SERB OPINION 2006-001

STATE OF OHIO
BEFORE THE STATE EMPLOYMENT RELATIONS BOARD

In the Matter of

State Employment Relations Board,

Complainant,

v.

Kent State University,

Respondent.

Case No. 2004-ULP-07-0433

ORDER
(OPINION ATTACHED)

Before Vice Chairman Gillmor and Board Member Verich: December 15, 2005.

On July 30, 2004, the American Association of University Professors, Kent State University Chapter ("the AAUP") filed an unfair labor practice charge against Kent State University ("the University"), alleging that the University violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5). On November 5, 2004, the State Employment Relations Board ("the Board" or "Complainant") found probable cause to believe that the University violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) by refusing to bargain in good faith with respect to the distribution of licensing and royalty income. A hearing was held on June 6, 2005, wherein testimonial and documentary evidence was presented. Subsequently, all parties filed post-hearing briefs.

On September 20, 2005, the Administrative Law Judge issued a Proposed Order, recommending that the Board find that the University did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5). On October 11, 2005, the AAUP filed exceptions to the Proposed Order. On October 20, 2005, the University filed cross-exceptions to the Proposed Order and a response to the AAUP's exceptions. On October 31, 2005, the AAUP filed a response to the cross-exceptions.

After reviewing the record, Proposed Order, exceptions, cross-exceptions, responses to the exceptions and cross-exceptions, and all other filings in this case, the Board 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 did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it refused to bargain over the distribution of licensing and royalty income. As a result, the Board dismisses the complaint and dismisses with prejudice the unfair labor practice charge.

It is so ordered.

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

/s/ 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 21st day of February, 2006.

/s/ DONNA J. GLANTON, ADMINISTRATIVE ASSISTANT

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OPINION

GILLMOR, Vice Chairman:

On July 30, 2004, the American Association of University Professors, Kent State University Chapter ("the AAUP") filed an unfair labor practice charge against Kent State University ("the University"). On November 5, 2004, the State Employment Relations Board ("SERB" or "Complainant") found probable cause to believe that the University violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) by refusing to bargain in good faith with respect to the distribution of licensing and royalty income. For the reasons below, we find that the University did not commit an unfair labor practice when it refused the AAUP's demand to bargain over patent income distribution in negotiations for the parties' successor collective bargaining agreement.

I. BACKGROUND

The University is a state-funded, public institution of higher learning with its main campus in Kent, Ohio. The AAUP is the deemed-certified exclusive representative for a bargaining unit of the University's full-time tenure track faculty. The University and the AAUP were parties to a collective bargaining agreement covering the period of

September 16, 2001 through September 16, 2004 ("CBA"). At all relevant times, the University and the AAUP were negotiating a successor agreement to the CBA. Article XVIII of the CBA, "Intellectual Property Rights," provides in Section 1, "Scope," as follows:

> This Article sets forth the rights and obligations of the parties hereto as to intellectual property rights of the University and the Faculty, such rights to include, but not be limited to, rights in intellectual property that can be copyrighted. The conditions of this Article exist within the context of, and are not intended to contravene, applicable federal or state statute or regulations, including but not limited to Section 201(b) of the Copyright Revision Act of 1976 and Ohio Revised Code Section 3345.14, and extant University policy and established procedures. Works subject to trademark or patent registration as defined in University Policy 5-10, as in effect January 1, 1999, are explicitly excluded from the provisions of this Article.

The University's three key missions are research, education, and public service. Its faculty, staff, and students engage in basic and applied research to further their knowledge in their respective academic disciplines. The faculty and staff are paid a regular salary for the performance of their regular duties and responsibilities, which is not conditioned on, or measured by, the extent to which any research conducted by the faculty or staff member culminates in an invention that the University patents and licenses to third parties.

A full-time, tenure-track, faculty member's regular duties and responsibilities include actively pursuing research and engaging in scholarly pursuits and/or creative activity. Under O.R.C. § 3345.14, the University possesses exclusive ownership rights to, and control over, any invention by a faculty member, any patent that may result from such invention, and any income derived from such patent, including all license income, if the invention arises in the course of the faculty member's work for the University or is the result of the faculty member's use of University facilities.

