

STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD

SEN OFFICE 90-003

In the Matter of
State Employment Relations Board,
Complainant,

v.

Vandalia-Butler City School District Board of Education,
Respondent.

CASE NUMBER: 86-ULP-06-0194

OPINION

Sheehan, Chairman:

I.

The following is a capsulization of the facts relevant to the issues sub judice. The reader is directed to the Hearing Officer's Proposed Order of January 23, 1989, for a full compilation of the facts, which are incorporated herein by reference.

The issues in the case arose during the negotiation of a successor collective bargaining agreement between the Ohio Association of Public School Employees/AFSCME, AFL-CIO (OAPSE) and the Vandalia-Butler City School District Board of Education (Respondent or Employer). Negotiations commenced in April 1985 and continued through 5 or 6 negotiating sessions concluding with a session on June 14, 1985. After a mutual agreement as

¹Finding of Fact (F.F) #1. References to the transcript, exhibits, stipulations and/or 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 stated fact.

to the lack of significant progress, the parties requested assistance from the Federal Mediation and Conciliation Service.² Mediation was utilized from July 1985 through October 1985. In November 1985, the negotiating teams notified the Employer that they were at "impasse".³ Mediation was again utilized, but to no avail, and the Union submitted a Notice of Intent to Strike on February 25, 1986. Subsequent to the notice but prior to the beginning of the strike, the Respondent's Superintendent wrote a letter (March 6, 1986 letter) which was delivered directly to bargaining unit members. The letter contained a summary of negotiations. However, the letter also contained comments by the Superintendent to the effect that OAPSE might not present the Employer's latest proposal to the employees and that the employees should "not allow themselves to be led to a strike" (emphasis added).⁴ Additionally, the Superintendent invited the bargaining unit members to contact the administration directly to discuss this information. A second letter (March 12 letter) was mailed directly to the employees on March 12, 1986, subsequent to the beginning of the strike on March 10. The second letter was to inform the striking employees that their insurance benefits had been cancelled the day the strike began.⁵

²This request was made pursuant to the parties' agreed dispute settlement procedure which supplemented the statutory procedure set forth in O.R.C. §4117.11. See Article III, Exhibit A, the parties' collective bargaining agreement.

³F.F. #1

⁴Transcript (T.) p. 26; SERB Exh. 3.

⁵F.F. #7; SERB Exh. 4.

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The strike ended and employees returned to work on March 31, 1986. On April 22, 1986, the Employer unilaterally implemented changes in the terms and conditions of employment of bargaining unit members. The Employer's position was that there had been no progress in negotiations and therefore the parties were at "ultimate impasse".⁶ On April 23, 26 and 29, 1986, the Employer sent letters directly to the employees discussing the unilateral implementation of the last best offer.⁷

On June 2, 1986, OAPSE filed an Unfair Labor Practice Charge against the Respondent alleging violations of Ohio Revised Code (O.R.C.) §4117.11(A)(1), (A)(2), (A)(3), (A)(5) and (A)(8).⁸ On March 19, 1987, the State Employment Relations Board (Board or SERB) determined that there was probable cause to believe that the Respondent had committed an unfair labor practice. SERB issued a Complaint against the Respondent on June 8, 1987, alleging violations of O.R.C. §4117.11(A)(1), (A)(2), (A)(3) and (A)(5). A hearing was held on September 9 and 10, 1987, when testimony and documentary evidence was presented regarding relevant issues.

II.

The issues in the instant case are:

- 1) Whether Respondent's statements relating to future employment and loss of benefits, as well as its attempt to cancel the health insurance, constitutes interference, restraint or coercion in violation of O.R.C. §4117.11(A)(1).

⁶Respondent's Post-Hearing Brief, page 17.

⁷F.F. #10

⁸All reference to statutes will be to the Ohio Revised Code Chapter 4117, unless otherwise noted.

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- 2) Whether the Respondent's direct communication with employees represented by the Union, as well as the unilateral implementation of its final offer, constitutes violations of O.R.C. §4117.11(A)(1), (A)(2) and (A)(5).
- 3) Whether the Respondent's transfer of certain employees immediately subsequent to the end of the strike, as well as its refusal to subsequently employ substitute food service employees who honored the strike, constitutes discrimination in violation of O.R.C. §4117.11(A)(1) and (A)(3).

III.

