

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

208  
SERB OPINION 89-033

In the Matter of  
State Employment Relations Board,  
Complainant,

v.

Mayfield City School District Board of Education,  
Respondent.

CASE NUMBER: 87-ULP-02-0076  
87-ULP-06-0247

ORDER  
(Opinion attached.)

Before Chairman Sheehan, Vice Chairman Davis, and Board Member Latané;  
June 8, 1989.

On February 27, 1987, the Mayfield Education Association (Charging Party or MEA) filed an unfair labor practice charge against the Mayfield City School District Board of Education (Respondent). On June 11, 1987, MEA filed an additional unfair labor practice charge against the 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 in both cases. Subsequently, the cases were consolidated and a complaint was issued alleging that the Respondent had violated O.R.C. §4117.11(A)(1), (A)(3), (A)(4) and (A)(5) by refusing to bargain over the creation, wages, terms and conditions of employment for the position of elementary librarian supervisor and by not renewing the contract pending outcome of protected activity.

The cases were heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions and response. The Board adopts the hearing officer's Admissions, adopts the Findings of Fact, apart from Nos. 2 and 11 and replaces them with the following:

2. On or about November 16, 1986, Respondent informed Ms. Gillmore that it wanted her to accept an additional supplemental contract for the newly-created position of elementary librarian supervisor. (T. 19, 148-149) Although there was some discussion between Respondent and MEA about the terms of the supplemental contract, Respondent did not negotiate with Ms. Gillmore. (T. 20, 21).
11. Ms. Gillmore supported the MEA's filing of an unfair labor practice charge with SERB on February 27, 1987, Case No. 87-ULP-02-0076, which alleged that Respondent was refusing to bargain over the wages, hours, and terms and conditions of the elementary librarian supervisor supplemental position. (T. 24). In April 1987, Dr.

Burkholder told Ms. Gillmore that her supplemental contract for elementary librarian supervisor was not going to be renewed for the 1987-88 school year until the unfair labor practice charge was resolved. Dr. Burkholder gave no other reason for the nonrenewal. In fact, Dr. Burkholder told Ms. Gillmore that she would have liked Gillmore to continue in the position. (T. 25-26). The supplemental contract was nonrenewed on April 22, 1987. (T. 24, 25; Jt. Exh. 8).

Finding of Fact No. 13 is added and adopted to read: "Had Ms. Gillmore's supplemental contract for elementary librarian supervisor been renewed for the 1987-88 school year, she would have worked under it and would have earned \$700 for the school year. (T. 27, 33)." The Board adopts Conclusions of Law Nos. 1 and 2; amends No. 3 to find a violation of O.R.C. §4117.11(A)(1) and (A)(5) occurred by the Respondent's refusal to bargain wages, hours, and terms and conditions of employment; amends No. 4 to find a violation of O.R.C. §4117.11(A)(1), (A)(3) and (A)(4) by the Respondent's refusal to renew Ms. Gillmore's contract until the unfair labor practice charge had been resolved; and adopts the Conclusions of Law as amended. The Respondent is ordered to:

- A. Cease and Desist from:
  - Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Chapter 4117 of the Revised Code, discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code, discharging or otherwise discriminating against employees because they have filed charges or given testimony under Chapter 4117 of the Revised Code and Refusing to bargain collectively with the representative of its employees certified pursuant to Chapter 4117 of the Revised Code, and from otherwise violating O.R.C. §4117.11(A)(1), (3), (4) and (5).
- B. And take the following affirmative action:
  1. Post for sixty (60) days in all of its buildings where the employees work the Notice to Employees furnished by the Board stating that the Respondent shall cease and desist from the actions set forth in paragraph A.
  2. Bargain with MEA over the wages, hours, and terms and conditions of the elementary librarian supervisor supplemental position until they reach an agreement or impasse.

