97-014

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Ohio Association of Public School Employees,
AFSCME Local 4, AFL-CIO, Chapter 569,

Respondent.

Case No. 96-ULP-08-0505

OPINION

McGEE, Vice Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("Board") on exceptions to the Hearing Officer's Proposed Order issued on June 20, 1997. For the reasons below, we find that the remarks made by representatives of the Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO, Chapter 569 ("OAPSE"), at the July 15, 1996 meeting of the Rootstown Local School District Board of Education ("Employer") do not constitute an effort to engage the Employer in public negotiations or the illegal bypassing of the Employer's designated representative in violation of Ohio Revised Code ("O.R.C.") § 4117.11(B)(3). We find that the remarks at issue are legitimate comments made by members of the public to a legislative body on issues properly before the legislative body at a public meeting.

I. BACKGROUND[1]

The Employer and OAPSE were parties to a collective bargaining agreement effective July 1, 1993 through June 30, 1995 ("1993-1995 Agreement"). Negotiations between the parties for a successor agreement commenced in September 1995. In its initial proposal, the Employer suggested the elimination of the prohibition against "contracting out" contained in the 1993-1995 Agreement.

[1]Finding of Fact Nos. 3, 5, 7-13, and 17-24.

Approximately 10-12 negotiating sessions were held between September 1995 and January 1996. On January 4, 1996, at the conclusion of their negotiation session the parties declared an impasse that triggered the contractual dispute resolution procedure. In a letter dated January 6, 1996, the Employer outlined its Final Proposal to OAPSE and "demanded" that it be submitted to "the rank and file for its consideration."

In a letter dated January 9, 1996, OAPSE, pursuant to Article III-Mediation in the 1993-1995 Agreement, contacted the Federal Mediation and Conciliation Service ("FMCS") requesting assistance. The parties attended two mediation sessions: one in February 1996, and a second one on June 6, 1996. While the parties resolved a number of contractual items between January 1996 and June 6, 1996, the successor collective bargaining agreement still was not finalized and "contracting out" remained the primary area of disagreement. The parties did not engage in any bargaining sessions after the June 6, 1996 meeting. On or about June 24, 1996, the Employer's board members met in an executive session with their legal counsel to discuss the status of negotiations.

In a letter dated June 26, 1996, the Employer's counsel advised OAPSE's chief spokesperson, Robert J. Lyell, in pertinent part:

> I have been instructed by the Board to tender this Final Offer which, if not accepted, will be unilaterally implemented as of July 15, 1996.
>
> * * *
>
> Again, this offer will be unilaterally implemented on July 15, 1996, unless such is accepted by the Union, in writing, prior to that time.

In a letter dated July 8, 1996, Mr. Lyell notified the FMCS that it was requesting a negotiation session at the parties' earliest possible convenience on or after July 29, 1996. In a letter on this same date, Mr. Lyell notified the Employer's counsel of his request to the FMCS together with a request that the Employer engage in further negotiations.

In a letter dated July 9, 1996, the Employer's counsel responded to Mr. Lyell's July 8, 1996 letter and advised, in pertinent part:

> In this regard, I would direct your attention to my correspondence dated June 26, 1996, and received by you on July 3, 1996, wherein you were advised that the Board has tendered its final offer and, barring acceptance by the Union of the final offer, would unilaterally implement such on July 15, 1996.
>
> Make no mistake that this is still the position of the Board of Education. As such, the Board sees no need to engage in further fruitless negotiation particularly at such a late date. Again, I would like to reiterate our intention to implement our final offer, if not accepted by the Union, on July 15, 1996, along with any and all other decisions which

may be necessary[.]