The Hearing Officer set forth in his Conclusions of Law:

1. The Vandalia-Butler City School District Board of Education is a "public employer" within the meaning of §4117.01(B).
2. The Ohio Association of Public School Employees/AFSCME, AFL-CIO, is an "employee organization" within the meaning of §4117.01(D).
3. The Respondent's statements to bargaining unit employees on March 4 and 7, 1986, relating to future employment constitute interference, restraint, and coercion in violation of O.R.C. §4117.11(A)(1).
4. The Respondent's direct communications with bargaining unit employees by letters and "summaries" dated March 6, 1986, March 12, 1986, April 23, 1986, and April 25, 1986, as well as its implementation of its final offer, do not constitute violations of §§4117.11(A)(1), (A)(2), or (A)(5).
5. The Respondent's transfer of striking bargaining unit employees immediately subsequent to the end of the strike constitutes a violation of §§4117.11(A)(1) and (A)(3).

The Board adopts Conclusions of Law 1, 2, 3 and 5. For reasons adduced below, the Board rejects the Hearing Officer's Conclusion of Law No. 4, which found that the Respondent's direct communication with bargaining unit employees by a letter dated March 6 did not constitute violations of §4117.11(A)(1), (A)(2) or (A)(5), and that the letter of March 12 did not

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constitute violation of O.R.C. §4117.11(A)(1). The Board finds that violations of these sections of the statute did, in fact, occur.

IV.

A.

In respect to the March 6 letter, the Board recently dealt with the issue of direct dealing in In re Findlay City School Dist. Bd. of Ed., SERB 88-006 (5-13-88) and In re Mentor Exempted Village School Dist. Bd. of Ed., SERB 89-011 (5-16-89). In Findlay, the Board stated:

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 Union's] relationship and effectiveness with the employees it represents.

In finding no violation in the instant case, the Hearing Officer reasoned that Findlay was distinguishable because "none of the correspondence was an attempt to solicit input from bargaining unit members regarding a mandatory subject"⁸ This reasoning ignores a crucial fact that Respondent Superintendent's action in the March 6 letter invited the employees to discuss negotiations directly with the School Board Administration. These negotiations concerned mandatory subjects of bargaining. Furthermore, the reasoning in Findlay clearly follows that of the National Labor Relations Board (NLRB) in General Electric, 150 NLRB 192, 57 LRRM 1491 (1964) where it was found that direct dealing occurs when there is an attempt "to deal with the union through the employees, rather than the employees through the union." Findlay is indeed applicable to the case at hand.

⁸Hearing Officer's Proposed Order, p. 8.

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The Hearing Officer also distinguished the instant case from Mentor, supra, on the basis that there was no "Notice of Intent to Strike" issued in that case. The mere presence of a strike notice in no way affects the status of the parties' negotiations. A strike notice is nothing more than the fulfillment of a statutory obligation placed upon a union before a job action can be instituted. The intent of such notice is to alert the employer in advance of the contemplated action. Seldom, if ever, is bargaining interrupted or curtailed following a notice to strike. More often, negotiations are accelerated and the period of time between the issuance of the notice and the intended date of strike is one of intensified and productive negotiations and, thus, not surprisingly, statistics show that a great majority of strike notices are not followed by a strike.¹⁰ Thus, a notice to strike does not constitute an impasse per se in negotiations.¹¹ In the case at hand, bargaining not only continued after the strike notice was issued but persisted even after the strike began, hence, under the facts of this case, the March 6 letter was sent in the midst of negotiations.¹²

In Mentor, supra, the Employer sent a "Negotiations Report" directly to bargaining unit employees explaining the status of negotiations, etc. In

¹⁰SERB Bureau of Mediation Statistical Report "Ohio Strike Activity, Strike Notices Filed 1984 - Present (01/03/90)."

¹¹"Impasse" is used frequently in the statutory procedure to indicate the time for advancement to the next step of the procedure. However, the term impasse, as used here, connotes the point in time "after good faith negotiations have exhausted the prospects of concluding an agreement." Taft Broadcasting Co., 163 NLRB 475, 478 (1967).

¹²F.F. No. 1; T. pp. 265-268.

the "report" the Employer expressly acknowledged the Union as the exclusive representative and the Employer's intention to bargain only with the Union. The "report" contained no editorial commentary. Nevertheless, the communication was still held to be direct dealing. Those features cited above were absent in the instant case. The letter of March 6 did not acknowledge the rights of the exclusive representative, nor the Respondent's intention to bargain only with the Union. It also contained a statement to the effect that the Union might not submit the Employer's latest proposal to the employees and that the employees should not allow themselves to be led into a strike. The letter went on to invite the employees to discuss the negotiation status and issues directly with the School Board Administration.¹³

Even if arguably the March 6 letter standing alone were determined to be non-coercive and, as the Respondent argues, a licit expression of free speech, its issuance framed between the two coercive statements of Ginny Brechak, Respondent's Food Service Manager, on March 4 and March 7¹⁴ would still cause employees to have more than a little circumspection as to the Respondent's motives and make it a coercive message. A single expression of speech should be viewed in the context of the totality of conduct and the circumstances under which it occurred.¹⁵

¹³SERB Exh. 3.