3. Immediately offer Sally Gillmore the supplemental position of elementary librarian supervisor at the same wages, hours, and terms and conditions that she had during the 1986-87 school year, unless Respondent and MEA have reached agreement on new wages, hours, and terms and conditions, in which case Ms. Gillmore would be offered the elementary librarian supervisor supplemental position on the new terms agreed upon by Respondent and MEA.
4. Pay Ms. Gillmore back pay from the date the 1987-88 school year began to the date Respondent offers Ms. Gillmore the elementary librarian supervisor supplemental position. Back pay shall be calculated at the wage rate Ms. Gillmore received as elementary librarian supervisor during the 1986-87 school year. However, if Respondent and MEA have reached agreement on a new wage rate for the supplemental position of elementary librarian supervisor before Ms. Gillmore is offered the supplemental position, Respondent shall pay Ms. Gillmore the 1986-87 wage rate to the date Respondent and MEA reached agreement on the new wage rate, and shall pay Ms. Gillmore at the new wage rate from the date Respondent and MEA reached agreement on the new wage rate to the date Respondent offers Ms. Gillmore the elementary librarian supervisor position.
5. Notify the SERB in writing within twenty (20) calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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

  
WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 20<sup>th</sup> day of December, 1989.

  
CYNTHIA L. SPANSKI, CLERK

2293b:j1b



# NOTICE TO EMPLOYEES

## FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE  
STATE EMPLOYMENT RELATIONS BOARD  
AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

### WE WILL CEASE AND DESIST FROM:

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Chapter 4117 of the Revised Code, discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code, discharging or otherwise discriminating against employees because they have filed charges or given testimony with the representative of its employees certified pursuant to Chapter 4117 of the Revised Code, and from otherwise violating O.R.C. 4117.11(A)(1), (3), (4) and (5).

WE WILL NOT in any like or related matter, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

### WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Bargain with MEA over the wages, hours, and terms and conditions of the elementary librarian supervisor supplemental position until they reach an agreement or impasse.
2. Immediately offer Sally Gillmore the supplemental position of elementary librarian supervisor at the same wages, hours, and terms and conditions that she had during the 1986-87 school year, unless Respondent and MEA have reached agreement on new wages, hours, and terms and conditions, in which case Ms. Gillmore would be offered the elementary librarian supervisor supplemental position on the new terms agreed upon by Respondent and MEA.
3. Pay Ms. Gillmore back pay from the date the 1987-88 school year began to the date Respondent offers Ms. Gillmore the elementary librarian supervisor supplemental position. Back pay shall be calculated at the rate Ms. Gillmore received as elementary librarian supervisor during the 1986-87 school year. However, if Respondent and MEA have reached agreement on a new wage rate for the supplemental position of elementary librarian supervisor before Ms. Gillmore is offered the supplemental position, Respondent shall pay Ms. Gillmore the 1986-87 supplemental librarian supervisor rate at the new wage rate from the date Respondent and MEA reached agreement on the new wage rate to the date Respondent offers Ms. Gillmore the elementary librarian supervisor position.

DATE \_\_\_\_\_

MAYFIELD CITY SCHOOL DISTRICT BOARD OF EDUCATION  
87-ULP-02-0076 and 87-ULP-06-0247

BY \_\_\_\_\_

TITLE \_\_\_\_\_

**THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED**

This notice must remain posted for sixty (60) consecutive days from the date of posting and must not be altered, defaced, or covered by any other material. Any questions concerning this notice or compliance with its provisions may be directed to the Board.  
R299b.11b

STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD

SEB OPINION 89-033

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State Employment Relations Board,  
Complainant,

v.

Mayfield City School District Board of Education,  
Respondent.

CASE NUMBERS: 87-ULP-02-0076  
87-ULP-06-0247

OPINION

Sheehan, Chairman:

I.

The issues in this case arise from the Mayfield City School District Board of Education's (Respondent) unilateral creation and implementation of a supplemental teaching contract entitled, "Elementary Librarian Supervisor." This new position was created to be in compliance with an Ohio Department of Education's requirement that elementary librarians be supervised by a certified librarian. On or about November 16, 1986, the Respondent offered this new position to Sally Gillmore, the high school head librarian, as an additional supplemental contract.<sup>1</sup> Ms. Gillmore accepted the assignment but was unsatisfied with the terms of the contract.<sup>2</sup> Subsequently, she contacted the Ohio Education Association (OEA) and complained about its terms.<sup>3</sup> Although there was some discussion between

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<sup>1</sup>Finding of Fact (F.F.) #2.

