo Sadowski and Guhlan Dastagir.

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<sup>1</sup> All statutory references will be to the Ohio Revised Code Chapter 4117 unless otherwise indicated.

IV. FINDINGS OF FACT

1. Respondent and the Union were parties to a collective bargaining agreement, the term of which was from September 1, 1984 through August 31, 1986. The parties began negotiations for a successor agreement on or about May 7, 1986. The chairperson of the Union's negotiating team was Judith Huffman. OEA Uniserv consultant Don Montague was also present on behalf of the Union. Respondent was represented at negotiations by principal Roy Vivian, Superintendent John Syx and attorney Patrick Johnson. At the first negotiations session, Respondent presented a written proposal which proposed new contract language in the areas of "management rights" and "professional standards." The professional standards contract language encompassed a progressive discipline procedure for bargaining unit employees. These matters were proposed and addressed as separate and distinct bargaining issues. The then existing collective bargaining agreement contained neither a management rights clause nor a professional standards statement contemplating progressive discipline. The Union rejected the Board's May 7, 1986 management rights and professional standards proposals on the basis that management had adequate rights set forth in Chapter 4117 and the Union did not want additional management rights established by contract. The Union took the position that Respondent had a right to discipline its employees and that the right to discipline was contemplated within the provisions of §4117.08(C). The Union did not, however, take the position that Respondent had a right to adopt a specific progressive discipline policy under §4117.08(C). (T. 95, 96, 99, 100, SERB Ex. 2, 6).<sup>2</sup>
2. At the next bargaining session on May 15, 1986, the Board presented another written proposal under the heading "Evaluation" in which a progressive discipline procedure was proposed as part of a teacher evaluation system. The Union's negotiating team rejected this proposal indicating that it was not interested in having progressive discipline in the contract either via evaluation or professional standards as it was presented at the May 7th meeting. At a subsequent session, the parties agreed to refer the issue of evaluation to a Union and school board appointed committee of teachers and administrators. The parties agreed to refer the general topic of teacher performance evaluation only. The Union did not agree to negotiate progressive discipline procedures in the context of this committee. (T. 101, 102, 103, 104, SERB Ex. 7).

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<sup>2</sup> All references to the transcript of the hearing are indicated parenthetically by "T." followed by the page number(s). All references to exhibits are indicated parenthetically by "SERB Ex." followed by the number. References to the transcript or exhibits in the Findings of Fact are intended for convenience only and are not intended to suggest that such references are the sole support in the record for the Findings of Fact.

3. At the next negotiation session on May 20, 1986, Respondent submitted another written proposal providing for a progressive discipline procedure. This proposal explicitly included progressive discipline in a proposed management rights clause. The Union rejected the Board's May 20, 1986 management rights proposal, including the progressive discipline procedure. The Union reiterated its position that it believed the Board's statutory management rights were sufficient and that it did not want additional management rights established by contract. The Union did not represent to Respondent that it had the right to implement a progressive discipline policy pursuant to the management rights section of Chapter 4117. (T. 108, 108, SERB Ex. 8).
4. At the next negotiation session on June 11, 1986, progressive discipline was again proposed in the same form as at the May 20, 1986 session. The Union again rejected the proposed progressive discipline policy. The parties next met on June 24, 1986. During the course of the June 24th session, the parties discussed the remaining proposals on which they had not yet reached tentative agreement. By the close of the day, the parties reached a tentative agreement on the contract and had engaged in an item-by-item sign-off on most of the issues. The parties mutually agreed that all the issues that had not been tentatively agreed to at the bargaining table would be withdrawn. The Union again rejected the Board's management rights proposal and the Board agreed to withdraw it, including the progressive discipline language. Respondent agreed to withdraw the progressive discipline procedure proposal in exchange for the Union's promise that it would advise its membership of the rights reserved to management in Chapter 4117 and the Union's agreement to read Chapter 4117 to the bargaining unit members at any Union ratification meeting held to consider a tentative agreement. (T. 192, 193, 204, 206, 207, 215, 221, SERB Ex. 9).