¹⁴F.F. Nos. 2, 3 and 5. These two coercive statements to the employees regarding the legality of the strike and the prospect for future employment were found by the Hearing Officer to be unfair labor practices as set forth in Conclusion of Law No. 3, which was adopted by both the Majority and the dissent.

¹⁵See, NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 9 LRM 405 (1941).

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In the instant case, the March 6 letter appealed directly to the employees. It disparaged the credibility of the exclusive representative and invited the employees to speak directly to the administration on bargaining issues. The letter's contents represent a classic example of an Employer attempting to "deal with the Union through the employees." Thus, the Respondent's direct communication with the employees via the March 6 letter clearly constitutes interference with, restraint and coercion of employees in the exercise of the rights guaranteed them, as well as refusal to bargain collectively with the exclusive representative. The letter of March 6, 1986, is in violation of O.R.C. §4117.11(A)(1) and (A)(5).

Furthermore, the letter of March 12, 1986, notifying employees of the cancellation of their insurance benefits, was misleading. The letter was mailed directly to the employees two days after the strike began and one day after the parties met with the mediator. The letter noted that the striking employees' benefits were cancelled as of March 10, the day the strike began. However, the insurance carrier was not requested to cancel the benefits until the Respondent mailed the request on March 13. Moreover, many of the striking employees remained covered through the term of the strike. The issue here is not whether the Respondent had the right to cancel the benefits, but whether the notice of cancellation was misleading and, therefore, violative of the Act. If the Respondent's sole intention was to withhold compensation, then doubtlessly another procedure would have been used. In light of this procedure and the misleading content of the notice, the Board finds that the letter of March 12, 1986, interfered with, restrained and coerced employees of their statutory right to participate in a legal strike and thus violated O.R.C. §4117.11(A)(1).

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B.

The Respondent's April 22, 1986, unilateral implementation of terms and conditions of employment interfered with, restrained or coerced employees in the exercise of the rights guaranteed in O.R.C. Chapter 4117. This decision is based on the finding that ultimate impasse was not reached because the Respondent breached the duty to bargain in good faith.

To support a finding of ultimate impasse in the case at hand, there must first be a finding of good faith bargaining between the parties. This is not the case here. O.R.C. §4117.11(A)(5) provides that to refuse to bargain collectively is an unfair labor practice. To refuse to bargain collectively is to breach the duty to bargain in good faith.

In Mentor, SERB determined that an employer's accurate, non-coercive communication of its bargaining proposals which was sent to its employees during collective bargaining negotiations constituted direct dealing in violation of O.R.C. §4117.11(A)(5), which is the duty to bargain in good faith. There was no dissent in this case. In addition, both the Majority and the concurring opinions in Mentor agreed that the Mentor ruling is not a per se ruling. Mentor, fn. 9. In other words, all agreed that there might be some circumstances in which an employer's accurate, non-coercive communication of its bargaining proposals sent directly to its employees may not be an unfair labor practice.

In the case at issue, the dissenting opinion suggests that the circumstance in which direct dealing does not constitute a violation is when a specific point in time is reached during the collective bargaining process. At one place in the dissenting opinion the point in time chosen is the ultimate impasse. "If a condition of ultimate impasse exists, as in the

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case at hand, a factual, noncoercive communication by the employer directly to the employees must be allowable... " (Dissenting Opinion, p. 3). At another place the point in time chosen is a point at which a strike is imminent. "... if negotiations have reached a point at which a strike is imminent, a direct, factual non-coercive communication ... should be allowable." (Id.). And in yet another place, the chosen point in time is a point where, "The parties have reached a stage comparable to completion of factfinding, and that a strike is imminent." (Id.). Since it is not clear what is "a stage comparable to completion of factfinding" in a situation where the parties operate under a MAD, there is nothing much to say about that point in time. It is also not clear at what point "a strike is imminent." The statistics kept by the SERB Bureau of Mediation shows that more than 82% of strike notices filed did not result in a strike. Hence, the filing of a strike notice is not a point in time where a strike is imminent. Again, when is a strike imminent and how it is determined is not clear at all.

The third mentioned point in time is when ultimate impasse exists. Ultimate impasse is a legal concept adopted from the private sector. The test developed by the NLRB as to whether there is an ultimate impasse is reflected and approved in the case of American Federation of Television and Radio Artist [Taft Broadcasting Co.], 395 F. 2d 622, 628 (D.C. Cir. 1968),

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and appears to be whether there is "no realistic possibility that continuation of discussion at that time would have been fruitful." Under NLRB case law the existence of an impasse is very much a question of fact, and many factors are considered in such factual determinations. "The bargaining history, the good faith of the parties in negotiations, the length of the negotiations, the importance of the issue or issues as to which there is disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining exists." Taft Broadcasting Co., 163 NLRB 475, 478 (1967). Thus, an ultimate impasse is not a point in time which can be predetermined in theory. It is a case by case determination involving the development of a record with enough factual data to determine whether at what point good faith negotiations towards reaching an agreement have been exhausted.