<sup>2</sup>Admission (Adm.) #8.

<sup>3</sup>F.F. #3.

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Cases 87-ULP-02-0076 & 87-ULP-06-0247  
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the Respondent and the Mayfield Education Association (MEA or Intervenor) concerning the terms of the supplemental contract, the terms were never bargained.<sup>4</sup> On February 27, 1987, the Intervenor filed an unfair labor practice charge with the State Employment Relations Board alleging that the Respondent refused to bargain over wages, hours, and terms and conditions of the elementary librarian supervisor position. In April, Ms. Gillmore was informed by the Respondent that her supplemental contract for elementary librarian supervisor was not going to be renewed for the 1987-88 school year because the dispute as to the duties and responsibilities of the elementary librarian supervisor had not been resolved.<sup>5</sup> Ms. Gillmore subsequently filed an unfair labor practice charge against the Respondent alleging discrimination under §4117.11 of the Ohio Revised Code (O.R.C.).

A hearing was held on April 12, 1988, before SERB Hearing Officer Timothy Lecklider. The hearing officer found that the Respondent did not refuse to bargain in good faith and did not discriminate against Ms. Gillmore on the basis of exercising her rights granted under O.R.C. Chapter 4117 or on the basis of her filing an unfair labor practice charge against the Respondent. Consequently, the hearing officer recommended the charges against the Respondent be dismissed. For reasons adduced below, the Board does not concur with the hearing officer's recommendations and finds violation of O.R.C. §4117.11(A)(1), (A)(4) and (A)(5).

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<sup>4</sup>F.F. #2.

<sup>5</sup>Transcript (T.) p. 136.

II.

The first issue is whether the Respondent refused to bargain with the Intervenor with respect to wages, hours, terms and other conditions of employment in violation of O.R.C. §4117.11(A)(1) and (A)(5).

To comply with an Ohio Department of Education requirement that school districts' elementary librarians receive the supervision of a certificated librarian, the Respondent created a new position of "Elementary Librarian Supervisor" through the issuance of a supplemental teaching contract.\* Several options were considered but it was ultimately determined by the Respondent that this would be the better solution under the circumstances. The contract was offered to Ms. Sally Gillmore, the high school's head librarian. The creation of this supplemental contract meant additional compensation and more responsibility for the recipient. Thus, wages, hours, and terms and other conditions of employment were clearly affected.

It has been well settled that "if a public employer intends to implement a decision which 'affects' wages, hours, terms and conditions of employment of a bargaining unit, then the employer must bargain the issue. This is so even if the question is reserved for managerial discretion." Lorain City School District Board of Education v. SERB, 40 Ohio St. 3d, 257 (1988); 1988 SERB 4-63 (9th Dist. Ct. of App., Lorain, 7-20-88); and In re Lakewood, SERB 88-009, (7-11-88), aff'd., 1988 SERB 4-141 (C.P., Cuyahoga 1988).'

\*Adm. #8.

'In Lakewood, the Board held:

The "as affects" proviso is an acknowledgment and a resolution of the following dilemma: while there are some matters upon which a public employer must be able to take independent  
Footnote continued on next page.

Contrary to the hearing officer's view that a demand to bargain must first be made before a refusal to bargain violation can be found, the obligation to bargain is a mutual one. If the mutual obligation is to have meaning, the party wishing to make a change, at the very least, must give timely notice of the change to the other party. Otherwise the bargaining obligation is unfulfilled.\*

In the instant case, the Respondent never informed the Intervenor that it was creating a new position of "Elementary Librarian Supervisor." In fact, the Intervenor became involved only after Ms. Gillmore complained of her dissatisfaction with the new supplemental contract. By that time, the contract was in place with the terms and conditions set, and it was much too late then for any substantive negotiation to take place.\* Even when

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action if it is to properly run its operation, such independent management authority may be essential only as to certain aspects of those actions; in other aspects and at other levels, those very actions can be inexplicably related to the determination of "wages, hours, terms, and other conditions of employment," and negotiation on those issues is essential to preserve meaningful collective bargaining rights.