The Board of Trustees for the University has adopted policies regarding patents, including University Policy Nos. 3342-5-10 and 3342-5-11. The University has the responsibility – economic and otherwise – to protect such inventions by applying for patents and otherwise safeguarding the inventions, including patent prosecution. The University's Office of Technology Transfer and Economic Development ("OTT") oversees the patenting of faculty, staff, and student inventions. OTT is responsible for coordinating efforts to identify and protect the University's intellectual property rights.

The University employs approximately 1,000 faculty members. Thirty-four different faculty members have disclosed an aggregate of 183 inventions since 1984. The University has obtained a total of 62 United States patents on the inventions of a total of 16 different faculty members. The University has formulated an "Invention Disclosure Form" to be completed by faculty members and submitted to OTT upon the creation of a claimed invention. After OTT receives an invention disclosure form, the University Patent and Copyright Board decides whether to apply for a patent for the invention.

If the University Patent and Copyright Board decides to seek a patent, the University obtains outside patent counsel at University expense. If the University obtains a patent, it has the exclusive right to license the patent through licensing agreements with third parties. OTT markets the patent to interested companies. No guarantee exists that any patent obtained by the University will be licensed to any third party. The development of a licensing agreement is a function of several factors, including the nature of the invention covered by the patent, the market demand for the use of the patented invention, the ability of the licensee to compensate the University for use of the University's intellectual property, and the perceived commercial value of the intended use of the patented invention.

Through licensing agreements, third parties are granted the right to use the University's patented inventions in exchange for certain consideration. Typically, the consideration consists of cash payments in the form of upfront fees, yearly minimum fees, and running royalties. Upfront fees are fees paid when a license agreement is executed. Running royalties are received if and when a company produces a commercial product that is introduced into the marketplace. The extent and nature of these payments are determined and controlled solely by the terms of the license agreements that are negotiated by University representatives and the third party.

The time from disclosure of an invention to the receipt of a patent is approximately three years. It then takes three or more years from the time a patent is obtained to the time the University receives any income from the licensing of the patent. The University's portfolio currently includes 21 licensing agreements. From 1988 to 2004, the University received approximately $7,466,000 in patent income from its licensing agreements.

The AAUP does not have any role in negotiating a licensing agreement on behalf of the University. On occasion, the University will consult with bargaining-unit members regarding potential licensees and technical aspects of the patents to be licensed. Neither the AAUP nor any faculty member that is listed as an "inventor" on an Invention Disclosure Form or a patent obtained by the University ever has been a signatory to any license agreement covering any of the University's patents.

In 1988, the University developed and implemented its Patent Income Guidelines ("the Guidelines"). The purposes of the Guidelines are to promote continuing research, to share income with inventors, and to recover a portion of research and patenting expenses. According to the Guidelines, a percentage of the patent income is distributed to faculty members who are "inventors": 40 percent is distributed to the inventor, 15 percent to the inventor's University research unit, 15 percent to the University general fund, and 30 percent to the Research and Graduate Studies Department ("RAGS").

Commercialization of research is increasingly an important part of what potential faculty members seek in their employment. The University structured the Guidelines to be generous to inventors. A share of 40 percent of patent income is within the upper range. Among research universities, the distribution range for patent income to inventors is between 25 and 50 percent.

The income received from licensing the University's patents supports the University's mission to promote and maintain its research programs. RAGS promotes research and administers the University's graduate studies programs. OTT is an office within RAGS. Currently, 100 percent of OTT's budget is funded through patent income. Patent income also supports research by providing seed money for new projects, providing funds for equipment and infrastructure, providing funds to hire adjunct faculty to fill teaching duties so that full-time faculty members can devote more time to research, and providing funds to send faculty and students to research seminars and conferences. The University also receives federally funded grants to partially support its research programs.

Distributions of license income are made to "inventors" pursuant to the Guidelines only if and when such income is obtained by the University from the third party pursuant to a license agreement. Distributions of license income are necessarily dependent upon several conditions that are beyond the University's and the inventor's control, such as the licensee's financial well-being and the commercial viability of the third party's product in which the invention is used. When distributions of license income are made by the University to an inventor, the University provides the inventor with an I.R.S. Form 1099-MISC for any license income paid out to the faculty member/inventor for that tax year.

When the Guidelines were implemented in 1988, the University and the AAUP were parties to a collective bargaining agreement covering the period of September 16, 1987 through September 16, 1990. At that time, the AAUP did not request that the University bargain the decision to create or implement the Guidelines. The AAUP also did not file any grievance protesting the creation or implementation of the Guidelines.