The dissenting opinion declared that ultimate impasse occurred in the case at hand. However, there is nothing in the record to support such a declaration. The record, in the case at hand, did not develop any factual data to show that when the letter at issue was sent to the employees, the parties were at ultimate impasse. On the contrary, the record clearly shows that at the time this letter was sent directly to the employees, the parties were in the midst of collective bargaining negotiations; and there is no fact to support the suspicion that these negotiations were fruitless or that the parties had exhausted the prospect of concluding an agreement. It should be strongly emphasized at this point that even the occurrence of a strike does not necessarily mean that negotiations prior to the strike have reached an impasse. See, J. H. Bonck Co., Inc., 170 NLRB 1471, 1479 (1968).

where the strike in that case was found to be no more than a tactic to support the bargaining position of the unions and did not establish an impasse in the collective bargaining process. See also, Handing Glass Industries, 248 NLRB 902 (1980), where the NLRB concluded that no impasse occurred even though a strike took place and a mediator was called in.

One last point, the Dissenting Opinion links O.R.C. §4117.21, which excludes collective bargaining negotiations from the Sunshine Law, with the direct dealing issue. Direct dealing is not a violation of the privacy requirement. Direct dealing is a violation of the duty to bargain in good faith which is essentially a corollary of the employer's duty to recognize the exclusive representative. See, the United States Supreme Court in NLRB v. Insurance Agents' Int'l. Union, 361 U.S. 477, 45 LRRM 2705, 2707 (1960). Thus, whether the privacy requirement of §4117.21 ends with the publication of the fact-finder's report or not has nothing to do with direct dealing. The reason for the publication of the fact-finder's report, once it has been rejected, is to pressure both the employer and the union to seriously consider the rejection since it will be open to public scrutiny. Thus, the publication of the fact-finder's report is another tool in the statutory scheme to achieve an agreement, but it is not a vehicle to violate the duty to negotiate in good faith and to undermine the exclusive bargaining agent. As long as the employer has the obligation to recognize the representative of its employees, the employer has to bargain in good faith and, thus, cannot directly deal with its employees. As the court said in General Electric Co., 150 NLRB 192, 57 LRRM 1491, 1499 (1964), the duty of the employer to bargain in good faith "requires at a minimum recognition that the statutory representative is the one with whom it must deal in conducting

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bargaining negotiations, and that it can no longer bargain directly or indirectly with the employees."

The Minority's analogy to In re City of Lima, SERB 85-042 (9-17-85) has no relevancy to the case at hand. Lima, supra, dealt with the union's publication of a fact-finding panel's report before the City Council voted on its recommendation. A fact-finder's report is by its nature different and distinguished from the private and sensitive collective bargaining negotiations between an Employer and a union. A fact-finder's report is a set of recommendations made by a third party and served upon both the employer and employee organizations. By law, pursuant to O.R.C. §4117.14(C)(6) and O.A.C. Rule 4117-9-05(K), its contents must be revealed to all members of the employee organization as well as to the legislative body since both must vote upon its recommendations no later than seven (7) days after its issuance. The contents of the report are, thus, always made public either in the form of a collective agreement or, if rejected by one or both of the parties, through a SERB publication, within a very short time of its issuance.

In summary, the essential distinction between the Minority's position and that of the Majority is that the Minority associates the notice to strike with impasse and with the imminence of a strike. A strike notice is indicative of neither. In an apparent effort to design an overly simplistic rule, the Minority seeks to identify a specific point in the bargaining process where direct dealing does not constitute a violation. While the Majority agrees there may be circumstances where direct dealing is not a violation, it is disinclined to enunciate any rule which holds the potential for straight-jacketing the bargaining process.

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By sending the letter of March 6 and giving the speeches of March 4 and 7, the Respondent violated O.R.C. §4117.11(A)(1) and (A)(5) and as a result breached the duty to bargain in good faith. The finding of a breach of the duty to bargain in good faith precludes a finding of ultimate impasse in this case. Since there was no ultimate impasse, the Respondent's unilateral implementation of its last best offer constitutes a unilateral change in the terms and conditions of employment and, therefore, an unfair labor practice in violation of O.R.C. §4117.11(A)(1) and (A)(5).¹⁶

Therefore, the Board amends the Hearing Officer's Conclusion of Law No. 4 to read:

The Respondent's direct communication with bargaining unit employees by letters and "summaries" dated March 6, 1986, and March 12, 1986, as well as its implementation of its final offer did constitute violations of O.R.C. §4117.11(A)(1), (A)(2) and (A)(5).

