

**STATE OF OHIO  
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Toledo City School District Board of Education,

Respondent.

Case No. 2000-ULP-05-0274

**ORDER  
(OPINION ATTACHED)**

Before Chairman Pohler, Vice Chairman Gillmor, and Board Member Verich:  
September 20, 2001.

On May 1, 2000, the Toledo Association of Administrative Personnel ("Charging Party") filed an unfair labor practice charge against the Toledo City School District Board of Education ("Respondent"). On September 7, 2000, the State Employment Relations Board ("Board" or "Complainant") found probable cause to believe that the Respondent had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

A hearing was held on December 19, 2000. On April 16, 2001, the Proposed Order was issued. On May 9, 2001, the Charging Party and the Complainant filed exceptions to the Proposed Order. On May 18, 2001, the Respondent filed a response to the Charging Party's and Complainant's exceptions. On June 21, 2001, the Board directed the representatives of the parties to appear before the Board for an oral argument on the merits of this case. On July 18, 2001, the parties' representatives presented their oral arguments to the Board.

After reviewing the record and all filings, the Board amends Conclusion of Law No. 3 by replacing "did not constitute" with "constituted" and adopts the Findings of Fact and Conclusions of Law, as amended, in the Proposed Order, incorporated by reference, for the reasons set forth in the attached Opinion, also incorporated by reference.

The Toledo City School District Board of Education is ordered to:

A. CEASE AND DESIST FROM:

- (1) Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by unilaterally implementing an extended school-day proposal, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
- (2) Refusing to bargain collectively with the exclusive representative of its employees by unilaterally implementing an extended school-day proposal, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Pay back pay for any hours worked over the standard work day to the Toledo Association of Administrative Personnel bargaining-unit members who worked an extension of the work day without additional compensation;
- (2) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Toledo Association of Administrative Personnel work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo City School District Board of Education shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (3) Notify the State Employment Relations Board in writing within twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

Order  
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It is so ordered.

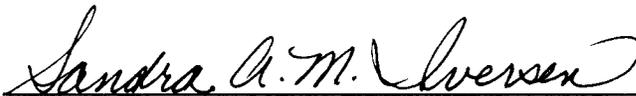
POHLER, Chairman; GILLMOR, Vice Chairman; and VERICH, Board Member,  
concur.



SUE POHLER, CHAIRMAN

You are hereby notified that an appeal may be perfected, pursuant to Ohio Revised Code Section 4117.13(D) by filing a notice of appeal with the State Employment Relations Board at 65 East State Street, 12th Floor, Columbus, Ohio 43215-4213, and with the court of common pleas in the county where the unfair labor practice in question was alleged to have been engaged in, or where the person resides or transacts business, within fifteen days after the mailing of the State Employment Relations Board's order.

I certify that this document was filed and a copy served upon each party by certified mail, return receipt requested, on this 1st day of October, 2001.



SANDRA A.M. IVERSEN, ADMINISTRATIVE ASSISTANT



# 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 to abide by the following:

**A. CEASE AND DESIST FROM:**

1. Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117 by unilaterally implementing an extended school-day proposal, and from otherwise violating Ohio Revised Code Section 4117.11(A)(1); and
2. Refusing to bargain collectively with the exclusive representative of its employees by unilaterally implementing an extended school-day proposal, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

**B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:**

1. Pay back pay for any hours worked over the standard work day to the Toledo Association of Administrative Personnel bargaining-unit members who worked an extension of the work day without additional compensation;
2. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Toledo Association of Administrative Personnel work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo City School District Board of Education shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
3. Notify the State Employment Relations Board in writing twenty calendar days from the date the **ORDER** becomes final of the steps that have been taken to comply therewith.

***SERB v. Toledo City School District Board of Education***  
**Case No. 2000-ULP-05-0274**

\_\_\_\_\_  
BY

\_\_\_\_\_  
DATE

\_\_\_\_\_  
TITLE

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

This Notice must remain posted for sixty 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 State Employment Relations Board.

**STATE OF OHIO  
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Toledo City School District Board of Education,

Respondent.

Case No. 2000-ULP-05-0274

**OPINION**

POHLER, Chairman:

This unfair labor practice case comes before the State Employment Relations Board ("SERB" or "Complainant") upon the issuance of a Proposed Order on April 16, 2001, and the filing of joint exceptions by the Complainant and Toledo Association of Administrative Personnel and a response to those exceptions by the Toledo City School District Board of Education ("School Board" or "Respondent"). On July 18, 2001, the parties presented oral arguments to SERB. For the reasons below, we find that the Respondent violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally implemented an extended school-day proposal.

