

**STATE OF OHIO
STATE EMPLOYMENT RELATIONS BOARD**

In the Matter of

State Employment Relations Board,

Complainant,

v.

Toledo City School District Board of Education
and Assistant Superintendent Craig Cotner,

Respondents.

Case No. 2000-ULP-05-0275

ORDER
(OPINION ATTACHED)

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

On May 1, 2000, the Toledo Federation of Teachers, Local 250, AFT ("Charging Party") filed an unfair labor practice charge against the Toledo City School District Board of Education and Assistant Superintendent Craig Cotner (collectively "Respondents"). On September 21, 2000, the State Employment Relations Board ("Board" or "Complainant") dismissed the charge for lack of probable cause. On October 20, 2000, the Charging Party filed a motion for reconsideration. On November 21, 2000, the Board granted the motion for reconsideration and found probable cause to believe that the Respondents had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

A hearing was held on March 13, 2001. On May 8, 2001, the Proposed Order was issued. On June 6, 2001, the Charging Party filed exceptions to the Proposed Order. On June 8, 2001, the Complainant filed exceptions to the Proposed Order. On June 28, 2001, the Respondents filed a response to the Charging Party's and Complainant's exceptions.

After reviewing the record and all filings, the Board amends Conclusion of Law No. 3 by replacing "did not violate" with "violated" 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 and Assistant Superintendent Craig Cotner are 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 a longer school day, 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 a longer school day, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- (1) Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Toledo Federation of Teachers, Local 250, AFT work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo City School District Board of Education and Assistant Superintendent Craig Cotner shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- (2) 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.

It is so ordered.

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



SUE POHLER, CHAIRMAN

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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 a longer school day, 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 a longer school day, and from otherwise violating Ohio Revised Code Section 4117.11(A)(5).

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

- 1. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Toledo Federation of Teachers, Local 250, AFT work, the Notice to Employees furnished by the State Employment Relations Board stating that the Toledo City School District Board of Education and Assistant Superintendent Craig Cotner shall cease and desist from actions set forth in paragraph (A) and shall take the affirmative action set forth in paragraph (B); and
- 2. 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 and Assistant Superintendent Craig Cotner
Case No. 2000-ULP-05-0275**

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 and
Assistant Superintendent Craig Cotner,

Respondents.

Case No. 2000-ULP-05-0275

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 May 8, 2001, and the filing of joint exceptions by the Complainant and the Toledo Federation of Teachers, Local 250, AFT, AFL-CIO ("TFT") and a response to those exceptions by the Toledo City School District Board of Education ("School Board") and Assistant Superintendent Craig Cotner (collectively, the School Board and Mr. Cotner are referred to as "Respondents"). For the reasons below, we find that the Respondents violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when they unilaterally implemented a longer school day.

I. SUMMARY OF FACTS

The Toledo Federation of Teachers, Local 250, AFT, AFL-CIO is the exclusive representative for a bargaining unit that includes certain employees of the School Board. The School Board and the TFT were parties to a collective bargaining agreement ("CBA") effective from December 1, 1997 to November 30, 2000, containing a grievance procedure

that culminated in final and binding arbitration. On September 15, 2000, the TFT and the School Board agreed to extend the term of the CBA through March 31, 2001.

Article XXVII of the CBA, titled "SCHOOL CALENDAR, ARRIVAL, DISMISSAL TIME," provides in relevant part:

- N. If a longer school day is adopted upon agreement by the Federation and the Board, teacher schedules, pay and other working conditions shall be implemented after the agreement of the Federation and the Board. The Board and Federation will explore the implementation of a year-round school pilot. Teacher schedules, pay, and other working conditions shall be subject to agreement of the Federation and the Board. (Underlining in original).

In 1997, the Ohio General Assembly passed Senate Bill 55, which requires students who graduate from high school after September 15, 2001, to complete more units in core curriculum areas in order to graduate. During the 1999-2000 school year, the School Board identified approximately 700 students of a sophomore class of approximately 3,000 who were at risk of not graduating with their class because of the increased unit requirement. In January 2000, the School Board and the TFT began discussing alternatives to scheduling for the high schools for the 2000-2001 school year in order to provide students with increased opportunities to earn the required number of units. One alternative the parties discussed was extending the school day with "early bird" or "late bird" sessions.

Development of the high school schedule and courses to be taught during a given school year begins during the previous school year. Counselors meet with students beginning in December or January to plan each student's course of study for the next school year. Pursuant to the terms of the CBA, preference forms for teaching assignments are to be submitted to teachers by April 15, and teaching assignments for the next school year are to be posted by June 1.

