

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEED OPINION 89-017

In the Matter of

192

State Employment Relations Board,

Complainant,

v.

Montgomery County Joint Vocational School District
Board of Education,,

Respondent.

CASE NUMBER: 87-ULP-5-0203

ORDER
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;
March 2, 1989.

On May 7, 1987, the Montgomery County Joint Vocational School Employees Association (Charging Party) filed an unfair labor practice charge against the Montgomery County Joint Vocational 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 refusing to negotiate on issues affecting the terms and conditions of employment with the exclusive representative of its employees. The case was heard by a Board hearing officer.

The hearing officer identified a number of mandatory subjects of bargaining on which the Respondent refused to bargain. However, there were other subjects of bargaining in dispute which were not addressed by the hearing officer.

In the Directive issued on January 12, 1989, the Board directed the parties to file with the Board briefs identifying those bargaining subjects which were not addressed by the hearing officer and which were the subject of the refusal to bargain allegations. The briefs were also to discuss whether those identified subjects are mandatory subjects of bargaining.

The Board has reviewed the record, the hearing officer's proposed order, exceptions, responses and briefs. For the reasons stated in the attached opinion, incorporated by reference, the Board amends the Finding of Fact No. 17 to read that the Union rejected the fact-finder's report, deletes Conclusion of Law No. 6, amends Conclusion of Law No. 5 to read that the Respondent violated O.R.C. 4117.11(A)(1) and (5) by refusing to bargain in good faith and unlawfully imposed conditions upon negotiations, amends Recommendation 2.a.(1) to delete "(2)" following "Chapter 4117.11(A)(1)." The Board adopts the Findings of Fact, Conclusions of Law and Recommendations as amended.

The Respondent is ordered to bargain on all issues determined to be mandatory subjects of bargaining by the hearing officer and the Board, as stated in the attached opinion.

The Respondent is further ordered to:

A. Cease and Desist from:

- (i) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Chapter 4117.11(A)(1) refusing to bargain collectively with the employee organization and otherwise violating R.C. §4117.11(A)(5).
- (ii) Refusing to bargain collectively with the exclusive representative of its employees on subjects that affect the wages, hours, terms and conditions of employment of its employees.

B. Take the following affirmative actions:

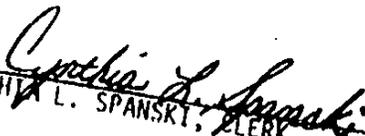
- (i) Post for sixty days, in all the usual normal posting locations where the bargaining unit employees work, the Notice to Employees furnished by the Board stating that the Montgomery County Joint Vocational School District shall cease and desist from the action set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B).
- (ii) Immediately engage in good faith collective bargaining with the exclusive representative of its employees and if necessary request the assistance of a mediator.

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 14th day of July, 1989.


CYNTHIA L. SPANSKI, CLERK

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SERB OPINION 89-017

In the Matter of
State Employment Relations Board,
Complainant,
and
Montgomery County Joint Vocational School District
Board of Education,
Respondent.

CASE NUMBER: 87-ULP-05-0203

OPINION

Latané, Board Member:

1

The issues in this case arose in January 1987 during contract negotiations for a successor collective bargaining agreement. The parties involved are the Montgomery County Joint Vocational School Employees Association (Union or Charging Party), representing one unit which contains certified teaching staff and a second unit which includes classified nonteaching staff, and the Montgomery County Joint Vocational Local School District Board of Education (Employer or Respondent).

On January 8, 1987, the parties met to begin negotiations for a successor agreement to the one-page memorandum of agreement which had been in effect from 1984 to 1987. At this meeting the Union presented a comprehensive master contract proposal which was discussed by the parties during two subsequent meetings in January.¹ On April 21, 1987, the Employer presented two counterproposals, one for each bargaining unit. During this meeting the Employer also presented a letter to the Union stating that the Employer would only negotiate items contained in the table of contents of its own proposals.² The Union responded by demanding that the Employer negotiate the subjects included in the original Union proposal.³ The Employer refused to do so, and insisted that it would not bargain on all of the issues presented by the Union.

