

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Twinsburg City School District Board of Education,

Respondent.

Case No. 2003-ULP-06-0300

**ORDER  
(OPINION ATTACHED)**

Before Vice Chairman Gillmor and Board Member Verich: December 1, 2005.

On June 2, 2003, the Twinsburg Support Staff Association, OEA/NEA (“Intervenor”) filed an unfair labor practice charge against the Twinsburg City School District Board of Education (“Respondent”), alleging that the Respondent violated Ohio Revised Code (“O.R.C.”) Sections 4117.11(A)(1) and (A)(5). On November 7, 2003, the State Employment Relations Board (“Board” or “Complainant”) found probable cause to believe that the Respondent violated O.R.C. Sections 4117.11(A)(1) and (A)(5). A hearing was held on January 14 and 15, 2004.

On June 18, 2004, the Administrative Law Judge issued a Proposed Order, recommending that SERB find that the Respondent violated O.R.C. Sections 4117.11(A)(1) and (A)(5) when it implemented its “last, best, and final” offer prior to reaching ultimate impasse. On July 8, 2004, the Respondent filed exceptions to the Proposed Order. On July 20, 2004, the Complainant and Intervenor each filed a response to the exceptions. On August 19, 2004, the Board directed the parties to appear before it for oral argument. The oral argument was held on January 26, 2005.

On October 20, 2005, the Respondent filed a motion to dismiss. On October 27, 2005, the Complainant filed a response in opposition to the Respondent’s motion. On October 28, 2005, the Intervenor filed a motion for an extension of time to respond to the motion to dismiss. On October 31, 2005, the Respondent filed a reply to the Complainant’s response. On November 3, 2005, the Intervenor filed its brief in opposition to the Respondent’s motion to dismiss. On November 11, 2005, the Intervenor filed its response to the Respondent’s reply.

After reviewing the record, the Proposed Order, the exceptions, the responses to exceptions, and all other filings in this case, the Board grants the Intervenor's motion for an extension of time to reply; denies the Respondent's motion to dismiss; adopts the Findings of Fact and Conclusions of Law in the Administrative Law Judge's Proposed Order, and finds, for the reasons set forth in the attached Opinion, incorporated by reference, that the Respondent violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) when it implemented its "last, best, and final" offer prior to reaching ultimate impasse.

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

A. Cease and desist from:

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and refusing to bargain collectively with the exclusive representative of its employees, by implementing its "last, best, and final" offer prior to reaching ultimate impasse and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

B. Take the following affirmative action:

1. Return the bargaining-unit employees represented by the Twinsburg Support Staff Association, OEA/NEA to the status quo as it existed before May 30, 2003, including reimbursing bargaining-unit employees for any losses incurred as a result of the unlawful unilateral implementation of changes to wages, hours, and terms and conditions of employment effective May 30, 2003;
2. Bargain with the Twinsburg Support Staff Association, OEA/NEA on all issues remaining on the table as of May 29, 2003;
3. Post the Notice to Employees furnished by the State Employment Relations Board for sixty days in all of the usual and normal posting locations where bargaining-unit employees represented by the Twinsburg Support Staff Association, OEA/NEA work; and
4. 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.

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December 1, 2005  
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It is so ordered.

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

/s/ Craig R. Mayton  
CRAIG R. MAYTON, EXECUTIVE DIRECTOR

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 a copy of this document was served upon each party's representative by certified mail, return receipt requested, this 2<sup>nd</sup> day of December, 2005.

/s/ Donna J. Glanton  
DONNA J. GLANTON, 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:**

Interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in Ohio Revised Code Chapter 4117, and refusing to bargain collectively with the exclusive representative of its employees, by implementing its "last, best, and final" offer prior to reaching ultimate impasse and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5).