\*Other jurisdictions have held similarly - Pleasant Valley School Dist., 9 PERC ¶16093; Victor Valley Union High School Dist., 10 PERC ¶17079.

\*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.

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subsequent discussions occurred, the Respondent showed no inclination to change the terms and conditions of the supplemental contract and, in fact, no changes were made.

In National Labor Relations Board v. Katz, 369 U.S. 736 (1962), the United States Supreme Court dealt with unilateral actions and held:

Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of §8(a)(5), without also finding the employer guilty of overall subjective bad faith. While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here. Id. at 747-748.

In the instant case, the hearing officer found that the willingness of the Respondent to bargain in good faith after taking unilateral action was enough to cure any violations of D.R.C. §4117.11(A)(5). His reasoning was premised on the subjective element of good faith. However, a finding of subjective bad faith is not necessary. Katz, supra. A unilateral act violates the duty to bargain because of its inherent nature of being inapposite to the collective bargaining process.<sup>10</sup> Bargaining after a unilateral change, whether in good faith or not, does not change the adverse

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<sup>10</sup>Int'l. Ladies Garment Workers Union v. NLRB, 463 F. 2d 907, 917-919 (D.C. Cir. 1972), 80 LRRM 2716.

effect that it has on the collective bargaining process nor does it erase the violation of §§(A)(1) and (A)(5).'' Therefore, the Respondent's unilateral creation and implementation of the supplemental teaching contract without negotiating it with the Intervenor is a violation of O.R.C. §4117.11(A)(1) and (A)(5).

III.

The second issue in this case is whether the Respondent, by not renewing the supplemental contract and by conditioning bargaining on the resolution of the unfair labor practice charge, violated O.R.C. §4117.11(A)(1), (A)(3) and (A)(5).

O.R.C. §4117.11 provides:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

\* \* \*

- (3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code. Nothing precludes any employer from making and enforcing an agreement pursuant to division (C) of section 4117.09 of the Revised Code.
- (4) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Chapter 4117. of the Revised Code.

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''Indeed, [n]o genuine bargaining ... can be conducted where [the] decision has already been made and implemented." Int'l. Ladies Garment Workers Union, supra, at 919; citing Town and Country Manufacturing Co., 136 NLRB 1022, 1030 (1962); enf'd., 316 F. 2d 846 (5th Cir. 1963).

In re Gallia-Jackson-Vinton Joint Vocational School Dist. Bd. of Ed.,  
SERB 86-044 (11-13-86), enf'd., Gallia-Jackson-Vinton Joint Vocational  
School Bd. of Ed. v. SERB, 1989 SERB 4-6 (C.P., Gallia, 12-30-88), sets  
forth the elements and standards of proof necessary to prevail in an O.R.C.  
§4117.11(A)(3) case. The hearing officer correctly concluded that the  
complainant established a prima facie case of discrimination. Ms. Gillmore  
properly exercised her rights under Chapter 4117 by complaining to her union  
representative of her dissatisfaction with terms of the supplemental  
contract. In turn, the union filed an unfair labor practice charge on Ms.  
Gillmore's behalf whereby the Respondent refused to renew Ms. Gillmore's  
supplement contract until the unfair labor practice charge was resolved.

However, the hearing officer found that the Respondent's statement to  
Ms. Gillmore (that non-renewal of her supplemental contract was a distinct  
possibility) was sufficient to rebut the established prima facie case. The  
reliance on this statement was misplaced. Although the statement was made  
prior to the filing of the unfair labor practice charge, it was made in  
response to Ms. Gillmore's complaint to her union representative about  
dissatisfaction with the terms of the supplemental contract. The action  
pursued by Ms. Gillmore is a right granted under O.R.C. §4117.03 and  
protected by O.R.C. §4117.11(A)(3). Moreover, the Respondent refused to  
renew Ms. Gillmore's supplemental contract because the unfair labor practice  
charge was unresolved. Such a stance is inimical to the rights guaranteed  
the employee.