¹Finding of Fact (F.F.) 2.

²These proposals contained sections on: (I) recognition of the Union as exclusive representative; (II) grievance procedures; (III) association rights (including a provision for deduction of Union dues by the Employer on written authorization by unit members); (IV) board rights; (V) salaries and fringe benefits (details excluded); (VI) implementation; and (VII) duration.

³F.F. 3, SERB Exh. 8-10.

The parties continued to meet throughout the spring, and the Employer continued to refuse to bargain the items contained in the original Union proposal.⁴ A mediator was called in and, at a meeting held on May 21, 1987, informed the parties that he had no jurisdiction to determine whether certain subjects were mandatory or permissive, and recommended fact finding due to the distance between the positions of the Union and the Employer.⁵

The parties went to fact finding and continued to bargain. At the conclusion of the first day of fact finding, the Employer agreed to negotiate on every topic contained in the original Union proposal, on the condition that if an item were not agreed to, it would be deemed not to have been negotiated at all. The Union agreed to this provision and bargaining continued. However, the Employer insisted on bargaining during this time "leave it" manner. No agreement was reached on or about August 5, 1987. It was accepted by the Employer and rejected by the Union.⁶

A final negotiating session was held on September 10, 1987. During this meeting the Employer presented three proposals and took the position that one of the three had to be accepted in totality or not at all. The Union asked the Employer if it would negotiate on any of the items not included in the Employer's proposal but which were included in the Union's original proposal. The Employer answered that it would only negotiate one of the three package proposals if presented.⁷ No agreement was reached at this meeting.

The issues in this case are:

- II
- (1) Whether the Employer, by refusing to negotiate on certain bargaining issues, violated O.R.C. §4117.11(A)(5);
 - (2) Whether the Employer refused to bargain in good faith in violation of O.R.C. §4117.11(A)(5) when it refused to bargain and insisted on an "all or nothing" package approach to negotiation.

III

The Board adopts the Hearing Officer's Conclusions of Law Nos. 1 through 4, deletes No. 6 and adopts No. 5 as amended to read:

- *F.F. 4.
*F.F. 10.
*F.F. 15, 5-17.
*F.F. 19.

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The Respondent violated R.C. §4117.11(A)(1) and (A)(5) by refusing to bargain in good faith in that it failed to negotiate mandatory subjects of bargaining and unlawfully imposed conditions upon negotiations.

With regard to the first issue, there were 32 bargaining issues which the Union asked to bargain and which the Employer refused to bargain about. The hearing officer addressed approximately 14 of the items but there were 18 items which were not addressed in the Proposed Order. To simplify discussion, all of the disputed issues are listed below. The numbers correspond to those in the table of contents of SERB Exh. 23 which was the Union's original proposed master contract.

- Proposal No. 6: Fair Share Fee.
- Proposal No. 7: Payroll Deductions.
- Proposal No.21: Special Leave for Association Business. ,
- Proposal No.22: Leave for Negotiations.
- Proposal No.23: Certified Contracts.
- * Proposal No.24: Specific Assignments - certified.
- Proposal No.25: School Calendar.
- Proposal No.27: Planning Time.
- Proposal No.28: Calamity Days.
- Proposal No.29: Staff Meetings.
- Proposal No.31: Emergency Leave.
- * Proposal No.35: New Assignments - certified.
- Proposal No.36: Professional Travel.
- Proposal No.38: Evaluation - certified staff.
- * Proposal No.40: Salary Advancement - certified.
- * Proposal No.42: Method of salary payment.
- Proposal No.43: Additional salary compensation.
- Proposal No.44: Home Instruction.
- * Proposal No.48: Substitution.
- Proposal No.49: Extra Duty Compensation.
- Proposal No.50: Home Visit Compensation.
- Proposal No.51: Tuition Reimbursement.
- Proposal No.52: Retirement Incentive Plan.
- Proposal No.53: Eligibility for Insurance Benefits.
- Proposal No.54: Hospitalization Coverage and Carrier.
- Proposal No.55: HMO Coverage and Carrier.
- Proposal No.56: Dental Insurance Coverage and Carrier.
- Proposal No.61: Work Day and Work Week - classified.
- Proposal No.64: Holidays - classified.
- Proposal No.65: Paid Vacation - classified.
- Proposal No.66: Evaluation - classified.
- Proposal No.68: Extra Duty Pay - classified.