**I. SUMMARY OF FACTS**

The Toledo Association of Administrative Personnel ("Union" or "TAAP") is the exclusive representative for a deemed-certified bargaining unit of the School Board's administrative employees. The School Board and TAAP were parties to a collective bargaining agreement effective February 1, 1998 to January 31, 2000 ("CBA"), containing

a grievance procedure that culminated in final and binding arbitration. The CBA was extended through March 31, 2001, by agreement of the parties. Article VIII addresses extended time, including extended time for the work day, and compensation for employees who work beyond their normal work day or work week. Article VIII, Section B(2)(a), is titled "Extensions of the Work Day" and states:

Extensions of the work day when students are to be present for regular coursework which are mandated by the appropriate assistant superintendent shall be compensated in a manner agreed upon by TAAP and the superintendent or his/her designee.

In 1997, the Ohio General Assembly passed Senate Bill 55. One of the effects of the legislation is to require students to complete an increased number of units in order to graduate after September 15, 2001. In order to carry out Senate Bill 55, the School Board decided to establish a program to help students who are at risk of graduating late (after September 15, 2001). On February 24, 2000, Assistant Superintendent Cotner sent a proposal to TAAP President David McClellan that would extend the school day by implementing a seven period day. The proposal contained no provision for additional compensation for the extension of the school day. On February 25, 2000, a meeting was held between representatives of TAAP and the District. Among those present were TAAP President David McClellan, Deputy Superintendent Richard Daoust, and Assistant Superintendent Craig Cotner.

On March 2, 2000, TAAP President David McClellan sent a counterproposal to Deputy Superintendent Richard Daoust and Assistant Superintendent Craig Cotner that included compensation for persons working the extended day. On March 6, 2000, Assistant Superintendent Cotner sent TAAP President McClellan a revised proposed memorandum of understanding regarding extending the high school day. The proposal contained no provision for additional compensation for TAAP members for the extension of the school day. On March 10, 2000, a negotiation meeting took place between TAAP

and the School Board; TAAP President McClellan and Assistant Superintendent Cotner were among those present. At that meeting, TAAP explained its March 2, 2000 counterproposal, and the School Board explained its March 6, 2000 counterproposal.

On March 17, 2000, Assistant Superintendent Cotner provided TAAP President McClellan with the District's proposed memorandum of understanding extending the school day for the 2000/2001 school year, and indicated that the District was going to implement the proposal over the objections of TAAP. The extended school day would begin in September 2000.

## II. DISCUSSION

The Respondent is alleged to have violated O.R.C. §§ 4117.11(A)(1) and (5), which state in relevant part as follows:

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

(1) Interfere with, restrain, or coerce employees in the exercise of rights guaranteed in Chapter 4117. of the Revised Code[;]

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(5) Refuse to bargain collectively with the representative of his employees recognized as the exclusive representative \* \* \* pursuant to Chapter 4117. of the Revised Code[.]

The Complainant has the burden of demonstrating by a preponderance of the evidence that the Respondent has committed an unfair labor practice. O.R.C. § 4117.12(B)(3). Article VIII, Section B(2)(a) of the CBA states that extensions of the work day when students are to be present for regular coursework that is mandated by the appropriate assistant superintendent shall be compensated in a manner agreed upon by TAAP and the superintendent or designee. This subsection of Article VIII does not apply to the present case since the District was proposing an extra period for classes that were

remedial in nature, not regular coursework, and the extra period was only for tenth and eleventh grade students who had been identified as being at risk of not graduating with their classes. The issue presented is whether the District engaged in bad-faith bargaining when it implemented its final proposal and modified Article VIII of the CBA.

Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU, AFL-CIO*, SERB 96-004 (4-8-96). Pursuant to O.R.C. § 4117.01(G), the duty to bargain does not compel either party to agree to a proposal or require either party to make a concession. A circumvention of the duty to bargain, regardless of subjective good faith, is unlawful. *In re Mayfield City School Dist Bd of Ed*, SERB 89-033 (12-20-89); *NLRB v. Katz*, 369 U.S. 736, 82 S.Ct. 1107 (1962).

The negotiations concerning the extended school-day proposal occurred within the context of midterm bargaining. In *In re Franklin County Sheriff*, SERB 90-012 (7-18-90) ("*Franklin County Sheriff*") at pp. 3-79 — 3-80, SERB found that the language of O.R.C. Chapter 4117 establishes that the statutory dispute resolution procedure does not apply to midterm disputes. "In the absence of a settlement procedure, the Board will deal with specific incidents on a case-by-case basis." *Id.* at 3-80. In *In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95) ("*Youngstown*"), SERB discussed the requirements for midterm bargaining over subjects not covered by the collective bargaining agreement. SERB held that an employer may implement its last, best offer when the parties have reached ultimate impasse in bargaining or when the employer has made good-faith attempts to bargain the matter before time constraints necessitated the implementation of its last, best offer. *Id.* Ultimate impasse is the point at which good faith negotiations toward reaching an agreement have been exhausted. *In re Vandalia-Butler City School Dist Bd of Ed*, SERB 90-003 (2-9-90) ("*Vandalia-Butler*"). During negotiations for a successor agreement, the employee organization may pursue issues that required mandatory midterm bargaining and were not resolved by mutual agreement as part of its overall contract negotiations, including the submission of the issues to any applicable

dispute settlement procedure that may include binding conciliation or arbitration, or the right to strike as permitted by statute. SERB has not yet addressed what standard to apply to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement.