Vice Chairman Davis concurs. Board Member Latané dissents.

¹⁶In re City of Springfield, SERB 85-033 (6-27-85); See also, Taft Broadcasting Co., *supra*, at note 11; NLRB v. Herman Sawage Co., 45 LRRM 2829 (S. Cir. 2/25/60); United Contractors, Inc., 102 LRRM 1012 (NLRB 8-9-79).

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DISSENTING OPINION

Latané, Board Member:

I concur with the majority determination to uphold Conclusions of Law 1, 2, 3, and 5, but disagree with their reversal of Conclusion of Law 4. I agree with the Hearing Officer's conclusion that in this case, Respondent's direct communications with bargaining unit employees by letters and negotiations summaries subsequent to the filing of a strike notice by the employee organization did not constitute violations of O.R.C. §4117.11(A)(1), (A)(2) or (A)(5). These communications do not, in my opinion, constitute bad faith bargaining, and Respondent's implementation of its final offer should be lawful, the parties having reached ultimate impasse.

The majority, in contrast, found that the employer's letter of March 6, 1986, sent directly to bargaining unit members, violated O.R.C. §4117.11(A)(1), (A)(2), and (A)(5); and that the letter of March 12, 1986, violated O.R.C. §4117.11(A)(1). Having reached these conclusions, the majority further determined that the employer engaged in bad faith bargaining, thus nullifying ultimate impasse, and making the implementation of the employer's last best offer a violation of O.R.C. §4117.11(A)(1) and (A)(5).

I continue to hold the position presented in my concurring opinion in re Mentor Exempted Village School Dist. Bd. of Ed., SERB 89-011 (5-16-89), that factual, noncoercive communications about collective bargaining from an employer to bargaining unit employees are not necessarily per se direct dealing violations. Footnote 9 in the majority opinion in Mentor seems to indicate that we are in agreement on this point. Where I part company with the majority on this issue is as to when and under what circumstances such factual, noncoercive communications by a public employer to its employees are lawful.

Mentor, ibid.

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A reading of the majority opinion might lead a reader to the conclusion that the NLRB is generally opposed to employer communications to employees about bargaining issues. Such is not the case. NLRB decisions stating that factual, noncoercive communications from an employer directly to employees are allowable under certain circumstances.² Factual, noncoercive statements about bargaining by an employer without more simply do not constitute direct dealing under NLRB law. Similarly, other states have found that such communications are allowable.³ However, the inclusion of O.R.C. §4117.21 in the Ohio collective bargaining statute places limitations on such communications during collective bargaining negotiations because it requires that "Collective bargaining meetings between public employers and employee organizations are private, and are not subject to section 121.22 of the Revised Code." (See Mentor Concurring Opinion for further discussion of this reasoning.)

In Mentor I found that a violation occurred because the communication from employer directly to employees took place during collective bargaining negotiations prior to implementation of either statutory or alternative dispute resolution procedures. Following reasoning presented in Brookfield⁴ and Mentor Concurring Opinion, the privacy requirement is clearly ended, if the parties are operating under statutory dispute resolution procedures, with the publication of a fact-finder's report, as mandated under O.R.C. §4117.14(C)(6).

Publication of a fact-finder's report should leave both the employer and the employee organization free to engage in a more public voicing of each party's proposals. As stated in Brookfield:

By requiring the publication of the factfinder's report, the Legislature appears to have signaled an end to the strictly private nature of negotiations which had prevailed up until that time. I believe the Legislature intended that the public employer and the employee organization should then be free to engage in a more public dissemination of their views on specific

²United Technologies Corporation, 274 NLRB 87, 118 LRRM 1446 (1985); Proctor and Gamble Manufacturing Co., 160 NLRB 334, 62 LRRM 1617 (1966); Adolph Coors Co., 235 NLRB 271, 98 LRRM 1539 (1978).

³MSAD #49 Board of Directors, 3 NPER 20-12005 (Maine LRB 10/3/77); Burlington Education Association v. Burlington Board of School Commissioners, CCH Pub. Empl. Barg., Par. 44, 549, Admin. Rulings, (Vt. LRB), Docket No. 84-28, 7 NPER 47-15015 (6/28/84); Brentwood Clerical Association, Case Nos. D-0196, U-4752, Hg. Off's Decision, 4 NPER 33-14630 (NY 9/14/81).

⁴Brookfield Local School District Board of Education, 87-ULP-4-0153, (8-18-1988) adopted without exception under O.R.C. §4117.12(B)(2).

