

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

In the Matter of

State Employment Relations Board,

Complainant,

v.

Crestline Exempted Village School District Board of Education,

Respondent.

Case No. 2004-ULP-08-0465

**ORDER
(OPINION ATTACHED)**

Before Vice Chairman Gillmor and Board Member Verich: February 16, 2006.

On August 12, 2004, the Crestline Education Association, OEA/NEA ("the Union") filed an unfair labor practice charge against the Crestline Exempted Village School District Board of Education ("Respondent"), alleging that Respondent violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). On February 10, 2005, the State Employment Relations Board ("SERB" or "Complainant") found probable cause to believe that Respondent had violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) by unilaterally changing a term of the contract during negotiations that affected the wages of bargaining-unit members by refusing to award step increases under the Collective Bargaining Agreement ("CBA").

On August 24, 2005, the Administrative Law Judge issued a Proposed Order, recommending that the Board find that Respondent violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5). On September 12, 2005, Respondent filed exceptions to the Proposed Order. On September 23, 2005, the Union and Complainant filed a joint response to the exceptions in support of the Proposed Order.

After reviewing the record, Proposed Order, exceptions, response to the 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 violated Ohio Revised Code Sections 4117.11(A)(1) and (A)(5) when it unilaterally changed a term of the collective bargaining agreement during negotiations that affected the wages of bargaining-unit members by refusing to award step increases under the agreement.

The Crestline Exempted Village 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 unilaterally changing a term of the collective bargaining agreement during negotiations that affected the wages of bargaining unit members by refusing to award step increases under the collective bargaining agreement, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5); and
- B. Take the following affirmative action:
 1. Grant step increases to all eligible bargaining-unit members retroactive to dates such raises should have been received;
 2. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Crestline Education Association, OEA/NEA work, the Notice to Employees furnished by the State Employment Relations Board stating that the Crestline Exempted Village 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 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.

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



J. RUSSELL KEITH, GENERAL COUNSEL &
ASSISTANT EXECUTIVE DIRECTOR

Order
Case No. 2004-ULP-08-0465
February 16, 2006
Page 3 of 3

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 March, 2006.



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:

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 unilaterally changing a term of the collective bargaining agreement during negotiations that affected the wages of bargaining unit members by refusing to award step increases under the collective bargaining agreement, and from otherwise violating Ohio Revised Code Sections 4117.11(A)(1) and (A)(5); and

B. TAKE THE FOLLOWING AFFIRMATIVE ACTION:

1. Grant step increases to all eligible bargaining-unit members retroactive to dates such raises should have been received;
2. Post for sixty days in all the usual and normal posting locations where bargaining-unit employees represented by the Crestline Education Association, OEA/NEA work, the Notice to Employees furnished by the State Employment Relations Board stating that the Crestline Exempted Village 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 that this Order becomes final of the steps that have been taken to comply therewith.

SERB v. Crestline Exempted Village School District Board of Education
Case No. 2004-ULP-08-0465

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.

Crestline Exempted Village School District Board of Education,

Respondent.

Case No. 2004-ULP-08-0465

OPINION

VERICH, Board Member:

On August 12, 2004, the Crestline Education Association, OEA/NEA ("the Union") filed an unfair labor practice charge against the Crestline Exempted Village School District Board of Education ("the District"). On February 10, 2005, the State Employment Relations Board ("the Complainant" or "SERB") found probable cause to believe that an unfair labor practice had been committed. For the reasons below, we find that the Crestline Exempted Village School District Board of Education violated Ohio Revised Code ("O.R.C.") §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed a term of the collective bargaining agreement during negotiations that affected the wages of bargaining-unit members by refusing to award step increases under the Collective Bargaining Agreement ("CBA").

I. BACKGROUND

Crestline Education Association, OEA/NEA is the deemed-certified exclusive representative for a bargaining unit of the District's classroom teachers, guidance counselors, and librarians. The District and the Union were parties to a collective

bargaining agreement effective from July 1, 2001 through June 30, 2004 ("2001-2004 CBA"), containing a grievance-arbitration procedure that culminated in final and binding arbitration.

Article 2, Section F of the CBA provides as follows:

Disagreement

1. In the event the parties are unable to reach an agreement within fifty days of the expiration of the existing contract, either party may declare impasse. That party shall, within five (5) days, contact the Federal Mediation and Conciliation Service and request the appointment of a mediator.
2. The mediation period shall last for not longer than thirty (30) days from the first meeting with the mediator unless both parties agree to an extension.
3. In the event a tentative agreement is reached during the mediation period, the procedure of paragraph E shall be followed.
4. This procedure shall be deemed an alternative dispute resolution procedure pursuant to RC 4117.14 (C).
5. In the event no agreement is reached during the mediation period, the parties are free to exercise all rights provided by law.

Alternative Settlement Procedures

Nothing in this article shall be construed to prohibit the parties at any time from voluntarily and mutually agreeing to submit any or all of the issues in dispute to any other alternative dispute settlement procedure.