It is undisputed that Ms. Gillmore was the Respondent's choice to  
supervise the elementary school librarians. She was selected after various  
other options had been reviewed, and she was clearly considered well

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qualified to assume the responsibility. The record reveals nothing to suggest that Ms. Gillmore's supplemental contract to supervise the elementary school librarians would not have been renewed. The only barrier to renewal was the pendency of Ms. Gillmore's unfair labor practice charge.

Because the non-renewal of Ms. Gillmore's supplemental contract constituted the withdrawal of present benefit of employment in a manner that interfered with Ms. Gillmore's exercising her rights under O.R.C. Chapter 4117, the Respondent violated O.R.C. §4117.11(A)(1) and (A)(3). Because the Respondent's reason for withdrawing a present benefit of employment was the filing and pendency of an unfair labor practice charge, the Respondent violated O.R.C. §4117.11(A)(1) and (A)(4).

Vice Chairman Dav's concurs. Board Member Latané dissents.

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STATE EMPLOYMENT RELATIONS BOARD

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The cases were heard by a Board hearing officer. The Board has reviewed the record, the hearing officer's proposed order, exceptions and response. The Board adopts the hearing officer's Admissions, adopts the Findings of Fact, apart from Nos. 2 and 11 and replaces them with the following:

2. On or about November 16, 1986, Respondent informed Ms. Gillmore that it wanted her to accept an additional supplemental contract for the newly-created position of elementary librarian supervisor. (T. 19, 148-149). Although there was some discussion between Respondent and MEA about the terms of the supplemental contract, Respondent did not negotiate with Ms. Gillmore. (T. 20, 21).
11. Ms. Gillmore supported the MEA's filing of an unfair labor practice charge with SERB on February 27, 1987, Case No. 87-ULP-02-0076, which alleged that Respondent was refusing to bargain over the wages, hours, and terms and conditions of the elementary librarian supervisor supplemental position. (T. 24). In April 1987, Dr.

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Finding of Fact No. 13 is added and adopted to read: "Had Ms. Gillmore's supplemental contract for elementary librarian supervisor been renewed for the 1987-88 school year, she would have worked under it and would have earned \$700 for the school year. (T. 27, 33)." The Board adopts Conclusions of Law Nos. 1 and 2; amends No. 3 to find a violation of O.R.C. §4117.11(A)(1) and (A)(5) occurred by the Respondent's refusal to bargain wages, hours, and terms and conditions of employment; amends No. 4 to find a violation of O.R.C. §4117.11(A)(1), (A)(3) and (A)(4) by the Respondent's refusal to renew Ms. Gillmore's contract until the unfair labor practice charge had been resolved; and adopts the Conclusions of Law as amended. The Respondent is ordered to:

A. Cease and Desist from:

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Chapter 4117 of the Revised Code, discriminating in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117 of the Revised Code, discharging or otherwise discriminating against employees because they have filed charges or given testimony under Chapter 4117 of the Revised Code and Refusing to bargain collectively with the representative of its employees certified pursuant to Chapter 4117 of the Revised Code, and from otherwise violating O.R.C. §4117.11(A)(1), (3), (4) and (5).

B. And take the following affirmative action:

1. Post for sixty (60) days in all of its buildings where the employees work the Notice to Employees furnished by the Board stating that the Respondent shall cease and desist from the actions set forth in paragraph A.
2. Bargain with MEA over the wages, hours, and terms and conditions of the elementary librarian supervisor supplemental position until they reach an agreement or impasse.

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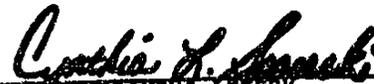
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4. Pay Ms. Gillmore back pay from the date the 1987-88 school year began to the date Respondent offers Ms. Gillmore the elementary librarian supervisor supplemental position. Back pay shall be calculated at the wage rate Ms. Gillmore received as elementary librarian supervisor during the 1986-87 school year. However, if Respondent and MEA have reached agreement on a new wage rate for the supplemental position of elementary librarian supervisor before Ms. Gillmore is offered the supplemental position, Respondent shall pay Ms. Gillmore the 1986-87 wage rate to the date Respondent and MEA reached agreement on the new wage rate, and shall pay Ms. Gillmore at the new wage rate from the date Respondent and MEA reached agreement on the new wage rate to the date Respondent offers Ms. Gillmore the elementary librarian supervisor position.
5. Notify the SERB in writing within twenty (20) calendar days from the date the Order becomes final of the steps that have been taken to comply therewith.