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

1. Return the bargaining-unit employees represented by the Twinsburg Support Staff Association, OEA/NEA to the status quo as it existed before May 30, 2003, including reimbursing bargaining-unit employees for any losses incurred as a result of the unlawful unilateral implementation of changes to wages, hours, and terms and conditions of employment effective May 30, 2003;
2. Bargain with the Twinsburg Support Staff Association, OEA/NEA on all issues remaining on the table as of May 29, 2003;
3. Post the Notice to Employees furnished by the State Employment Relations Board for sixty days in all of the usual and normal posting locations where bargaining-unit employees represented by the Twinsburg Support Staff Association, OEA/NEA work; and
4. Notify the State Employment Relations Board in writing within twenty calendar days from the date that this Order becomes final of the steps that have been taken to comply therewith.

***SERB v. Warren County Sheriff , Case No. 2004-ULP-06-0343***

\_\_\_\_\_  
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,

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v.

Twinsburg City School District Board of Education,

Respondent.

Case No. 2003-ULP-06-0300

**OPINION**

GILLMOR, Vice Chairman:

This matter comes before the State Employment Relations Board (“Board” or “Complainant”) upon the issuance of a Proposed Order on June 18, 2004, and the filing of exceptions to the Proposed Order by the Respondent, Twinsburg City School District Board of Education (“District”), and a response to the exceptions by the Intervenor, Twinsburg Support Staff Association, OEA/NEA (“Union”), and the Counsel for Complainant. For the reasons that follow, the Board finds that the District violated Ohio Revised Code (“O.R.C.”) §§ 4117.11(A)(1) and (A)(5) when it implemented its “last, best, and final” offer prior to reaching ultimate impasse.

**BACKGROUND**

The Union is the Board-certified exclusive representative for a bargaining unit of the District’s support staff personnel. The unit consists of approximately 200 employees. The District and the Union were parties to a collective bargaining agreement (“CBA”) effective January 1, 2000 to December 31, 2002.

In September 2002, the District's Superintendent, James Jones, discussed with the Union President, David Zeitlow, delaying the start of bargaining, both because of an ongoing tax levy campaign and to allow the District additional time to prepare its proposal. The tax levy passed.

On November 12, 2002, the Union filed a Notice to Negotiate, pursuant to Ohio Administrative Code Rule 4117-9-02, seeking negotiation on a successor CBA. The Union agreed to delay the start of negotiations until November 25, 2002. The parties further agreed that the CBA would be extended until January 31, 2003, and that the District would postpone implementation of the health care rate increase during the contract extension period.

The CBA provides as follows at Article 5, Section C: "All Association and Board proposals for discussion shall be presented in writing at the first meeting. Following the initial submission of issues, only counter proposals may be submitted." The initial District proposal did not include a proposal on health insurance, Article 30, Fringe Benefits. The Union's initial proposal contained proposed changes to Article 30.

The Union's representative, Labor Relations Consultant Karen Gee, informed the District that its insurance proposal must be submitted at the first session and gave them an opportunity to do so. The District informed Ms. Gee that its insurance proposal was not ready.

The initial session on November 25, 2002, lasted less than one hour and involved only the physical exchange of proposals. The previous CBA contained 37 substantive articles and an execution clause (Article 38). Neither party sought or proposed changes to 21 of the 37 articles.

The parties held their next session on December 9, 2002, and it lasted approximately 2½ hours. The District made a proposal, and the Union made a counter proposal. The District's proposal contained language modifying Article 30, Fringe Benefits. The Union informed the District that since the District's initial proposal had not contained proposed modifications to Article 30, the Union would not accept such a proposal now. The District told the Union that if the Union did not accept this proposal after the first session, then premiums would increase to the extent that no one would be able to afford coverage. The District had to contract for the new health insurance program it was proposing by June 1, 2003, or it would have to maintain the current health insurance program.

The District made a counter proposal on the issue of multiple handicapped assistants. The District indicated that it was not interested in the Union's proposals on several issues. The parties signed off on a tentative agreement involving bus washing that modified the CBA to comport with current practice.