The Board finds that the items listed above, except for the starred (*) items, all pertain to or affect wages, hours, and other terms and conditions of employment, and as such there is a duty to bargain about them in good

faith pursuant to O.R.C. §4117.08 (A).^{*} There is insufficient evidence in this case to decide whether the starred (*) items are mandatory bargaining subjects in this case.

IV

For the reasons stated below the Board finds that the Employer's total actions in negotiating, which involved refusal to bargain on mandatory bargaining conditions, as well as the imposition of extremely limiting O.R.C. §4117.11(A)(5), constitute bad faith bargaining in violation of O.R.C. §4117.11(A)(5).

As the Board has stated: "An environment for good faith bargaining can be compromised in a variety of ways."¹ The Employer in this case engaged in a series of negotiating practices which did compromise the bargaining environment and so failed to comply with the statutory duty to bargain collectively in good faith with the Union. O.R.C. §4117.01(G) provides:

'To bargain collectively' means to perform the mutual obligation of the public employer, by its representatives, and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. This includes executing a written contract incorporating the terms of any agreement reached. The obligation to bargain collectively does not mean that either party is compelled to agree to a proposal nor does it require the making of a concession. (Emphasis added)

The Board has not previously addressed the specific issue presented by the Employer's conduct in this case; i.e., the propriety of package bargaining. However, there is persuasive authority elsewhere holding that a party is not bargaining in good faith when it insists on a total package agreement.²

When an employer takes the position that it does not have to bargain on issues which are mandatory subjects of bargaining, and when eventually it produces only "take it or leave it" counterproposals, it constitutes a violation of O.R.C. §4117.11 (A)(1) and (A)(5). In this case the Board finds that the Employer's package approach to negotiating mandatory subjects was bad faith bargaining.

^{*}See SERB v City of Lakewood, 1988 SERB 4-141 (Ct.Com.Pl. 1988); also Lorain City Sch. Dist. Bd. of Educ. v. SERB, 40 Oh St 3d 257 (1988).

¹In re City of Twinsburg, SERB 87-011 (6-4-87).

²Escambia County School Board, 2 FPER 93 (Fla. PERC 5-13-76).

V

The specific items at issue in this case are now discussed below. The number in parenthesis following each issue refers to the number of the item as it appears in the original Union proposal and as presented at p. 3, supra.

1. ITEMS PERTAINING TO WAGES

Leave

Issues involving paid leave are generally held to be mandatory subjects of bargaining because they involve payment of compensation for working time and, therefore, pertain directly to wages, hours, and other terms and conditions of employment.¹¹ In this case, the items of leave for association of business (21) and leave for negotiations (22) are both mandatory subjects within the meaning of O.R.C. §4117.08(A) because they pertain to wages. Thus, the Employer was obligated to bargain in good faith on these issues.