It is so ordered.

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

  
WILLIAM P. SHEEHAN, CHAIRMAN

I certify that this document was filed and a copy served upon each party on this 20<sup>th</sup> day of December, 1989.

  
CYNTHIA L. SPANSKI, CLERK

2293b:j1b



# NOTICE TO EMPLOYEES

## FROM THE STATE EMPLOYMENT RELATIONS BOARD

POSTED PURSUANT TO AN ORDER OF THE  
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AN AGENCY OF THE STATE OF OHIO

After a hearing in which all parties had an opportunity to present evidence, the State Employment Relations Board has determined that we have violated the law and has ordered us to post this Notice. We intend to carry out the order of the Board and abide by the following:

### WE WILL CEASE AND DESIST FROM:

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WE WILL NOT in any like or related matter, interfere with, restrain, or coerce our employees in the exercise of rights guaranteed them under Chapter 4117 of the Revised Code.

### WE WILL TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Bargain with MEA over the wages, hours, and terms and conditions of the elementary librarian supervisor supplemental position until they reach an agreement or impasse.
2. Immediately offer Sally Gillmore the supplemental position of elementary librarian supervisor at the same wages, hours, and terms and conditions that she had during the 1986-87 school year, unless Respondent and MEA have reached agreement on new wages, hours, and terms and conditions, in which case Ms. Gillmore would be offered the elementary librarian supervisor supplemental position on the new terms agreed upon by Respondent and MEA.
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MAYFIELD CITY SCHOOL DISTRICT BOARD OF EDUCATION  
87-ULP-02-0076 and 87-ULP-06-0247

DATE \_\_\_\_\_

BY \_\_\_\_\_

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END 2012  
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OPINION

Sheehan, Chairman:

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The issues in this case arise from the Mayfield City School District Board of Education's (Respondent) unilateral creation and implementation of a supplemental teaching contract entitled, "Elementary Librarian Supervisor." This new position was created to be in compliance with an Ohio Department of Education's requirement that elementary librarians be supervised by a certified librarian. On or about November 16, 1986, the Respondent offered this new position to Sally Gillmore, the high school head librarian, as an additional supplemental contract.<sup>1</sup> Ms. Gillmore accepted the assignment but was unsatisfied with the terms of the contract.<sup>2</sup> Subsequently, she contacted the Ohio Education Association (OEA) and complained about its terms.<sup>3</sup> Although there was some discussion between

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<sup>2</sup>Admission (Adm.) #8.

<sup>3</sup>F.F. #3.

the Respondent and the Mayfield Education Association (MEA or Intervenor) concerning the terms of the supplemental contract, the terms were never bargained.\* On February 27, 1987, the Intervenor filed an unfair labor practice charge with the State Employment Relations Board alleging that the Respondent refused to bargain over wages, hours, and conditions of the elementary librarian supervisor position. In April, Ms. Gillmore was informed by the Respondent that her supplemental contract for elementary librarian supervisor was not going to be renewed for the 1987-88 school year because the dispute as to the duties and responsibilities of the elementary librarian supervisor had not been resolved.† Ms. Gillmore subsequently filed an unfair labor practice charge against the Respondent alleging discrimination under §4117.11 of the Ohio Revised Code (O.R.C.).

A hearing was held on April 12, 1988, before SERB Hearing Officer Timothy Lecklider. The hearing officer found that the Respondent did not refuse to bargain in good faith and did not discriminate against Ms. Gillmore on the basis of exercising her rights granted under O.R.C. Chapter 4117 or on the basis of her filing an unfair labor practice charge against the Respondent. Consequently, the hearing officer recommended the charges against the Respondent be dismissed. For reasons adduced below, the Board does not concur with the hearing officer's recommendations and finds violation of O.R.C. §4117.11(A)(1), (A)(4) and (A)(5).