In 2003, the University notified the AAUP of its intent to revise and codify its procedures relating to the distribution of license income. The notification was, in part, a response to a grievance filed on behalf of a University professor, who was also a bargaining-unit member, concerning the application of the Guidelines to a license relating to an invention he created. The professor claimed that he had not received any income owed to him under the Guidelines based on a licensing agreement; the University disputed the claim. Ultimately, the parties resolved the grievance through a settlement agreement. The settlement agreement provided in part: "The University further agrees to codify its procedures relating to the distribution of licensing fees and royalty income. * * * The Union will be given the opportunity to review and comment on a draft policy prior to its submission to the governance process."

In order to codify a University policy as a part of the University's policy register, the policy must be approved by the Board of Trustees. Any University policy that directly affects the educational mission of the University is reviewed and considered by the appropriate governing bodies, including the Faculty Senate. The University's proposed revisions to the Guidelines are embodied in a Proposed University Policy.

On October 2, 2003, the AAUP sent a letter to the University demanding to bargain over the Proposed University Policy. On November 3, 2003, the AAUP representatives and University officials met informally concerning the AAUP's demand to bargain. By a letter dated November 19, 2003, the University rejected the AAUP's demand to bargain the terms of the Proposed University Policy. On December 9, 2003, the AAUP filed a grievance under the collective bargaining agreement based upon the University's decision not to bargain over the Proposed University Policy.

On May 6, 2004, the AAUP filed a Notice to Negotiate with SERB and served the University, seeking to negotiate a successor collective bargaining agreement. During negotiations for the successor collective bargaining agreement on May 28, 2004, and

July 23, 2004, the AAUP made a formal request to the University to bargain over issues relating to the distribution of licensing income the University receives from the licensing agreements covering its patents, including bargaining over the terms of the Guidelines. The University's chief negotiator advised the AAUP that the University would not bargain with the AAUP on those issues. On July 30, 2004, the AAUP filed the ULP charge in this matter relating to the University's refusal to bargain.

II. DISCUSSION

O.R.C. § 4117.11 provides 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[.]

Good-faith bargaining is determined by the totality of the circumstances. 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. Hard bargaining, however, is not bad-faith bargaining. *In re Springfield Local School Dist Bd of Ed*, SERB 97-007 (5-1-97) ("*Springfield*"), at 3-46.

A. Neither the Bayh-Dole Act nor O.R.C. § 3345.14 Preempt the Application of O.R.C. Chapter 4117 to the Facts of this Case

The federal Bayh-Dole Act, in 35 U.S.C. § 202(c)(7)(B), requires that any funding agreement providing federal funds for university research contain appropriate provisions to effectuate "a requirement that the contractor share royalties with the inventor." 35 U.S.C. § 202(c)(7)(C) requires a university to utilize the balance of any royalties or income earned from the inventions for the support of scientific research or education.

O.R.C. § 3345.14 provides in relevant part as follows:

(A) As used in this section, "state college or university" means any state university or college defined in division (A)(1) of section 3345.12 of the Revised Code, and any other institution of higher education defined in division (A)(2) of that section.

(B) All rights to and interests in discoveries, inventions, or patents which result from research or investigation conducted in any experiment station, bureau, laboratory, research facility, or other facility of any state college or university, or by employees of any state college or university acting within the scope of their employment or with funding, equipment, or infrastructure provided by or through any state college or university, shall be the sole property of that college or university. No person, firm, association, corporation, or governmental agency which uses the facilities of such college or university in connection with such research or investigation and no faculty member, employee, or student of such college or university participating in or making such discoveries or inventions, shall have any rights to or interests in such discoveries or inventions, including income therefrom, except as may, by determination of the board of trustees of such college or university, be assigned, licensed, transferred, or paid to such persons or entities in accordance with division (C) of this section or in accordance with rules adopted under division (D) of this section.

(C) As may be determined from time to time by the board of trustees of any state college or university, the college or university may retain, assign, license, transfer, sell, or otherwise dispose of, in whole or in part and upon such terms as the board of trustees may direct, any and all rights to, interests in, or income from any such discoveries, inventions, or patents which the college or university owns or may acquire. Such dispositions may be to any individual, firm, association, corporation, or governmental agency, or to any faculty member, employee, or student of the college or university as the board of trustees may direct. Any and all income or proceeds derived or retained from such dispositions shall be applied to the general or special use of the college or university as determined by the board of trustees of such college or university.