Under the National Labor Relations Act ("NLRA"), an employer commits an unfair labor practice if it unilaterally changes a term in an existing agreement only if the term is a mandatory subject of bargaining. Once the parties agree to permissive subjects of bargaining, those subjects continue to exist essentially at the will of either party; although civil remedies may apply, parties to a contract may rescind any permissive term of the contract at any time without violating § 8(a)(5) of the NLRA. *Allied Chemical & Alkali Workers of America v. Pittsburgh Plate Glass Co.*, 404 U.S. 157, 185-86, (1971) ("*Pittsburgh Plate Glass*"). The midterm unilateral modification of a collective bargaining agreement is "a prohibited unfair labor practice only when it changes a term that is a mandatory rather than a permissive subject of bargaining." *Pittsburgh Plate Glass, supra* at 185. See also *Pall Biomedical Products Corporation*, 331 NLRB No. 192 (2000); *Tampa Sheet Metal Company, Inc.*, 288 NLRB 322 (1988). Once agreement is reached, the terms of the written bargaining agreement are preserved and neither management [*Int'l Union v NLRB*, 246 U.S. App. D.C. 306, 310; 765 F.2d 175 (1985)] nor labor [*Teamsters Cannery Local 670 v NLRB*, 856 F.2d 1250, 1257 (CA 9, 1988)] may unilaterally modify the agreement without the consent of the other party. A minority of public-sector jurisdictions, including Illinois<sup>1</sup> and Pennsylvania<sup>2</sup>, follows this standard.

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<sup>1</sup>*Barry Community Unit School District 1*, 15 PERI ¶ 1064 (IELRB Opinion and Order, 10-6-98); *Vienna School District No. 55 v. IELRB*, 162 Ill.App.3d 503, 515 N.E.2d 476 (4th Dist. 1987); *Service Employees International Local Union #316 v. IELRB*, 153 Ill.App.3d 744, 505 N.E.2d 418 (4th Dist. 1987); *East St. Louis School District 189*, 12 PERI ¶ 1074, Case No. 96-CA-0008-S (IELRB Opinion and Order, 9-19-96); *Kewanee Community Unit School District No. 229*, 4 PERI ¶ 1136, Case No. 86-CA-0081-C (IELRB Opinion and Order, 9-15-88).

<sup>2</sup>*Jersey Shore School District*, 18 PPER ¶ 18117 (Final Order, 1987); *Appeal of Cumberland Valley School District*, 483 Pa. 134, 394 A.2d 946 (S.Ct. 1978).

The NLRA standard is unworkable under O.R.C. Chapter 4117. Under O.R.C. § 4117.08 the continuation, modification, or deletion of an existing provision of a collective bargaining agreement is treated like a mandatory subject of bargaining regardless whether the topic would otherwise fall in the category of a mandatory or permissive subject of bargaining. In addition, § 8(d) of the NLRA specifically prohibits an employer from altering contractual terms concerning only mandatory subjects of bargaining during the life of an agreement without the consent of the union. O.R.C. § 4117.11(A)(5) does not contain similar language distinguishing between how mandatory and permissive subjects of bargaining are treated.

A majority of public-sector jurisdictions, including Florida, California, New Jersey, and Michigan, applies a form of the following standard: a party cannot modify the existing collective bargaining agreement without negotiation by and agreement of both parties. For example, the Florida Public Employees Relations Commission (“PERC”) has adopted and steadfastly adheres to the principle that an employer breaches its bargaining obligation and commits a per se violation of the Florida Act if, in the absence of a clear and unmistakable waiver by the bargaining agent, it unilaterally alters the status quo with respect to the wages, hours, or other terms and conditions of employment of its employees represented by a bargaining agent.<sup>3</sup>

The majority standard is too restrictive to accomplish the purposes of O.R.C. Chapter 4117. The parties must be able to respond to emergency situations that arise during the term of the collective bargaining agreement, especially in situations where they cannot reach agreement after engaging in good-faith negotiations. O.R.C. § 4117.22