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\*F.F. #2.  
†Transcript (T.) p. 136.

II.

The first issue is whether the Respondent refused to bargain with the Intervenor with respect to wages, hours, terms and other conditions of employment in violation of O.R.C. §4117.11(A)(1) and (A)(5).

To comply with an Ohio Department of Education requirement that school districts' elementary librarians receive the supervision of a certificated librarian, the Respondent created a new position of "Elementary Librarian Supervisor" through the issuance of a supplemental teaching contract.\* Several options were considered but it was ultimately determined by the Respondent that this would be the better solution under the circumstances. The contract was offered to Ms. Sally Gillmore, the high school's head librarian. The creation of this supplemental contract meant additional compensation and more responsibility for the recipient. Thus, wages, hours, and terms and other conditions of employment were clearly affected.

It has been well settled that "if a public employer intends to implement a decision which 'affects' wages, hours, terms and conditions of employment of a bargaining unit, then the employer must bargain the issue. This is so even if the question is reserved for managerial discretion." Lorain City School District Board of Education v. SERB, 40 Ohio St. 3d, 257 (1988); 1988 SERB 4-63 (9th Dist. Ct. of App., Lorain, 7-20-88); and In re Lakewood, SERB 88-009, (7-11-88), aff'd., 1988 SERB 4-141 (C.P., Cuyahoga 1988).'

\*Adm. #8.

'In Lakewood, the Board held:

The "as affects" proviso is an acknowledgment and a resolution of the following dilemma: while there are some matters upon which a public employer must be able to take independent  
Footnote continued on next page.

Contrary to the hearing officer's view that a demand to bargain must first be made before a refusal to bargain violation can be found, the obligation to bargain is a mutual one. If the mutual obligation is to have meaning, the party wishing to make a change, at the very least, must give timely notice of the change to the other party. Otherwise the bargaining obligation is unfulfilled.\*

In the instant case, the Respondent never informed the Intervenor that it was creating a new position of "Elementary Librarian Supervisor." In fact, the Intervenor became involved only after Ms. Gillmore complained of her dissatisfaction with the new supplemental contract. By that time, the contract was in place with the terms and conditions set, and it was much too late then for any substantive negotiation to take place." Even when

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action if it is to properly run its operation, such independent management authority may be essential only as to certain aspects of those actions; in other aspects and at other levels, those very actions can be inexplicably related to the determination of "wages, hours, terms, and other conditions of employment," and negotiation on those issues is essential to preserve meaningful collective bargaining rights.

\*Other jurisdictions have held similarly - Pleasant Valley School Dist., 9 PERC ¶16093; Victor Valley Union High School Dist., 10 PERC ¶17079.

\*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.

subsequent discussions occurred, the Respondent showed no inclination to change the terms and conditions of the supplemental contract and, in fact, no changes were made.

In National Labor Relations Board v. Katz, 369 U.S. 736 (1962), the United States Supreme Court dealt with unilateral actions and held:

Unilateral action by an employer without prior discussion with the union does amount to a refusal to negotiate about the affected conditions of employment under negotiation, and must of necessity obstruct bargaining, contrary to the congressional policy. It will often disclose an unwillingness to agree with the union. It will rarely be justified by any reason of substance. It follows that the Board may hold such unilateral action to be an unfair labor practice in violation of §8(a)(5), without also finding the employer guilty of overall subjective bad faith. While we do not foreclose the possibility that there might be circumstances which the Board could or should accept as excusing or justifying unilateral action, no such case is presented here. Id. at 747-748.