Compensation

Several of the items at issue involve the payment of wage compensation for work performed outside of normal work duties and/or hours. These items directly pertain to wages and are, therefore, mandatory subjects within the meaning of O.R.C. §4117.08(A). Thus, the Employer in this case improperly refused to bargain on: salary advancement for certified employees (40) and additional salary compensation (43);¹² extra duty compensation (49) &

¹¹Sierra College Faculty Assn. v. Sierra Joint Comm. College Dist., 4 NPER 05-12150 (Cal. PERB 11-5-81), an employer was obligated to respond to a union proposal for a reduction in workload, without loss of compensation, for instructors who were acting as negotiators; Jefferson Classroom Teachers Assoc., CTA/NEA v. Jefferson School Dist., 2 NPER 05-11117 (Cal. PERB 6-19-80), a union proposal that union officials be released from regular duties for the purpose of union business without loss in pay was related to working hours and was, therefore, held a mandatory subject; and City of Albany v. Helsby, 92 LRRM 2110 (NY Ct App 1976), time off for union activity is in the same category as length of the work year and vacation time, pertains to a term of employment, and is therefore a mandatory subject.

¹²See Oakland Board of Education, 4 NPER 31-13173 (NJ PERC 6-4-82); NEA, IEA, Highwood-Highland Park Education Ass'n and Highwood-Highland Park School District No. 111, 10 NPER IL-18166 (IELRB 7-14-87); Manitowoc Education Ass'n v Manitowoc Public School District, 10 NPER WI-19025 (WERC 10-20-87).

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(68);¹³ home visit compensation (50) and home instruction compensation (44).¹⁴ All of these items are mandatory subjects that must be bargained in good faith.

In addition, there are several items that involve other forms of compensation. These items also pertain to wages because they are generally made available to employees as part of a compensation package in place of direct wage payments. Therefore, they are mandatory subjects within the meaning of O.R.C. §4117.08(A). In this case these items include: reimbursement for tuition costs (51);¹⁵ retirement benefits (52);¹⁶ professional travel allowances (36);¹⁷ holidays for classified employees (64) and emergency leave days (31);¹⁸ paid vacation for classified employees (65);¹⁹ insurance and health care benefits (53-56).²⁰ These items must be bargained in good faith.

2. HOURS

Changing an employee's hours is a mandatory subject of bargaining. The

¹³See Moreno Valley Unified School District, 4 NPER 05-13107 (Cal. PERB 4-30-82); Bridgeton Education Ass'n v. Board of Education of the City of Bridgeton, 334 A.2d 376 (NJ S Ct 1975); Care Ambulance, 107 LRRM 1043, 255 NLRB 417, 692 F.2d 762 (table), 111 LRRM 2650 (9th Cir. 1982).

¹⁴Elsinore Valley Education Ass'n, CTA/NEA v. Lake Elsinore School District, 10 NPER CA-19012 (Cal. PERB 12-18-87); and Moreno Valley, supra at note 13.

¹⁵See Town of Henrietta and Roadrunners Ass'n, Local 1170, CWA, 19 PERB 4625, 120-3013 (NY PERB 3-17-87).

¹⁶City of Tallahassee v. PERC, 4 NPER 10-13041 (Fla. S Ct 1981)

¹⁷State of New Jersey, 15 NJPER 20060 (1989); Community Electric Services of L.A. & IBEW Local 440, 271 NLRB No.93, 117 LRRM 1001 (1984)

¹⁸E.I. DuPont de Nemours, 259 NLRB 961, 109 LRRM 1096 (1982); NLRB v. Sharon Hats, 289 F.2d 628, 48 LRRM 2098 (5th Cir. 1961); Sherwin Williams, 260 NLRB 1321, 109 LRRM 1338 (1982); 714 F.2d 1095, 114 LRRM 2506 (11th Cir 1983).

¹⁹See Great Southern Trucking, 127 F.2d 180, 10 LRRM 571 (4th Cir. 1942); Township of Marlboro, 9 NPER 18126 (NJ PERC 1987).