O.R.C. § 4117.10 provides in relevant part:

Except for sections 306.08, 306.12, 306.35, and 4981.22 of the Revised Code and arrangements entered into thereunder, and section 4981.21 of the Revised Code as necessary to comply with section 13(c) of the "Urban Mass Transportation Act of 1964," 87 Stat.

> 295, 49 U.S.C.A. 1609(c), as amended, and arrangements entered into thereunder, this chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly.

The University argues that a requirement that it collectively bargain an agreement with the AAUP on the distribution of patent income to bargaining-unit member inventors would contravene the Bayh-Dole Act and O.R.C. § 3345.14, which the University argues are controlling. A requirement to bargain collectively is not inconsistent or in conflict with either the Bayh-Dole Act or O.R.C. § 3345.14. In addition, O.R.C. Chapter 4117, pursuant to O.R.C. § 4117.10, would prevail over O.R.C. § 3345.14 if the provisions were in conflict.

The Bayh-Dole Act, in 35 U.S.C. § 202(c)(7)(B), requires universities receiving federal funding for research projects that result in patented inventions to share patent royalties with inventors. The University has cited no provision of the Bayh-Dole Act that places restrictions or a stipulation on the method by which such sharing is to be accomplished. A collectively bargained provision describing how such income will be shared with faculty member inventors presents no conflict with the Bayh-Dole Act. The application of O.R.C. Chapter 4117 is not preempted by the Bayh-Dole Act.

The University next argues that O.R.C. § 3345.14 gives the University unfettered discretion over the disposition of its patent rights, and that an obligation to negotiate with the AAUP over the distribution of patent income would conflict with this unfettered discretion. O.R.C. § 3345.14 specifies that no faculty member of a college or university "participating in or making such discoveries or inventions, shall have any rights to or interests in such discoveries or inventions, including income therefrom, except as may, by determination of the board of trustees of such college or university, be assigned, licensed, transferred, or paid to such persons or entities" in accordance with O.R.C. § 3345.14(C).

O.R.C. § 3345.14 contemplates that a university board of trustees may enter into various contractual relationships, each having as their subject matter the university-owned inventions and patents. The licensing agreements the University enters into with third parties are examples of such contracts. The proviso in O.R.C. § 3345.14 that patent rights may be licensed "upon such terms as the board of trustees *may* direct" (emphasis added) does not preclude contract negotiations from occurring among the University and potential third-party licensees. Indeed, the parties stipulate that University representatives negotiate the terms of license agreements with third parties. Similarly, under O.R.C. Chapter 4117, a university board of trustees acts to accept or reject a proposed collective bargaining agreement after its designated representative has completed the collective bargaining negotiations process. O.R.C. §§ 4117.10(B) and (C).

The University asserts that it has absolute discretion over its inventions, patents, and license incomes under the Bayh-Dole Act and O.R.C. § 3345.14. In its post-hearing brief, it pointed out that this issue is a case of first impression in Ohio and cited a recent Kansas case dealing with the same issue. In that case, *Pittsburg State Univ./Kansas Nat'l Educ. Ass'n v. Kansas Bd of Regents/Pittsburg State Univ.*, 101 P.3d 740 (Kan. App. 2004), the employee organization took the position that intellectual property rights themselves, not royalty income from those rights, were subject to mandatory collective bargaining. The appellate court held that the Copyright Act of 1976, 17 U.S.C. § 201 vested ownership and control of faculty-created intellectual property in the university as employer. The court further held that requiring collective bargaining over ownership and control of intellectual property conflicted with and was pre-empted by federal law. The court also noted that the applicable Kansas statutory provision [K.S.A. 75-4330(a)] expressly provides that "mandatorily negotiable conditions of employment are further limited if the subject matter of the conditions are preempted by federal or state law."

On appeal, the Kansas Supreme Court reversed in part the appellate court's decision. In *Pittsburg State University v. Kansas Bd of Regents*, 122 P.3d 336, 178 L.R.R.M. 2521 (2005), the court concluded that "neither state nor federal law preempts the subject of ownership of intellectual property from being included within the scope of a memorandum of understanding. Therefore, the subject of the ownership of intellectual property is not 'preempted' within the meaning of K.S.A. 75-430(A)(1)," the applicable provision of Kansas' Public Employer-Employee Relations Act. The court then remanded the case to determine whether ownership of intellectual property is a condition of employment.