On April 30, 2004, the District filed a Notice to Negotiate with SERB, which was also served upon the Union, for a successor collective bargaining agreement. On May 3, 2004, the Union filed a Notice to Negotiate with SERB, which was also served upon the District, for a successor collective bargaining agreement.

The parties had five negotiating sessions from the first held on June 28, 2004, through August 2004. They reached tentative agreements on two and one-half articles out of nine. The parties agreed to meet with a mediator and had three sessions with the mediator starting September 7, 2004. The parties did not reach tentative agreements on any articles during the mediation sessions. Neither party declared impasse.

On September 9, 2004, at the end of the third mediation session, the mediator asked the parties for additional mediation dates three to four weeks hence, as the mediator was going to be unavailable for that period of time. The Union provided the mediator with additional dates that it would be available for mediation. The mediator gave these dates to the Employer. The Employer told the mediator that its team members would need to discuss whether the Employer would participate further.

On October 6, 2004, the Employer notified the Union and the mediator that the parties' mutually agreed dispute resolution procedure ("MAD") had expired, that there was no agreement to extend it and that the next step was for the parties to go to fact-finding. The Employer requested a fact finder. One was appointed, but the fact-finding process has not been completed.

Article VIII, Section K of the CBA contains a salary schedule that includes a salary index including provisions for step increases corresponding to years of service. Each bargaining-unit member who completes a year of service or remains under contract for the next school year advances to the next step in the salary index. The Employer has been honoring all of the terms of the expired CBA with the exception of several about which grievances were filed and with regard to the step increases contained in the salary index incorporated into the CBA.

During previous negotiations for successor agreements continuing after the expiration of a CBA, teachers received their step increases prior to the new CBA being

executed. Although no certificate of availability of funds existed for the 2004-2005 school year, the District continued to expend funds for its ongoing obligations. Although the Union and the Employer had no specific discussions regarding extension of the CBA, they continued to operate under the terms and conditions of the CBA after its June 30, 2004 expiration date. Salaries were paid, insurance coverage remained the same, and grievances were filed and processed.

On July 1, 2004, while the parties were still engaged in negotiations for a successor CBA, the Employer notified bargaining-unit members that they would not be advanced to the next successive step in the salary index at the beginning of the 2004-2005 school year. The Employer did not implement the step increases called for in the expired CBA for the 2004-2005 school year. Bargaining-unit members are being paid at the same salary level for 2004-2005 as they were paid for 03-04.

II DISCUSSION

The issue is whether the District engaged in bad-faith bargaining in violation of O.R.C. §§ 4117.11(A)(1) and (A)(5) when it changed a term of the contract during negotiations that affected the wages of bargaining-unit members by refusing to award step increases. 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[.]

Good-faith bargaining is determined by the totality of the circumstances. *In re Dist 1199/HCSSU/SEIU*, SERB 96-004 (4-8-96). 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 employer is required 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). *In re City of Broadview Heights*, SERB 99-005 (3-5-99); *In re Ottawa County Riverview Nursing Home*, SERB 96-006 (5-31-96).

O.R.C. § 4117.14(B)(3) provides as follows: "The parties shall continue in full force and effect all the terms and conditions of any existing collective bargaining agreement, without resort to strike or lock-out, for a period of sixty days after the party gives notice or until the expiration date of the collective bargaining agreement, whichever occurs later, or for a period of ninety days where applicable." Ohio Administrative Code ("O.A.C.") Rule 4117-9-02(E)¹ provides as follows:

Except as the parties may modify the negotiation process by mutually agreed-upon dispute settlement procedures, the parties shall continue in full force and effect all the terms and conditions of any existing collective bargaining agreement, without resort to strike or lockout, *for a period of sixty days after the party gives notice, until the expiration date of the collective bargaining agreement, or the statutory dispute settlement procedures are exhausted, whichever occurs later.* (Emphasis added).

The primary issue in this case is whether a public employer can make a change in a term or condition of employment after the collective bargaining agreement expires but during negotiations for a successor agreement. In its post-hearing brief at p. 9, the Employer expressed the following: "R.C. 4117.14(B)(3) and OAC 4117-9-02(E)(1) do not require the maintenance of 'status quo' in perpetuity. Rather, the duty to maintain 'in full force and effect all the terms and conditions,' lasts ONLY until the LATER of contract expiration, or sixty (60) days after the Notice to Negotiate." (emphasis in original). This

¹ In *In re City of Fostoria*, SERB 86-037 (9-15-86), SERB found that ultimate impasse occurred at the end of the publication period following the rejection of the fact-finding recommendation in O.R.C. § 4117.14(C)(6). *Fostoria* was overruled and the policy enunciated by it repealed by the amendment of Ohio Administrative Code Rule 4117-9-02(E), effective May 18, 1987." *SERB v City of Lancaster*, SERB 88-001 (1-22-88) at p. 3-3.

view, which relies on the passage of time solely, is not consistent with the Ohio Supreme Court's Syllabus in *State ex rel. Boggs v. Springfield Local School Dist. Bd. of Edn.* (1998), 82 Ohio St.3d 222, 1998-Ohio-249 ("*Boggs*"): "Where a collective bargaining contract executed pursuant to R.C. Chapter 4117 includes an express termination date, the agreement may be deemed to continue by implied mutual assent after that date only until such time as either party to the agreement acts in a manner inconsistent with the inference that both parties wish to be governed by the contract."