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collective bargaining proposals so that employees can then make up their own minds regarding the merits of a strike. (footnote deleted.) A strike by its very nature is a public act. The public, therefore, has a right to know why the strike is taking place or what events led up to the strike. The public employer should be free to justify its position on bargaining issues to its employees and the public at that time, provided that in doing so it does not repudiate the employee organization as the party with whom it must negotiate for wages, hours, terms and conditions of employment. Brookfield, supra.

As a legislative body's vote to accept or reject a fact-finder's report must be taken in public under O.R.C. §121.22(H), I find that the privacy requirement certainly is ended by that point in time. Support for this position is found in SERB's determination that no violation occurred when the union caused the recommendations of the factfinding panel to be published in a local newspaper prior to the legislative vote on the fact-finder's report. The publication took place prior to the expiration of the seven-day period from the date the fact-finder's recommendations were mailed. City of Lima v. F.O.P. Lodge 21, (2 OPER 2647).⁵

If parties are operating under an alternative dispute resolution procedure, the end of the requirement to bargain privately is less easily pinpointed. In COTA, SERB 89-032, (11-29-89) I suggested that guidelines to determine that a direct communication from an employer to employees is permissible include that the parties have reached a stage comparable to completion of factfinding, and that a strike is imminent. Perhaps a more complete way to state the principle in the case of a MAD provision is to describe it as the point at which the employee organization may lawfully strike after exhaustion of the MAD, but in no event later than the date of the issuance of a strike notice.

I agree with the majority that the employer must negotiate with the employees through the union, and not negotiate with the union through employees, as stated by the NLRB in General Electric, 150 NLRB 192, 57 LRRM 1491 (1964). However, if negotiations have reached a point at which a strike is lawful, a direct, factual, noncoercive communication presenting the employer's viewpoint and/or factually presenting actions that will be taken should be allowable. Similarly, for an employer to be forbidden the

⁵ This SERB decision is cited because it provides a clue to when the statutory requirement to bargain privately ends, not because it is otherwise relevant to the case at hand. I do disagree, however, with the majority's reasoning that "a fact-finder's report is ... a completely different thing from private and sensitive collective bargaining negotiations...." Such a report is, in fact, a set of recommendations based on the contract proposals which are the subject of the negotiations.

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opportunity to distribute factual, noncoercive information to employees subsequent to the filing of a strike notice is to deny the employer an opportunity to contribute to a settlement which might prevent a strike or to lay out its position in public prior to the commencement of a strike.

The communications in this case occurred subsequent to the requirement to negotiate privately mandated under O.R.C. §4117.21, and the position presented in my concurring opinion in Mentor is applicable. That is, an employer's accurate, noncoercive communication to its employees of its bargaining proposals in certain circumstances may not be a violation, standing alone. As noted previously, it appears obvious from the majority's statement in footnote 9 of Mentor that we are in concurrence as to this statement.⁶

I would suggest that our apparent agreement on this point might indicate that the majority is not willing to create an absolute, per se ruling that an employer's communication with its employees about the status of its bargaining position is prohibited under any circumstances. Logically, it follows that if a communication from an employer to bargaining unit members is permissible under certain circumstances, each case to be determined on its merits, the totality of circumstances in an entire case must be considered.

Indeed, the majority has stated this in its opinion. In discussing the letter dated March 6, 1986, the majority opinion states, inter alia, that "A single act cannot be disengaged from the totality of conduct and the circumstances under which it occurred."⁷

The March 6, 1986 communication which was sent directly to bargaining unit members consisted of a cover letter from the Superintendent and a three page non-editorial summary of negotiations. The cover letter contained two comments which the majority has found coercive. Those comments are:

"We trust that an informed union membership and the other bargaining unit employees who have chosen not to join the union will not allow themselves to be led to a strike in light of the offer which we have made to conclude these negotiations." and

"If you would like additional information or details concerning the administration's final offer, Mr. Keebaugh is available to respond to your inquiry."

Other than these two sentences the letter consists of nothing other than a synopsis of the status of negotiations at that date.

⁶Mentor, supra.

⁷NLRB v. Virginia Electric & Power Co., 314 U.S. 469, 9 LRRM 405 (1941).

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The majority opinion states that the Superintendent's statements in this letter invited the employees to discuss negotiations directly with the school board administration and disparaged the credibility of the exclusive representative. According to the majority, the contents of this letter represent a classic example of an employer attempting to "deal with the union through the employees."⁸ I agree with the majority that an employer should not attempt to deal with a union through the employees. However, I do not believe that to be the situation in this case.