The next session was tentatively scheduled for December 16, 2002, but it did not occur until January 7, 2003. The session lasted approximately 1 hour and 45 minutes. The Union's counter proposal and the initial proposals were all that were on the table. The District spent significant time discussing its position on insurance.

The next session was held on January 15, 2003. Proposals and counter proposals were exchanged, and the District had Transportation Superintendent Mariola attend to help respond to transportation proposals. Before the session, Mr. Mariola had not seen either the District's or the Union's proposals on transportation issues.

The next session was scheduled for January 21, 2003, but was rescheduled due to illness to January 27, 2003. The parties negotiated for approximately two hours.

The parties met on January 30, 2003, for approximately one-half hour. The District gave its proposal that included a modest wage increase and a modest increase in field-trip wage rates to the Union before the Union could give its proposal. Upon receipt of the District's proposal, Ms. Gee denounced the proposal and stated, "We're out of here." When asked, "Are you saying we're at impasse?" her response was, "We need to get a mediator in here."

The parties met with the assistance of a mediator on February 25, 2003, March 13, 2003, March 26, 2003, and April 7, 2003. The District presented its "last, best, and final" offer on April 7, 2003. On April 7, 2003, the mediator suggested to Ms. Gee that a financial research consultant from the Ohio Education Association review the finances of the District and make a presentation to the parties. A financial review session was set for May 27, 2003. The consultant reviewed the District's finances and made a presentation on May 27, 2003, to Union President Zietlow, Ms. Gee, the mediator, Assistant Superintendent Marlowe, and District Treasurer Aho. The consultant concluded that the Twinsburg District was financially sound and that it was one of the 20% of school districts in the state that do not receive parity aid.

The District established and continued to contribute to a non-mandatory "rainy day" or reserve fund. Only one-third of the districts in the state maintain such a fund, and most are spending it down or at least not contributing to the fund. The District's reserve-fund balance in 2003 was \$629,727.00.

On May 29, 2003, after being notified by the District's legal counsel that a meeting had been scheduled for unilateral implementation, the Union proposed at a sidebar with the mediator and the District's counsel that if the District came down on the employee co-pays the Union would waive Section 5d of the CBA and allow the District to put its proposal for the new health insurance plan on the table. This Union offer was made despite the District's failure to include a health insurance provision in its initial proposal. The Union also

indicated to the District's counsel that it had movement available on all issues on the table. The District's counsel met with his team, refused the Union's offer, and referred the Union back to the District's last, best, and final offer. At a joint session the same day, the Union again indicated that it had movement on all issues on the table. The District again referred back to its last, best, and final offer.

On May 30, 2003, the District unilaterally implemented its May 29, 2003 proposal. Implementation of the proposal was effective June 1, 2003. The new health insurance plan was effective July 1, 2003.

On July 15, 2003 and August 26, 2003, the Union rejected the unilaterally implemented contract and requested dates to continue bargaining. During negotiations, the parties executed tentative agreements on the following articles: Article 18, Bus Washing; Article 20, Paychecks; and Article 25, Facilities and Supplies.

### **DISCUSSION**

O.R.C. §§ 4117.11(A)(1) and (A)(5) provide 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 issue is whether the Employer engaged in bad-faith bargaining in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) by implementing its "last, best, and final" offer before reaching ultimate impasse.<sup>1</sup> O.R.C. § 4117.01(G) provides:

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<sup>1</sup> O.R.C. § 4117.11(A)(1) represents an alleged derivative violation of O.R.C. § 4117.11(A)(3) in this instance. *In re Amalgamated Transit Union, Local 268*, SERB 93-013 (6-25-93) at n.14.