At the July 15, 1996 school board meeting, Agenda Item 16 was a vote on whether to implement the Employer's last best offer. OAPSE Local President Barbara May commented on Agenda Item 16, noting that the Employer had ended negotiations with OAPSE, that the Employer had accused OAPSE of foot-dragging in the negotiations and had threatened the employees with contracting-out their jobs. OAPSE's chief spokesperson also spoke at the July 15, 1996 meeting regarding the same agenda item. The thrust of his comments was to request the school board to vote against implementation of the last best offer and, thus, to postpone the implementation decision for a later date. After the remarks by the OAPSE representatives, the school board members went into an executive session to discuss the status of negotiations and the implementation of the final offer. Upon returning from the executive session, the school board members passed a resolution to implement its final offer to OAPSE.

II. DISCUSSION

The issue before us is whether OAPSE's representatives' remarks at the July 15, 1996 school board meeting constitute an illegal effort to engage the Employer in negotiations and to illegally bypass the Employer's designated representative. In order to determine this issue we need to draw a line between various conflicting interests.

In *In re Dist 1199/HCSSU/SEIU, AFL-CIO*, SERB 96-004 (4-8-96) ("*Broadstock*"), a line was drawn between those utterances falling under the constitutional right union officials may have to address public officials at open meetings and those utterances constituting illegal, bad-faith bargaining:

> The question before us is not whether there is a constitutional right to talk in public to public officials in open meetings. Union officials like other citizens have this right. The question is whether union officials have a right to negotiate with any public official of their choice, regardless whether this is the appointed negotiator of the employer, in any public forum, at time and places determined by them unilaterally. Clearly there is no such right. On the contrary, such behavior is in violation of the statutory requirement of good faith bargaining.[2]

In *In re SERB v. OAPSE, Local 530*, SERB 96-011, at p. 3-93 (6-28-96) ("*Local 530*"), the Board found a violation of O.R.C. §

[2] *Id.* at 3-41 - 3-42.

4117.11(B)(3) where the union representatives appealed an unresolved bargaining issue directly to the members of the school board while negotiations were still ongoing with the employer's designated representatives, stating: "Where the parties are in the midst of negotiations and ultimate impasse has not been reached, the bargaining teams may not bypass each other to appeal directly to either the employees or the employer on issues that are part of ongoing negotiations."

In *In re Vandalia-Butler City School Dist Bd of Ed*, SERB 90-003, at 3-10 (2-9-90) (citations omitted), the Board discussed the analysis that must be undertaken to determine whether parties have reached ultimate impasse:

> 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 * * * 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. * * * 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 parties attended two sessions with the FMCS mediator, in February 1996 and on June 6, 1996. They were unable to finalize a successor agreement and "contracting out" remained the primary area of disagreement. The parties did not engage in any bargaining sessions after June 6, 1996. In a letter dated June 26, 1996, the Employer's counsel advised OAPSE's chief spokesperson that he had "been instructed by the Board to tender this Final Offer which, if not accepted, will be unilaterally implemented as of July 15, 1996." In response to a letter requesting further negotiations, the Employer's counsel responded in a letter dated July 9, 1996: "[T]he Board sees no need to engage in further fruitless negotiation particularly at such a late date." Thus, no later than July 9, 1996, good faith negotiations towards reaching an agreement have been exhausted, and the parties had reached ultimate impasse.[3]

Union officials, like all other members of the general public, have the right to speak in open meetings of a school board and to confront the elected officials on a variety of issues. However, such public meetings are not the forums for union officials to conduct collective bargaining negotiations. The determination of whether O.R.C. § 4117.11(B)(3)[4] was violated under the "totality of circumstances" is

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[3] *See Taft Broadcasting Co.*, 395 F.2d 622, 67 L.R.R.M. 3032 (D.C. Cir. 1968); *J. D. Lunsford Plumbing, Heating & Air Conditioning*, 254 NLRB 1360, 107 L.R.R.M. 1033 (1981), *aff'd*, 684 F.2d 1033, 110 L.R.R.M. 3367 (D.C. Cir. 1982).

[4] O.R.C. § 4117.11(B)(3) provides:

case specific and depends on the content and timing of the specific utterances.