²⁰See Oakland Unified School Dist., 4 PERC 111.022 (CA PERB 1980), aff'd 4 NPER 05-12084 (CA App Ct 1981); Everett School Committee, 4 NPER 22-13066 (MA LRC 1982); City of Newark, 4 NPER 31-12195 (NJ PERC 1981).

employer is obligated to bargain however minimal the change may be.²¹ Issues such as school calendar (25), regular working hours, overtime and the classified work day/work week (61) also pertain to hours; and therefore, under O.R.C. §4117.08 there is a duty to bargain about them. To the extent that state statutes mandate specific action by employers with regard to a certain subject, negotiations will be about the effects of the action so mandated.²²

The issue of calamity days (28) requires a different analysis. In Findlay City School District Board of Education,²³ the Board stated: "Whether to schedule a make-up day is not a matter for bargaining. However, when to hold the make-up day is a subject that requires bargaining with the exclusive representative."²⁴ The Board reasoned that the alteration of the existing calendar, necessitated by the addition of calamity days, affected hours, terms and conditions of employment and was, therefore, a mandatory subject of bargaining under O.R.C. §4117.08(A).²⁵

3. TERMS AND CONDITIONS OF EMPLOYMENT

The issue of fair share fees (6) is a mandatory subject of bargaining. This determination has two basis. The first is the holding of the National Labor Relations Board that union security, including dues checkoff, is a mandatory subject of bargaining pursuant to Section 8(a)(5) and (D) of the

²¹In re Perrysburg Bd. of Ed., SERB 86-038 (9-15-86), affirmed in Perrysburg Bd. of Ed. v. SERB, 1987 SERB 4-18 No. 86-CIV-383 (C P Wood, 1-16-87); SERB v. City of Bedford Heights, No. 54484 (8th Dist. Ct. App. Cuyahoga, 11-25-87); SERB v. Bowling Green Bd. of Ed., 1988 SERB 4-81 (C P Wood, 9-15-88); See Hedisen Mfg., 260 NLRB 590, 109 LRRM 1216 (1982); Technical Careers Inst., 259 NLRB 283, 108 LRRM 1359 (1981); Weston & Brooker, 154 NLRB 747, 60 LRRM 1015 (1965); Timken Roller Bearing, 70 NLRB 500, 18 LRRM 1370 (1946), enforcement denied on other grounds, 161 F. 2d 949, 20 LRRM 2204 (5th Cir. 1947); Camp and McInnes, Inc., 100 NLRB 524, 30 LRRM 1310 (1952); Inter-City Advertising, 61 NLRB 1377, 16 LRRM 153 (1945); enforcement denied on other grounds, 154 F. 2d 949, 17 LRRM 916 (4th Cir. 1946); Wilson & Co., 19 NLRB 990, 5 LRRM 560 (1940) enforced, 115 F. 2d 759, 7 LRRM 575 (8th Cir. 1940); Woodside Cotton Mills, 21 NLRB 42, 6LRRM 68 (1940).

²²SERB v. City of Lakewood, supra, at note 8.

²³Findlay City School Dist. Bd. of Educ., SERB 88-066 (5-13-88)

²⁴Findlay, Id.

²⁵SERB v. City of Lakewood, supra, at note 8; see also Lorain City School District Bd. of Ed. v. SERB, supra, at note 8.

NLRA.²⁶ Fair share fees are intertwined with the issue of union security and, because of this, pertain to terms and conditions of employment. The second basis is case law of other public sector jurisdictions that has held the issue of fair share fees to be a mandatory subject of bargaining.²⁷

The Intervenor's proposal on the subject of payroll deductions lists four purposes for deductions: union dues and assessments; tax sheltered annuities; hospitalization, dental and vision care insurance premiums; and credit union deposits.²⁸ Payroll deductions can be classified as either mandatory or permissive subjects of bargaining. The State of California has held that to be classified as mandatory, a payroll deduction must either be designed to enhance an employee's current or future economic status or must have a demonstrated relationship to a specifically enumerated mandatory subject of bargaining under the statute.²⁹ However, the Kansas Supreme Court has held, apparently without qualification, that payroll deductions are a mandatory subject of bargaining.³⁰

In the case at hand, three of the four deductions (annuities, health care and credit union) are designed to enhance an employee's economic status. They are an integral part of the compensation system and are no less a matter of employer-employee concern than is the basic wage rate.³¹ Thus, these payroll deductions are mandatory subjects of bargaining. The last deduction (union dues and assessments) is a mandatory subject of

²⁶Caroline Farms Division of Textron, Inc. v. NLRB, 401 F. 2d 205 (4th Cir. 1968).