Respondent's chief negotiator, attorney Patrick Johnson, maintained the position that Respondent's management rights/progressive discipline proposal was withdrawn on June 24, 1986 because he believed that the Union had conceded the Board's right to unilaterally implement progressive discipline. This position, however, is not supported by the record. During his testimony, Johnson could not recall any instance where a Union representative indicated during negotiations that it was the Union's position that Respondent had the right to implement a progressive discipline policy under Chapter 4117. He did recollect the Union taking the position that a progressive discipline policy was unnecessary because management already had the right to discipline its employees pursuant to §4117.08(C). No specific reference was made to the right to implement progressive discipline. (See T. 192-196).

5. Respondent unilaterally adopted a progressive discipline policy and procedure for bargaining unit teachers on or about August 25, 1986, the first day of the 1986-87 school year. Respondent did not notify the union president of this policy or bargain over the adoption or implementation of this policy. Beginning on or about February 17, 1987, the Board implemented the progressive discipline policy and began disciplining bargaining unit teachers pursuant to the policy. The policy remains in effect. (T. 37, 48, 49, 50).

#### V. ANALYSIS AND DISCUSSION

The issue presented for determination by the Board has been the subject of litigation before SERB in several previous instances. This subject was recently addressed in In re Findlay City School Dist. Bd. of Ed., SERB 87-031 (12-17-87). In that case, SERB was asked to determine whether an employer's adoption of a drug and alcohol use policy, which provided for employee discipline in the event of substance abuse adversely affected the employees' job performance, constituted a mandatory subject of bargaining. SERB concluded that the unilateral implementation of such a policy constituted a violation of §§4117.11(A.i) and (A)(5). In so concluding, SERB stated in pertinent part:

The inclusion of the sentence in the drug and alcohol policy inviting the imposition of discipline on employees whose performance is adversely affected by chemical dependency makes the adoption of such a "statement" a mandatory subject of bargaining. The threat of disciplinary action, ... brings the policy statement clearly within the scope of bargaining. The subject of discipline for chemical dependency adversely affecting job performance is clearly pertinent to the working environment of employees and the requirement to bargain over same does not abridge the employer's freedom to manage its operations in any significant manner.

The record of the instant case establishes that the Swanton Education Association is the exclusive representative of a bargaining unit of Respondent's certificated teachers. The Union and Respondent entered into negotiations for a successor collective bargaining agreement between May 7, 1986 and June 24, 1986. Respondent proposed contract language which would establish a progressive discipline policy. In each instance the proposal was rejected by the Union on the basis that the Union did not want additional management rights established by contract and management already had adequate rights, including the right to discipline its employees, set forth in Chapter 4117 of the Revised Code. The Union did not indicate during negotiations that it felt management had the right under Chapter 4117 to implement a progressive discipline policy. Each of Respondent's proposals regarding progressive discipline was clearly rejected by the Union. The record further demonstrates that as of June 24, 1986, the

parties signed off on all agreed-upon items and agreed to withdraw any outstanding issues including Respondent's proposed progressive discipline procedure. Respondent agreed to withdraw its proposal regarding progressive discipline in exchange for the Union's agreement to advise its membership of the rights reserved to management in the collective bargaining act and to read Chapter 4117 to the bargaining unit members at any Union ratification meeting held to consider a tentative agreement. Despite the Union's repeated rejection of Respondent's progressive discipline proposal and Respondent's eventual withdrawal of the proposal Respondent adopted a progressive discipline policy on or about August 25, 1986 and imposed discipline pursuant to that policy beginning on February 17, 1987. The policy remains in effect.

Complainant argues that Respondent's progressive discipline policy affects the terms and conditions of employment of the bargaining unit employees in question and is therefore a mandatory subject of bargaining. Complainant further submits that Respondent's unilateral adoption and subsequent implementation of this policy violates §§ 4117.11(A)(1) and (A)(5). Respondent, in defense of its actions, argues that §4117.08(C)(5) permits a public employer to lawfully adopt and implement a progressive discipline policy without bargaining. This argument fails to accurately reflect the current status of the law in this area.