Representatives from the School Board and the TFT met on January 14, 2000 and January 20, 2000. On January 21, 2000, Assistant Superintendent Cotner, an agent or representative of the School Board at all relevant times, prepared a draft memorandum of understanding (“MOU”) based upon the parties’ discussions up to that point, which focused on the alternative of extending the school day with “early bird” and “late bird” sessions. On January 26, 2001, Mr. Cotner sent the draft to the TFT. On February 3, 2000, the TFT sent Mr. Cotner a response and proposed revisions to the draft MOU. On February 4, 2000, the parties met again, and the School Board submitted a counterproposal. On February 11, 2000, the TFT submitted another counterproposal with a proposed addendum. On February 24, 2000, the School Board submitted a counterproposal to the TFT’s February 11, 2000 counterproposal and proposed addendum.

On February 28, 2000, Mr. Cotner spoke by telephone with TFT President Francine Lawrence to discuss outstanding issues regarding the proposed early bird and late bird sessions. Ms. Lawrence told Mr. Cotner that the TFT would not agree to any proposal without a “me too” provision.¹ Mr. Cotner explained that the School Board was offering flex time to administrative personnel who would need to come in early or work late. Ms. Lawrence maintained that a “me too” provision was necessary for the parties to reach agreement. On February 28, 2000, Ms. Lawrence faxed a memo to Mr. Cotner that read: “No ‘me too’? No deal.” On March 1, 2000, Mr. Cotner telephoned Ms. Lawrence, asking about the status of the proposed MOU. Ms. Lawrence again stated that the TFT would not agree to a proposal without a “me too” provision. On March 6, 2000, Mr. Cotner sent Ms. Lawrence revised drafts of the proposed MOU and addendum; he wrote that he would contact Ms. Lawrence to see if the parties could finalize the discussions.

¹A “me too” provision typically requires an employer to give the second bargaining-unit’s employees the same benefit or wage increase received by the first bargaining unit without any additional bargaining between the employer and the second unit’s exclusive representative.

Mr. Cotner and Ms. Lawrence spoke again on March 20, 2000. Mr. Cotner informed Ms. Lawrence that the School Board would not agree to a "me too" provision. Mr. Cotner also explained that the School Board was not offering additional compensation to either the administrative personnel unit or the nonteaching staff unit. Ms. Lawrence continued to maintain that the TFT required the "me too" provision. Mr. Cotner expressed his concern that although the parties had discussed the issues, it appeared that they could not come to a final agreement, and that the School Board was going to have to move ahead. On March 21, 2000, Mr. Cotner sent a letter to Ms. Lawrence, informing her that because of the time constraints involved in scheduling classes for the 2000-2001 school year and because the parties could not reach agreement on all terms, the School Board would be implementing the MOU and addendum in their most recent draft forms.

II. DISCUSSION

The Respondents are 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 the rights guaranteed in Chapter 4117. of the Revised Code[;]

* * *

(5) Refuse to bargain collectively with the representative of its 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 Respondents have committed an unfair labor practice. O.R.C. § 4117.12(B)(3). The issue in this case is whether the School Board engaged in bad-faith bargaining when it unilaterally implemented a longer school day.

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).

In *In re Franklin County Sheriff*, SERB 90-012 (7-18-90) at p. 3-80, SERB recommended that the parties adopt procedures especially designed to deal with midterm disputes since the statutory dispute procedure did not apply. The parties have negotiated such a procedure in this case. Under Article XXVII of the CBA, titled "SCHOOL CALENDAR, ARRIVAL, DISMISSAL TIME," a requirement was established that the parties must bargain to agreement issues involving longer school days, teacher schedules, pay, and other working conditions. The parties did not reach such an agreement in this case. Thus, the School Board's actions were an unlawful modification of the CBA.

Even if the CBA's language were not clear on the requirement for agreement, 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) 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 *In re Toledo City School Dist Bd of Ed*, SERB 2001-005 (10-1-2001) at slip op. p. 7, SERB 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 after bargaining the subject to ultimate impasse:

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 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 December 1, 1997 to November 30, 2000, and later extended through March 31, 2001. As a result, the parties were on notice concerning this requirement at the time they entered into the collective bargaining agreement. The School Board waited 2½ years after the legislative change to begin negotiating with the TFT, and the School Board implemented its proposal approximately six months before the CBA's original expiration date. These facts demonstrate that immediate action was not required due to exigent circumstances that were unforeseen at the time of negotiations or by legislative action. Thus, we find that the Respondents violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when the School Board implemented the MOU and addendum, resulting in a longer school day, without the agreement of the TFT.

III. CONCLUSION

For the reasons above, we find that the Toledo City School District Board of Education and Assistant Superintendent Craig Cotner violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by unilaterally implementing a longer school day. As a result, a cease-and-desist order with a Notice to Employees shall be issued to the Respondents requiring the School Board 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; 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 Federation of Teachers, Local 250, AFT, AFL-CIO work.

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