“To bargain collectively” means to perform the mutual obligation of the public employer, by its representatives and the representatives of its employees to negotiate in good faith at reasonable times and places with respect to wages, hours, terms and other conditions of employment and the continuation, modification, or deletion of an existing provision of a collective bargaining agreement, with the intention of reaching an agreement, or to resolve questions arising under the agreement. This includes executing a written contract incorporating the terms of any agreement reached. The obligation to bargain collectively does not mean that either party is compelled to agree to a proposal nor does it require the making of a concession.

Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU*, SERB 96-004 (4-6-96). 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).

An exhaustion of all efforts at good-faith bargaining must have occurred prior to the Employer declaring ultimate impasse and unilaterally deciding to implement its “last, best, and final” offer. In *In re Vandalia-Butler City School Dist Bd of Ed*, SERB 90-003 (2-9-90) at 3-16, SERB discusses the concept of ultimate impasse. Ultimate impasse is a legal concept adopted from the private sector. The test developed by the NLRB as to whether ultimate impasse has been reached is reflected and approved in the case of *American Federation of Television and Radio Artists (Taft Broadcasting Co.)*, 395 F. 2d 622, 628 (D.C. Cir. 1968) (“*Taft Broadcasting*”), 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

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considered in deciding whether an impasse in bargaining exists. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967) *aff'd sub nom. American Federation of Television and Radio Artists*, 395 F.2d 622 (D.C. Cir. 1968) ("*Taft Broadcasting*").

In *In re SERB v. Youngstown City School Dist. Bd. of Ed*, SERB 95-010 (6-30-95), we 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. The Board described "ultimate impasse" as follows:

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.

*In re Vandalia-Butler City School Dist Bd of Ed*, SERB 90-003 (2-9-90) at p. 3-10 (citations omitted), *aff'd sub nom. Vandalia-Butler City School Dist Bd of Ed v. SERB*, 1990 SERB 4-90 (CP, Montgomery, 10-1-90), *aff'd* 1991 SERB 4-81 (2d Dist Ct App, Montgomery, 8-15-91).

Under the "totality of the circumstances" test, the record does not support a finding that the parties had reached the point in their negotiations where they had exhausted good-faith negotiations. Instead, at all relevant times surrounding the District's unilateral implementation of its "last, best, and final" offer, the Union indicated it was ready, willing, and able to move on any remaining issues on the table. The Union's proposed movement included allowing the District to put its new insurance proposal on the table in return for a

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break on employee co-pays. This proposal was one that the Union believed was barred by Section 5d of the CBA given the District's failure to include an insurance provision in its initial proposal. The District has not adequately explained why, given the Union's ability to move on all issues, the District believed the parties were at ultimate impasse, and the answer is not obvious from the record, either. Thus, the record reveals that the parties still had a realistic possibility that a continuation of discussion at that time would have been fruitful.

“An environment for good faith bargaining can be compromised in a variety of ways.” *In re City of Twinsburg*, SERB 87-011 at 3-39 (6-4-87). In *In re Springfield Local School Dist Bd of Ed*, SERB 97-007 at 3-46 (5-1-97), we adopted the analysis of “surface bargaining” contained in *Virginia Holding Corp., dba Hotel Roanoke*, 293 NLRB 182, 132 L.R.R.M. 119 (1989); *Eastern Main Medical Center v. NLRB*, 638 F. 2d 1, 108 L.R.R.M. 2234, 2251 (1<sup>st</sup> Cir. 1981); *NLRB v. General Electric Co.*, 418 F. 2d 736, 72 L.R.R.M. 2530 (2d Cir. 1969), and *NLRB v. Wright Motors*, 603 F. 2d 604, 102 L.R.R.M. 2021 (7<sup>th</sup> Cir. 1979).