The procedure by which an employee is disciplined, the manner in which discipline is meted out, and the effect of the discipline on an employee's tenure or other employment benefits are all terms and conditions of employment. Thus, an employer's decision to adopt and subsequently implement a progressive discipline policy affects a number of terms and conditions of employment. The progressive discipline policy implemented in the instant case establishes the manner of employer discipline and the procedure by which it is meted out. Moreover, the instant procedure gives each instance of discipline a specific cumulative value which leads to the penalty of discharge. Thus, by its very nature, Respondent's progressive discipline policy affects terms and conditions of employment and constitutes a mandatory subject of bargaining. The unilateral adoption and implementation of this policy therefore violates §§ 4117.11(A)(1) and (A)(5). See Findlay Bd of Ed. supra, City of Lakewood, SERB 88-009 (7-11-88), and Lorain City School Dist. Bd of Ed v. SERB et al., Ohio Supreme Court Case No. 87-1859, (decided 12-30-88).

Respondent additionally argues that the Union waived its right to pursue the instant unfair labor practice charge because it conceded Respondent's right to unilaterally implement the progressive discipline policy in question. This argument is not supported by the record. As previously noted, the record establishes that the Union consistently and repeatedly rejected Respondent's proposals for a progressive discipline policy during negotiations. The Union maintained the position that the management rights reserved to Respondent under the Act were sufficient and that it did not want additional management rights established in the parties' contract. At no time did the Union espouse the position that Respondent had the right to

Implement a progressive discipline policy under the Act. Respondent eventually withdrew its proposal regarding progressive discipline in exchange for the Union's agreement to apprise its membership of Respondent's rights under Chapter 4117 and to review Chapter 4117 at any ratification meeting held by the Union. The record as a whole does not demonstrate that the Union consented to Respondent's implementation of a progressive discipline policy. The waiver of a statutory right can be effected only through clear and unmistakable action by the waiving party. City of Lakewood, supra. No such action was taken in the instant case.

Based upon the preceding discussion, the Hearing Officer finds that Complainant has established by the required preponderance of evidence that Respondent has violated §§ 4117.11(A)(1) and (A)(5) by unilaterally adopting and implementing a progressive discipline policy. The decision to adopt and implement such a policy is a mandatory subject of bargaining because it affects the terms and conditions of employment of the bargaining unit members in question. Respondent has, for all intents and purposes, attempted to achieve by unilateral action that which it was unable to achieve at the bargaining table.

#### VI. CONCLUSIONS OF LAW

1. The Swanton Local School District Board of Education is a "public employer" as defined by §4117.01(B).
2. The Swanton Education Association is an "employee organization" as defined by §4117.01(D).
3. By refusing to bargain with the exclusive representative of its certificated teachers regarding the adoption and implementation of a progressive discipline policy, the Respondent has:
  - a. Interfered with, restrained, or coerced employees in the exercise of their rights guaranteed by Chapter 4117 of the Revised Code in violation of §4117.11(A)(1); and
  - b. Refused to bargain collectively with the representatives of its employees recognized as the exclusive representative or certified pursuant to Chapter 4117 of the Revised Code in violation of §4117.11(A)(5).
4. The Union did not waive its right to bargain with Respondent regarding its decision to adopt and implement the progressive discipline policy.

VII: RECOMMENDATIONS

Based upon the record as a whole, it is respectfully recommended that:

1. The Board adopt the Findings of Fact and Conclusions of Law set forth above.
2. The Board issue an Order requiring the Respondent to:
  - a. CEASE and DESIST from interfering with, restraining, or coercing employees in the exercise of the rights guaranteed in Chapter 4117, or refusing to bargain collectively with the employees' representatives, and from otherwise violating §4117.11(A)(1) and (A)(5).
  - b. Take the following affirmative action:
    - (1) Post for sixty (60) days in the usual and normal posting locations where the bargaining unit employees work, the Notice to Employees furnished by the Board stating that the Swanton Local School District Board of Education shall cease and desist from the actions set forth in paragraph a. and shall take the affirmative action set forth in paragraph b.
    - (2) Immediately engage in collective negotiations with the Swanton Education Association regarding its decision to adopt and implement a progressive discipline policy.
    - (3) Immediately rescind the unilaterally adopted progressive discipline policy.
    - (4) Notify the State Employment Relations Board in writing within twenty (20) calendar days from the issuance of the Order of the steps that have been taken to comply therewith.

ISSUED and SUBMITTED to the State Employment Relations Board in accordance with Ohio Administrative Code Rule 4117-1-15 and SERVED on all parties by certified mail, return receipt requested, this 2nd day of February, 1989.

  
CHESTER C. CHRISTIE  
Hearing Officer