²⁷Charles L. Rue, et al. v. Bay Area Rapid Transit Supervisory and Professional Association, et al., 114 Cal. App. 3d 147 (Cal. Ct. App. 1980), citing NLRB v. Andrew Jergens Co., 175 F. 2d 130, 133 (9th Cir. 1949) (union security is a condition of employment and thus a mandatory subject of bargaining); City of Bangor v. Bangor Fire Fighters Assn., 6 NPER 20-14033 (Me. LRB 8-2-83).

²⁸Employee Ass'n Proposal on Payroll Deductions (7), SERB Exhibit 23, p. 7.

²⁹Jefferson Classroom Teachers Ass'n, supra at note 11.

³⁰National Education Assn. - Kansas City, Kansas v. Unified School District No. 500, Wyandotte County, Kansas, 608 P2d 415, 105 LRRM 2772 (Kansas Sup. Ct. 4-5-80); National Education Assn. - Topeka, Inc. v. Unified School Dist. 501, Shawnee County, Kansas, 103 LRRM 3174 (Kansas Sup. Ct. 3-1-80).

³¹Jefferson Classroom Teachers Ass'n, supra at note 11.

bargaining under state law. O.R.C. 54117.09(B)(2) states that any collective bargaining agreement shall contain a provision which authorizes the public employer to deduct fees, dues and assessments of members of the exclusive representative.

The procedure for awarding individual employment contracts (23) for teaching employees is a mandatory subject of bargaining. Contracts are the embodiment of the employees' terms and conditions of employment, and as such must be bargained.

Inservice staff meetings (29), which are part of the school calendar, are mandatory subjects of bargaining. The issue of inservice staff meetings is so closely related to the school calendar that it pertains to wages, hours and terms and conditions of employment.²²

The right to evaluate both certified (38) and classified (66) employees is a managerial right and falls under O.R.C. 54117.08(C). However, if the evaluations affect employees' wages, hours and terms and conditions of employment, the topic must be bargained.²³ Other public sector agencies have interpreted such a requirement to mean that if evaluations are to be used for such purposes as granting promotions, making assignments or granting work related awards, those evaluations will affect an employees' conditions of employment, and are therefore mandatory subjects of bargaining.²⁴

²²For example the Wisconsin Employment Relations Commission (W.E.R.C.) held that inservice day issues are the same as school calendar issues and as such are mandatory subjects of bargaining. Beloit City School Board v. W.E.R.C., 242 N.W.2d. 231, 73 Wis. 2d. 43 (1976). In another case W.E.R.C. held that the school calendar is related to wages, hour and conditions of employment. Joint School District v Wisconsin Employment Relations Board, 155 N.W.2d. 78, 37 Wis. 2d. 483 (1967)

²³City of Lakewood, supra at note 8; see also Lorain City School District, supra at note 8.

²⁴Clark County School District v. Local Government Relations Board, 530 P.2d. 114, 90 Nev. 442, (Nev. Sup. Ct. 1974). Board found teacher evaluation mandatory subject of bargaining in that it was significantly related to working conditions, affected teacher transfer, retention, promotion and compensation scale. However, as long as the evaluation is focused primarily on individual employees rather than on the general curriculum objectives of the Board, it is a permissive subject of bargaining. Anaheim Union High School District, NEA/CTA and Anaheim Secondary Teachers Ass'n., 2 NPER 05-11038 (Cal. PERB 3-21-80).

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While the issues enumerated in this opinion are not exhaustive of topics which require negotiation, their inclusion in this opinion should allay any question of the need to bargain such issues in contract negotiation.

Sheehan, Chairman, and Davis, Vice Chairman, concur.

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