In the present case, unlike *Local 530*, the parties were not in the middle of negotiations. The issue before the school board was whether to implement the last best offer. At this point the school board was no longer acting in its capacity as an employer, but was now acting as a legislative body. The school board then put Item 16 — whether to implement the Employer's last best offer — on the agenda for the July 15, 1996 meeting. When voting on issues in a public meeting the school board acts in its capacity as the legislative body. One function of a public meeting is to enable members of the public to comment on those agenda issues before the legislative body votes. Thus, once the school board began acting as a legislative body, the timing of the OAPSE representatives' statements was permissible.

Analyzing the content of the utterances, the case before us is very different from *Broadstock* because the thrust of the union officials' remarks in the case at issue was not an offer of a specific bargaining proposal or an attempt to negotiate directly with the members of the school board. The OAPSE representatives' statements were merely an expression of a position on a topic that was on the agenda for the school board to vote on — whether to implement the Employer's last best offer.

OAPSE's representatives attempted to persuade the school board to postpone its decision to implement its last best offer through their remarks. These remarks included the following:

> Sometime this evening, the elected officials of this Board of Education are going to be asked to make a very important decision that's on this agenda, and that decision is whether or not to implement a contract on Local 569 of OAPSE. All right? * * * What I would like you all to do is really take some time and examine this in your mind and say to yourselves why does this have to be done this evening? Why does this contract have to be implemented on the 15th of July. All right? * * * and if you choose to implement that contract, why can't you implement that contract on the 1st of August or the 15th of August or the 31st of July? * * * That is my question. That is what I'd like you to think about and that is what I'd like you to do when the time comes on that agenda item, is to vote that down, not implement that contract at this time, and get a time for the parties to get back together the way the board president was quoted as saying. * * * If you truly don't want to subcontract these jobs, if you truly want to make a good faith effort to resolve

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(B) It is an unfair labor practice for an employee organization, its agents, or representatives, or public employees to:

* * *

(3) Refuse to bargain collectively with a public employer if the employee organization is recognized as the exclusive representative or certified as the exclusive representative of public employees in a bargaining unit[.]

> this contract, we can do this, and if you think the parties, if you all think that OAPSE 569 is being unreasonable, you can implement this contract two or three weeks from now and still be under an implemented contract, in your opinion, plenty of time before school starts in the fall.

The thrust of the union officials' remarks is permissible lobbying[5] of elected officials acting as a legislative body on a topic which was officially put on the agenda by the legislative body for public comment. In this situation, the line between legitimate utterances and illegal ones needs to be drawn resulting in a finding that these remarks are legitimate utterances.

Unlike in *Broadstock* and *Local 530*, the record in the instant matter reveals that the union officials' remarks at the public meeting did not rise to the level of negotiations. Viewed in the context of a public meeting where the remarks were made to the legislative body on an agenda item legitimately part of the business of that legislative body, the remarks in question constitute no more than a legitimate expression of positions taken by members of the public to their elected officials — *i.e.*, vote no — in a forum designed specifically for such expressions. The remarks did not present a bargaining proposal — *e.g.*, 50 cents per hour per employee in *Broadstock*. Thus, under the totality of the circumstances, this action does not violate O.R.C. § 4117.11(B)(3).

III. CONCLUSION

For the reasons above, we find that remarks made by representatives of the Ohio Association of Public School Employees, AFSCME Local 4, AFL-CIO, Chapter 569 at the July 15, 1996 meeting of the Rootstown Local School District Board of Education do not constitute an effort to engage the Employer in public negotiations or the illegal bypassing of the Employer's designated representative in violation of O.R.C. § 4117.11(B)(3). The unfair labor practice charge and the complaint are hereby dismissed.

Pohler, Chairman, and Mason, Board Member, concur.

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[5] *See, e.g., Sulton School District*, Washington PERC Case No. 4780-U-83-796 (1984).