The majority states in its opinion that "Even if arguably the March 6 letter standing alone were determined to be non-coercive...its issuance framed between the two coercive statements of Ginny Brechak, Respondent's Food Service Manager, on March 4 and March 7 (footnote omitted) would still cause more than a little circumspection as to the respondent's motives and makes it a coercive message. A single act cannot be disengaged from the totality of conduct and the circumstances under which it occurred." (Emphasis added.)⁹ In keeping with this line of reasoning I believe that the two statements in the letter which the majority found to be coercive can be analyzed in the same way. I would argue that even if the two statements made by the superintendent were coercive, which I do not find to be the case, they should not be disengaged from the totality of conduct and the circumstances under which they were stated. The facts in this case demonstrate clearly that the employer had been bargaining theretofore and thereafter in good faith with the employee organization.

School district employees must be presumed to have some native intelligence and to be able to recognize an occasional sentence of propaganda from either side. The majority previously acknowledged this in a representation election case:

When evaluating literature of this nature, the Board considers the voters to possess basic intelligence and the ability to recognize and understand campaign literature for what it is. The Board bears in mind that campaign literature does not exist in a vacuum. Most voters are aware of the positions of the parties and evaluate campaign materials accordingly. The Board's rule promoting open and free dissemination of ideas enhance the opportunity for the voters to receive and evaluate information regarding the arguments and promotional points of the parties. In re Montgomery County Bd. of Mental Retardation and Developmental Disabilities, SERB 88-012 (9-15-88), at 3.62.¹⁰

⁸General Electric, supra.

⁹Virginia Electric & Power, supra.

¹⁰See also, In re Stark County Engineer, SERB 85-012 (4-4-85), "Union campaign material is unlikely to cast the employer in a favorable light, but it does not form the basis for an unlawful charge."

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I am not suggesting that employers should be permitted to issue untruthful or misleading statements about negotiations, but rather that a couple of sentences which an ordinary employee would easily recognize as mere propaganda should not "form the basis for an unlawful charge." Once employees and employee organizations have the right to lawfully strike on economic issues, and certainly once the employee organization has sent the employer a strike notice, the employer must be permitted an opportunity to make fair comments to the media, to the public, and to its own employees regarding the bargaining issues in dispute, so long as it does not repudiate the employee organization as the bargaining agent. The employer here in no way can be construed as inviting the employees to bargain directly with the employer, and thus there is no direct dealing violation.

In a number of prior decisions, the Board has referenced the First Amendment rights of employee organizations to speak out.¹¹ In my opinion, employers should have an equal right to speak out prior to a strike by public employees. The only limitation imposed by the Legislature on that right is O.R.C. §4117.21, discussed, and the prohibition on direct dealing. It would be incongruous to conclude that employees and their union can engage in public information picketing and a public strike, and yet conclude that the employer can not tell its side of the story to the public and its own employees. I believe that the following quote from the Montgomery County, supra, case should apply with equal force to those situations where collective bargaining negotiations have reached the point where a strike would be lawful.

In reviewing any election objection based upon the circulation of campaign literature, the guarantees of the First Amendment to the United States Constitution are paramount. The First Amendment guarantees and protects freedom of speech, including the distribution of leaflets and flyers in the course of representation campaigns. Stark County Engineer, SERB 85-012 (4-4-85). Recognizing that freedom of speech is essential to a fair and meaningful representation campaign, the Board has promulgated rules to "ensure a free atmosphere for the development of opinions and the dissemination of information and ideas for and against representation for purposes of collective bargaining." O.A.C. Rule 4117-5-06(D). Open, active exchange of information is imperative to enable the voters to make informed choices. Extreme caution must be exercised in any case that raises the possibility of restricting or penalizing such information flow. At 3-62.

¹¹In re Stark Co. Engineer, SERB 85-012 (4-4-85), union campaign materials; In re Univ. of Akron, SERB 86-010 (3-14-86), informational picketing.

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With the exception of the two statements, the letter of March 6, 1986, did not differ from the letter of March 12, 1986 in that both were sent for information purposes and in that the two statements in question, particularly when viewed in light of the letter as a whole, do not rise to the level of a violation of the law.

I further disagree with the majority's finding that the March 12, 1986 letter notifying employees of cancellation of insurance was misleading. This letter was merely informative. The majority states that the letter was mailed directly to employees two days after the strike began and further states that the cancellation took effect on the day the strike began. The issue, according to the majority opinion, is not whether the employer had the right to cancel benefits, but whether the notice of cancellation was misleading, and therefore a violation of O.R.C. §4117.11(A)(1).