In the instant case, the hearing officer found that the willingness of the Respondent to bargain in good faith after taking unilateral action was enough to cure any violations of O.R.C. §4117.11(A)(5). His reasoning was premised on the subjective element of good faith. However, a finding of subjective bad faith is not necessary. Katz, supra. A unilateral act violates the duty to bargain because of its inherent nature of being inapposite to the collective bargaining process.<sup>10</sup> Bargaining after a unilateral change, whether in good faith or not, does not change the adverse

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<sup>10</sup>Int'l. Ladies Garment Workers Union v. NLRB, 463 F. 2d 907, 917-919 (D.C. Cir. 1972), 80 LRRM 2716.

effect that it has on the collective bargaining process nor does it erase the violation of §§(A)(1) and (A)(5).'' Therefore, the Respondent's unilateral creation and implementation of the supplemental teaching contract without negotiating it with the Intervenor is a violation of O.R.C. §4117.11(A)(1) and (A)(5).

III.

The second issue in this case is whether the Respondent, by not renewing the supplemental contract and by conditioning bargaining on the resolution of the unfair labor practice charge, violated O.R.C. §4117.11(A)(1), (A)(3) and (A)(5).

O.R.C. §4117.11 provides:

(A) It is an unfair labor practice for a public employer, its agents, or representatives to:

\* \* \*

(3) Discriminate in regard to hire or tenure of employment or any term or condition of employment on the basis of the exercise of rights guaranteed by Chapter 4117. of the Revised Code. Nothing precludes any employer from making and enforcing an agreement pursuant to division (C) of section 4117.09 of the Revised Code.

(4) Discharge or otherwise discriminate against an employee because he has filed charges or given testimony under Chapter 4117. of the Revised Code.

''Indeed, [n]o genuine bargaining ... can be conducted where [the] decision has already been made and implemented.'' Int'l. Ladies Garment Workers Union, supra, at 919; citing Town and Country Manufacturing Co., 136 NLRB 1022, 1030 (1962); enf'd., 316 F. 2d 846 (5th Cir. 1963).

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In re Gallia-Jackson-Vinton Joint Vocational School Dist. Bd. of Ed., SERB 86-044 (11-13-86), en'f'd., Gallia-Jackson-Vinton Joint Vocational School Bd. of Ed. v. SERB, 1989 SERB 4-6 (C.P., Gallia, 12-30-88), sets forth the elements and standards of proof necessary to prevail in an O.R.C. §4117.11(A)(3) case. The hearing officer correctly concluded that the complainant established a prima facie case of discrimination. Ms. Gillmore properly exercised her rights under Chapter 4117 by complaining to her union representative of her dissatisfaction with terms of the supplemental contract. In turn, the union filed an unfair labor practice charge on Ms. Gillmore's behalf whereby the Respondent refused to renew Ms. Gillmore's supplement contract until the unfair labor practice charge was resolved.

However, the hearing officer found that the Respondent's statement to Ms. Gillmore (that non-renewal of her supplemental contract was a distinct possibility) was sufficient to rebut the established prima facie case. The reliance on this statement was misplaced. Although the statement was made prior to the filing of the unfair labor practice charge, it was made in response to Ms. Gillmore's complaint to her union representative about dissatisfaction with the terms of the supplemental contract. The action pursued by Ms. Gillmore is a right granted under O.R.C. §4117.03 and protected by O.R.C. §4117.11(A)(3). Moreover, the Respondent refused to renew Ms. Gillmore's supplemental contract because the unfair labor practice charge was unresolved. Such a stance is inimical to the rights guaranteed the employee.

It is undisputed that Ms. Gillmore was the Respondent's choice to supervise the elementary school librarians. She was selected after various other options had been reviewed, and she was clearly considered well

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qualified to assume the responsibility. The record reveals nothing to suggest that Ms. Gillmore's supplemental contract to supervise the elementary school librarians would not have been renewed. The only barrier to renewal was the pendency of Ms. Gillmore's unfair labor practice charge.

Because the non-renewal of Ms. Gillmore's supplemental contract constituted the withdrawal of a present benefit of employment in a manner that interfered with Ms. Gillmore's exercising her rights under O.R.C. Chapter 4117, the Respondent violated O.R.C. §4117.11(A)(1) and (A)(3). Because the Respondent's reason for withdrawing a present benefit of employment was the filing and pendency of an unfair labor practice charge, the Respondent violated O.R.C. §4117.11(A)(1) and (A)(4).

Vice Chairman Dav's concurs. Board Member Latané dissents.