In the case before us, the AAUP does not seek to establish ownership rights. Instead, it seeks to negotiate only over the distribution of patent income, and the Bayh-Dole Act expressly requires the University to share such income with inventors. O.R.C. § 4117.10 provides that except for certain statutory provisions not relevant to this case, "this chapter prevails over any and all other conflicting laws, resolutions, provisions, present or future, except as otherwise specified in this chapter or as otherwise specified by the general assembly." Even if we interpret O.R.C. § 3345.14 as giving the University sole discretion both to decide whether patent income will be distributed (decision bargaining) and to develop the terms on which patent income is distributed (effects bargaining, which is what the AAUP seeks in this case), O.R.C. Chapter 4117 prevails over O.R.C. § 3345.14. Therefore, the analysis must next turn to an examination of whether, under O.R.C. Chapter 4117, the University is required to bargain in good faith with respect to the distribution of patent income.

B. <u>The AAUP Did Not Waive Its Right to Bargain over the Issue during Negotiations for a Successor Collective Bargaining Agreement</u>

The University cites several provisions in the now-expired CBA as evidence that the AAUP waived its right to bargain over patent income distribution. With respect to midterm bargaining on this issue, the CBA reflects the parties' agreement that no midterm bargaining was required on the Proposed University Policy. In Article 18, the University and the AAUP expressly agreed to exclude works subject to patent registration from the CBA. Article 16, § 3 provides, in part, "that any discontinuance or modification of a practice, policy, pronouncement or benefit that affects Faculty and which is not set forth in this Agreement, will be developed and implemented only with due *consultation and advice* of appropriate Faculty bodies." (Emphasis added.) Article 3 provides that "it is understood and agreed that, except where expressly stated in this Agreement, nothing contained herein shall in any way limit the [University's] right to adopt new or modify or terminate existing policies, rules, regulations, and procedures in furtherance of its statutorily mandated authorities and responsibilities." Finally, Article 21, § 4 provides: "The parties by this Agreement have set forth their entire understanding on all matters which are or may properly be subject to collective bargaining." These provisions demonstrate the parties' agreement that no bargaining was required on University policies related to patent income during the term of the CBA.

The settlement agreement that resolved the professor's grievance was signed in January 2002, was also within the term of the CBA. The settlement agreement provided in paragraph 1.C. as follows:

> The University further agrees to codify its procedures relating to the distribution of licensing fees and royalty income. Such policy (or policies) will be subject to review by the appropriate academic and administrative bodies, including the Patent and Copyright Board and Faculty Senate, and will be taken to the Board of Trustees for approval and incorporated in the University Policy Register. The Union will be given the opportunity to *review and comment* on a draft policy prior to its submission to the governance process. (Emphasis added.)

From the record, it does not appear that the process contemplated by paragraph 1.C. was completed. In 2003, the University provided a proposed new policy on "Distribution of License Income from Inventions" to the AAUP Chapter President and to the Faculty Senate. In response, the AAUP formally demanded to bargain the terms and impact of the proposed policy. The University rejected the AAUP's demand. The AAUP filed a ULP charge, which SERB dismissed as premature because the Proposed University Policy was being considered but had not been implemented.

The basis for this ULP charge and complaint, however, involves negotiations for the successor collective bargaining agreement. On May 28 and July 23, 2004, during negotiations for the successor collective bargaining agreement, the AAUP made a formal request to the University to bargain over issues relating to the distribution of license income the University receives from the licensing agreements covering its patents, including bargaining over the terms of the Guidelines. The University's chief negotiator advised the AAUP that the University would not bargain with the AAUP on those issues. The AAUP then filed the ULP charge in this matter.

The University asserts that the AAUP either "slept on its rights" or waived its right to request bargaining over patent income distribution in the context of negotiations for the successor collective bargaining agreement. The University cites the grievance settlement agreement, the expired CBA, and the length of time the unilaterally promulgated policies and procedures have existed — approximately 16 years at the time negotiations for the successor collective bargaining agreement began. The Proposed University Policy contemplated by paragraph 1.C. of the grievance settlement agreement was submitted to the AAUP during the term of the CBA. Paragraph 1.C. of the settlement agreement reflects the procedure contemplated in Article 16, § 3 of the CBA for midterm revisions of policies and practices not set forth in the CBA. In the CBA, the AAUP agreed that bargaining such matters was not required during the CBA's term.