I find this contention to be without merit. A review of this letter clearly shows that the employer simply relayed information to employees that was already public knowledge. O.R.C. §4117.15(C) states that an employee is not entitled to pay or compensation while engaged in a strike. While it seems probable that employees would be aware that they would not receive a pay check during their participation in a strike, it is less likely that they would be aware that other forms of compensation, such as insurance benefits, could also be withheld. The March 12, 1986 letter merely informed employees that insurance coverage would be suspended during the strike and would be reinstated after the strike ended. It also suggested that employees seek other insurance coverage during this time if they needed it.

The majority opinion focuses on the date this letter was mailed and the procedure used to relay the information. In my opinion neither the content nor the timing constituted a violation of the law. The strike began on March 10, 1986 and the letter was dated March 12, 1986. If the letter had been mailed prior to the actual strike date, the message might have been construed as coercive, if interpreted to be a threat. However, the letter was mailed after commencement of the strike, and after the employer had determined which employees were participating in the strike. The fact that the insurance company was notified one day after the employees were notified and that some of the striking employees remained covered during the strike period, is in my opinion, irrelevant.

In their final point regarding the insurance letter the majority holds that not only was the information relayed to the employees misleading, but that the procedure used to convey it was questionable. The majority opinion states, "If the respondent's sole intention was to withhold compensation, then doubtlessly another procedure would have been used." Again, this contention is without merit. I find that the March 12, 1986, letter did not violate O.R.C. §4117.11(A)(1).

Lastly, the majority finds that the aforementioned communications by the employer were evidence of bad faith bargaining and thus, ultimate impasse was not reached, and implementation of the employer's last best offer was invalid. The issue of whether or not the communications were unlawful

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direct dealing is a totally different issue than whether the parties had reached ultimate impasse. The two issues are not related. Bad faith bargaining is, as had been stated earlier, an "all over" issue, based on the totality of the evidence. Thus, even if I agreed that the communications were unlawful, which I do not, I would not conclude that bad faith bargaining occurred.¹² The significance of whether or not the parties had reached impasse relates solely to the issue of whether or not the employer's unilateral implementation of its last best offer was lawful. To conclude that the employer engaged in bad faith bargaining, thereby precluding a finding that the parties were at impasse, based on an act which occurred subsequent to the filing of a valid strike notice is simply illogical under O.R.C. §4117.14.

The Employer had, by implication, asked SERB to rule that impasse did not exist, when asking for an unauthorized strike determination on the basis that the MAD was not legal in an earlier case related to this one. SERB found that the MAD was valid, and that the strike was legal, thereby certainly implying that impasse existed.¹³

In footnote 11 of the majority opinion, the majority makes clear that their use of the words "impasse" and "ultimate impasse" in their opinion is based on the NLRB's common definition of those terms. Such an approach does not apply in the Ohio public sector because of the detailed provisions of O.R.C. §4117.14, which the NLRA lacks.

In Ohio, by law, an employer may lawfully impose its last best offer when it has bargained in good faith and exhausted the statutory impasse resolution procedures. Where the parties have a MAD provision instead of the statutory provision, this point occurs when the MAD impasse resolution provisions have been exhausted. The employer's right to implement its last best offer is directly related to the employee organization's right to use its economic weapon--the economic strike. Each right is the opposite side of the same coin and each occurs when the parties are unable to resolve their bargaining impasse after exhaustion of the impasse resolution procedure.

As the Board found the strike to be legal in this instance, and that the parties had properly exhausted their MAD provisions, it necessarily follows that the employer had the right to implement its last best offer. That

¹²See COTA Concurring Opinion, supra, where I did agree that direct dealing, but not bad faith bargaining, occurred.

¹³SERB determined that the parties in this case had a valid alternate dispute resolution procedure, that it was exhausted, and that on that basis, the strike was legal. Thus, the Employer's contention that impasse did not exist was overruled by this Board. In re Ohio Association of Public School Employees and Vandalia-Butler City School District, SERB 86-012 (3-27-86).

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right can not be negated in this instance by an unfair labor practice which occurred subsequent to the parties having exhausted their MAD provisions pursuant to O.R.C. §4117.14.¹⁴

In summary, the two letters are not, in my opinion, evidence of bad faith bargaining. I find that the employer did bargain in good faith, ultimate impasse was reached and implementation of the last best offer was valid. Consequently, such implementation did not constitute a unilateral change in terms and conditions of employment, and there was no violation of O.R.C. §4117.11(A)(1) and (A)(5).

I agree with the Hearing Officer's proposed Analysis and Discussion, which is hereby incorporated by reference.

¹⁴Of course, it is perfectly proper for the parties to continue negotiations to reach a compromise and contract, just as it is perfectly legal for the parties to agree to amend or modify a conciliator's award by mutual agreement. Licking Co. Sheriff v. SERB, 1988 SERB 4-138 (CP, Licking, 11-14-88).