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<sup>3</sup> See *Florida School for the Deaf and the Blind Teachers United v. Florida School for the Deaf and the Blind*, 11 FPER ¶ 16080 at p. 263 (1985), *aff'd*, 483 So.2d 58 (Fla. 1st DCA 1986); *City of Pinellas County PBA v. City of St. Petersburg*, 6 FPER ¶ 11277 (1980); *St. Petersburg Association of Fire Fighters, Local 747 v. City of St. Petersburg*, 5 FPER ¶ 10391, *aff'd*, 388 So.2d 1124 (Fla. 2d DCA 1980); *Indian River CEA v. School Board of Indian River County*, 4 FPER ¶ 4262 (1978), *aff'd*, 373 So.2d 412 (Fla. 4th DCA 1979).

mandates that SERB liberally construe O.R.C. Chapter 4117 “for the accomplishment of the purpose of promoting orderly and constructive relationships between all public employers and their employees.” In *Franklin County Sheriff, supra* at 3-80, SERB recommended that the parties adopt procedures especially designed to deal with midterm disputes since the statutory dispute procedure did not apply.

Where the parties have not adopted procedures in their collective bargaining agreement to deal with midterm bargaining disputes, SERB will apply the following standard to determine whether an unfair labor practice has been committed when a party unilaterally modifies a provision in an existing collective bargaining agreement after bargaining the subject to ultimate impasse as defined in *Vandalia-Butler* :

A party cannot modify an existing collective bargaining agreement without the negotiation by and agreement of both parties unless immediate action is required due to (1) exigent circumstances that were unforeseen at the time of negotiations or (2) legislative action taken by a higher-level legislative body after the agreement became effective that requires a change to conform to the statute.

In addition, to clarify *Youngstown*, follow *Franklin County Sheriff*, and assure consistency in future cases involving issues not covered in the provisions of a collective bargaining agreement, but which require mandatory midterm bargaining, SERB will apply the same two-part test as stated above.

In the present case, the Ohio General Assembly passed Senate Bill 55 in 1997, and the statutory change affected students who graduate from high school after September 15, 2001. The parties' CBA was effective from February 1, 1998 to January 31, 2000, and later extended through March 31, 2001. On February 24, 2000, which was nearly 2½ years after Senate Bill 55 was passed, Assistant Superintendent Cotner sent to TAAP a proposal that would extend the school day by implementing a seven-period day, but it contained no provision for additional compensation for the extension of the school day. On February 25,

2000, a meeting was held between the representatives for TAAP and the School Board. On March 2, 2000, TAAP sent a counterproposal to the School Board that included compensation for persons working the extended day. On March 6, 2000, the School Board sent to TAAP a revised proposed memorandum of understanding regarding extending the high school day; it contained no provision for additional compensation for TAAP members for the extension of the school day. On March 10, 2000, a negotiation meeting took place between TAAP and the School Board. On March 17, 2000, Assistant Superintendent Cotner provided TAAP President McClellan with the School Board's proposed memorandum of understanding extending the school day for the 2000-2001 school year, and indicated that the School Board was going to implement the proposal over the objections of TAAP beginning September 2000.

The legislative change was passed in 1997. The CBA was not effective until February 1, 1998. As a result, the parties were on notice concerning this requirement at the time they entered into the collective bargaining agreement. Since the School Board waited 2½ years after the legislative change to begin negotiating with TAAP, immediate action in 2000 was not necessitated by legislative action. The School Board implemented its proposal approximately seven months after the CBA's original expiration date, which was also approximately six months before the CBA's extension expired. These facts do not demonstrate that immediate action was required due to exigent circumstances that were unforeseen at the time of negotiations. We do not find a violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) as to any individuals who did not change their work schedules or who merely adjusted their starting and ending times without any change in the number of hours worked each day. We do find that the Respondent violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it implemented its proposed memorandum of understanding that modified Article VIII of the CBA without the agreement of TAAP, resulting in bargaining-unit members working beyond the standard work day without additional compensation.

### **III. CONCLUSION**

For the reasons above, we find that the Toledo City School District Board of Education violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally implementing an extended school-day proposal. As a result, a cease-and-desist order with a Notice to Employees shall be issued to the Respondent requiring it to rescind the unilateral implementation of the longer school day, thereby returning the parties to the status quo ante; to cease and desist from unilaterally implementing changes to an existing collective bargaining agreement; to pay back pay to any bargaining-unit members who worked beyond the standard work day that the bargaining-unit members worked before the unilateral implementation of the extended school-day proposal; and to post the Notice to Employees for sixty days at all locations of the Toledo City School District Board of Education where bargaining-unit members represented by the Toledo Association of Administrative Personnel work.

Gillmor, Vice Chairman, and Verich, Board Member, concur.