The present issue involves the AAUP's request to negotiate a new provision in the successor collective bargaining agreement. The waiver of a statutory right to bargain must be established by clear and unmistakable action by the waiving party. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693 (1983); *In re SERB v. Youngstown City School Dist Bd of Ed*, SERB 95-010 (6-30-95) ("*Youngstown*") at 3-81. If the exclusive representative states that it does not wish to bargain collectively or does not request to bargain collectively within a reasonable period of time, then it will be found to have waived its rights. What constitutes a reasonable time to request to bargain collectively will depend upon the facts and circumstances in each case. Id.

On the facts of this case, the AAUP not only did not waive its right to request bargaining during negotiations for the successor collective bargaining agreement, it exercised its right on May 28, 2004, and July 23, 2004. Therefore, the AAUP's conduct over the past 16 years did not constitute a waiver or relinquishment of its right to demand to bargain over this issue in the context of negotiations for a successor collective bargaining agreement.

C. <u>Application of *Youngstown* Balancing Test</u>

Unless otherwise provided, public employers maintain the authority to determine matters of inherent managerial policy as outlined in O.R.C. § 4117.08(C). They are required, however, to bargain with an exclusive representative on all matters relating to wages, hours, or terms and other conditions of employment under O.R.C. § 4117.08(A). Thus, if a given subject involves the exercise of inherent managerial discretion and also materially affects any of these factors, a balancing test must be applied to determine whether the subject is a mandatory or permissive subject of bargaining. *Youngstown*, supra. Those management decisions that are found, on balance, to be mandatory subjects must be bargained before implementation, upon notice by the employer and a timely request by the employee organization, except where emergency situations render prior bargaining impossible. Id.

The aim of O.R.C. Chapter 4117 is not realized by requiring bargaining over every management decision that affects employees' working conditions. Id at 3-76 – 3-77. Therefore, we adopted the balancing test in *Youngstown* for determining whether subjects of bargaining are mandatory or permissive when tension between O.R.C. § 4117.08(A) and O.R.C. § 4117.08(C) exists, as mentioned above. Under this test, the following factors must be balanced:

> 1) The extent to which the subject is logically and reasonably related to wages, hours, and terms and conditions of employment;
> 2) The extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. § 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public; and
> 3) The extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter.

Because the University has cited matters of inherent managerial policy involved in the distribution of patent income, and the distribution of patent income relates to wages, hours, or terms and other conditions of employment, applying the balancing test is appropriate.

The first prong of the *Youngstown* balancing test is the extent to which the distribution of patent income is logically and reasonably related to wages, hours, and terms and conditions of employment. The University argues that the patent income distributions are not wages. The University argues that research is a job duty of faculty members and that, therefore, their regular salary already compensates them for this work. But University Policy No. 3342-5-10 states that one of its purposes is "[t]o provide appropriate compensation in accordance with the University policy on distribution of license and royalty income, for university faculty, students, and staff who invent."

The National Labor Relations Board and the United States Supreme Court have found that analogous forms of "additional" compensation are part of employee wages. *Oneita Knitting Mills, Inc.*, 204 NLRB 500 (1973) (implementation of merit increase program subject to mandatory bargaining); *NLRB v. Citizens of Tel Co.*, 326 F.2d 501 (5th Cir. 1964) (Christmas bonuses constitute wages); *NLRB v. Katz*, 296 U.S. 736 (1962) (merit increases subject to mandatory bargaining). The distribution of patent income is a term or condition of employment. It is only because of the inventor's status as a University employee that the inventor is eligible to receive a distribution of patent income under the policy. Finally, the University's own witness testified at hearing that the opportunity to receive patent-income distributions is an aspect of employment that may attract faculty to the University. The AAUP is correct that patent income distributions relate to wages, hours, and terms and conditions of employment.

The University also argues that the distribution of patent income bears no relationship to wages, hours, and terms and conditions of employment because relatively few bargaining-unit members receive patent income distributions. The University cites *In re Cleveland Heights-University Heights Bd of Ed*, SERB 97-005 (3-6-97) ("*Cleveland Heights*"), in support of its argument that the AAUP's interest in bargaining patent income distribution issues is *de minimis*. The focus of our concern in *Cleveland Heights* was not the number or percentage of bargaining-unit members affected by the non-bargained change, but rather with the impact of the change on those bargaining-unit members who were affected. In *Cleveland Heights*, the school board required guidance counselors, who were a small number of bargaining-unit members, to fill out additional paperwork related to Medicaid reimbursements. In finding the change to be *de minimis*, we did not mention, and were not concerned with, the number of bargaining-unit members affected; instead, we cited the fact that the additional paperwork took each *affected* bargaining-unit member only a few additional minutes each year to complete.