In the private sector, when a party is found to have used negotiation techniques to frustrate or avoid mutual agreement, that party is said to have engaged in “surface bargaining.” A party is alleged to have engaged in surface bargaining based upon the totality of its conduct at or away from the bargaining table since intent to frustrate an agreement is rarely articulated. *Virginia Holding Corp., dba Hotel Roanoke*, supra. “More than in most areas of labor law, distinguishing hard bargaining from surface bargaining calls for sifting a complex array of facts, which taken in isolation may often be ambiguous.” *Eastern Main Medical Center v. NLRB*, supra. “[I]f the Board is not to be blinded by empty talk and by the mere surface motions of collective bargaining, it must take some cognizance of the reasonableness of the positions taken by an employer in the course of bargaining negotiations.” *NLRB v. Reed & Prince Mfg. Co.*, 205 F.2d 131, 134, 32 L.R.R.M. 2225 (1st Cir 1953), cert. denied, 346 U.S. 887, 74 S.Ct. 139, 33 L.R.R.M. 2133

(1953). Although an employer may be willing to meet at length and confer with the Union, the employer has refused to bargain in good faith if it merely goes through the “motions” of bargaining, such as where an employer offers a proposal that cannot be accepted, along with an inflexible attitude on major issues and no proposal of reasonable alternatives.

Certain facts lead to an inescapable conclusion of surface bargaining on the part of the District. The District wished to delay the start of negotiations, but even after the delay did not have a proposal on insurance when insurance and wages were the two biggest areas of contention between the parties. The District was unwilling to agree to a health insurance committee with the Union prior to negotiations to make for more informed negotiation on that issue. At the initial session, the Union presented almost thirty proposals to the District. The District failed to participate in any meaningful discussion with regard to these proposals by responding “not interested” on many of them. The District refused to engage in any real give and take during the sessions. When asked by the Union about the rationale behind some of the District’s own proposals, the answers were vague responses such as “we prefer it that way,” which were not designed to stimulate further communication on the issues.

The only tentative agreements executed were on relatively minor issues such as bus washing, paychecks, and facilities and supplies. These tentative agreements, far from breaking new ground, simply memorialized for purposes of the CBA what was actually taking place. The District insisted on having a session devoted primarily to obtaining information and input on transportation issues from its Transportation Superintendent, yet at that meeting, the Transportation Superintendent had not even reviewed any of either sides’ transportation proposals. The District’s witnesses were unable to provide clarification as to how the parties were at ultimate impasse. The Superintendent described the negotiations as “productive, meaningful, and beneficial” (T. 661-662), yet the result was a unilaterally implemented “last, best, and final” offer.

The evidence presented in no way supports a finding that no realistic possibility existed that continuing the discussion at that time would have been fruitful. Therefore, the parties were not at ultimate impasse, and as a result the District was not warranted in implementing its “last, best, and final” offer in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5).

### **CONCLUSION**

For the reasons set forth above, the Board finds that the Twinsburg City School District Board of Education violated O.R.C. §§ 4117.11(A)(1) and (A)(5) when it implemented its “last, best, and final” offer prior to reaching ultimate impasse. An order shall be issued to the District requiring it to cease and desist from interfering with, restraining, or coercing employees in the exercise of their rights guaranteed in O.R.C. Chapter 4117, and refusing to bargain collectively with the exclusive representative of its employees, by implementing its last, best offer prior to reaching ultimate impasse and from otherwise violating O.R.C. §§ 4117.11(A)(1) and (A)(5). The order shall also require the District to take the following actions: (1) return the bargaining-unit employees represented by the Union to the status quo as it existed before May 30, 2003, including reimbursing bargaining-unit employees for any losses incurred as a result of the unlawful unilateral implementation of changes to wages, hours, and terms and conditions of employment effective May 30, 2003; (2) bargain with the Union on all issues remaining on the table as of May 29, 2003; (3) post the Notice to Employees furnished by the Board for sixty days in all of the usual and normal posting locations where bargaining unit employees represented by the Union work; and (4) notify the Board in writing within twenty calendar days from the date the order becomes final of the steps that have been taken to comply therewith.

Verich, Board Member, concurs.