In this case, the additional income received by those bargaining-unit members who receive patent income is significant. Dr. Kumar received patent income distributions of $16,232.14 and $1,875.00 in 2002 and 2003, respectively. It cannot be argued that these amounts of money are insignificant to a bargaining-unit member. But in determining the strength of the AAUP's interest under the first prong, it is significant to note that the invention by the faculty member is only the beginning of a lengthy process that involves University representatives, University patent counsel, and third party licensees, which may or may not lead, several years later, to the receipt of patent income.

The second prong of the *Youngstown* balancing test is the extent to which the employer's obligation to negotiate may significantly abridge its freedom to exercise those managerial prerogatives set forth in and anticipated by O.R.C. § 4117.08(C), including an examination of the type of employer involved and whether inherent discretion on the subject matter at issue is necessary to achieve the employer's essential mission and its obligations to the general public. One of the University's three key missions is research. In fulfilling this mission, the University endeavors to promote and maintain its research programs. The income received from licensing the University's patents supports the University's research mission. The purposes of the University's Patent Income Guidelines are to promote continuing research, to share income with inventors, and to recover a portion of research and patenting expenses.

Under the Guidelines, 40 percent of patent income is distributed to the inventor, 15 percent to the inventor's University research unit, 15 percent to the University general fund, and 30 percent to the Research and Graduate Studies Department ("RAGS"). RAGS promotes research and administers the University's graduate studies programs. OTT is an office within RAGS. Currently, 100 percent of OTT's budget is funded through patent income. Patent income also supports research by providing seed money for new projects, providing funds for equipment and infrastructure, providing funds to hire adjunct faculty to fill teaching duties so that full-time faculty members can devote more time to research, and providing funds to send faculty and students to research seminars and conferences. The Guidelines, therefore, involve management rights to determine the functions and programs of the University, to utilize technology, and to take actions to carry out the University's mission. In emphasizing its need for discretion in this area, the University points to the real issues in Ohio related to the availability of, and frequent changes in, public funding of higher education, and the University's need to have flexibility to devote patent income to areas of greatest need in furthering its research mission. The University has a strong interest in this prong.

The third prong of the *Youngstown* balancing test is the extent to which the mediatory influence of collective bargaining and, when necessary, any impasse resolution mechanisms available to the parties are the appropriate means of resolving conflicts over the subject matter. Under the third prong of the test, the parties have operated since 1988 under the Guidelines implemented by the University. The University has demonstrated a thorough knowledge of the patenting and licensing process, as well as an awareness of its income-sharing practices and how they compare with those of other research universities.

The participatory governance structure in place at the University, including the University Patent and Copyright Board and the Faculty Senate, provides ample opportunity for the parties to discuss and address areas of concern regarding the Guidelines, while allowing the University to exercise the managerial discretion necessary to further its research mission. While the AAUP asserts that collective bargaining is necessary to address issues such as notification to faculty members when their inventions are licensed, the University already has agreed to notify faculty inventors, on an ongoing basis, when their inventions are licensed, and to inform faculty recipients of income distributions that an accounting of such income is available upon written request. The mediatory influence of collective bargaining is not necessary to resolve conflicts over this subject matter.

Balancing the three prongs, the AAUP's interest under the first prong is moderate, while the University's interest under the second and third prongs is strong. Under the facts of this case, we conclude that patent income distribution is a permissive, rather than mandatory, subject of collective bargaining. Although the University may, at some future time, choose to bargain over patent income distribution, the University did not violate O.R.C. §§ 4117.11(A)(1) and (A)(5) when it refused the AAUP's demand to bargain over patent income distribution in negotiations for the parties' successor collective bargaining agreement.

III. CONCLUSION

For the reasons set forth above, we find that Kent State University did not violate Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it refused to bargain over the distribution of licensing and royalty income. The complaint is dismissed, and the unfair labor practice charge is dismissed with prejudice.

Verich, Board Member, concurs.