In *Boggs*, the employees manifested their intention to no longer be bound by the terms of the expired agreement when, after going on strike, they terminated their strike, delivered to the school superintendent a signed statement that they wished to have their continuing contracts honored by the employer, returned to work, and then filed an action in mandamus against the employer contesting the employer's abolishment of their positions. Thus, the employees clearly expressed their desire to be governed by statutory law rather than the expired agreement.

The record does not support a finding that the Employer has manifested a similar intention to no longer be bound by the terms of the expired agreement. Instead, the Employer has continued to honor most of the terms of the expired CBA except for several about which grievances were filed and with regard to the step increases contained in the salary index incorporated into the CBA. Thus, we are not presented with a *Boggs* scenario.

We are not presented with a *Rootstown* scenario, either. In *State ex rel. Rootstown Local School Dist. Bd. of Edn. v. Portage Cty. Court of Common Pleas* (1997), 78 Ohio St.3d 489, the collective bargaining agreement between the school board and the union expired. After subsequent negotiations did not lead to a successor agreement and the parties reached ultimate impasse, the school board, thirteen months later, implemented its final contractual offer. In the present case, the Employer has not implemented its last, best offer.

In *In re University of Cincinnati*, SERB 93-007 (5-13-93) at p. 3-48, we examined a set of facts involving the effect of a contract's expiration on the parties' negotiations and stated: "It is a well-established principle of collective bargaining law that even *after* contract expiration, parties can change employment terms only through mutual agreement or, if ultimate impasse is reached, through the employer's implementation of its last best offer. *NLRB v. Katz*, 369 U.S. 736, 82 S Ct 1107, 8 LEd(2d) 230, 50 LRRM 2177 (1962)." (emphasis in original). 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*"), *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).

The parties' MAD in this case provides as follows: "In the event no agreement is reached during the mediation period, the parties are free to exercise all rights provided by law." The MAD further provides: "Nothing in this article shall be construed to prohibit the parties at any time from voluntarily and mutually agreeing to submit any or all of the issues in dispute to any other alternative dispute settlement procedure."

According to the terms of the MAD in this case, the mediation period expired after thirty days since the parties did not mutually agree to extend the mediation period. With no agreement having been reached during the mediation period, the parties were "free to exercise all rights provided by law" according to the MAD. The Employer viewed those rights as including the fact-finding process, which it attempted to invoke on October 6, 2004. Thus, the Employer's actions demonstrated that the parties had not reached the point at which good-faith negotiations toward reaching an agreement had been exhausted, i.e., ultimate impasse.

An employer's failure to maintain the terms of an expired collective bargaining agreement (i.e., the *status quo ante*) prior to ultimate impasse constitutes bad-faith

bargaining in contravention of O.R.C. §§ 4117.11(A)(1) and (A)(5). “Freezing the status quo ante after a collective bargaining agreement has expired promotes industrial peace by fastening a noncoercive atmosphere that is conducive to serious negotiations on a new contract. Thus, an employer’s failure to honor the terms and conditions of an expired collective bargaining agreement pending negotiations on a new agreement constitutes bad faith bargaining.” *In re Cuyahoga County Commrs.*, SERB 89-006 (3-15-89) at p. 3-29 (citations omitted).

The terms and conditions of employment in the CBA established the Salary Index that was labeled as “Effective 7-1-03.” Article VIII, Section K of the CBA contained a salary schedule that included a salary index with provisions for step increases corresponding to years of service. Each bargaining-unit member who completed a year of service or remained under contract for the next school year advanced to the next step in the salary index. While the numbers in the salary schedule did not change from 2003-2004 to 2004-2005, the years of service for each bargaining-unit member could change from one school year to the next.

On July 1, 2004, the Employer notified the bargaining-unit members that they would not be advanced to the next successive step in the salary index at the beginning of the 2004-2005 school year. The Employer contended that it was prevented from implementing the step increases for the following year because no certificate of availability of funds had been issued by the Treasurer pursuant to O.R.C. § 5705.41.

O.R.C. § 5705.41 provides in relevant part:

No subdivision or taxing unit shall:

* * *

(D) (1) Except as otherwise provided in division (D)(2) of this section and section 5705.44 of the Revised Code, make any contract or give any order involving the expenditure of money unless there is attached thereto a certificate of the fiscal officer of the subdivision that the amount required to meet the obligation or, in the case of a continuing contract to be performed in

whole or in part in an ensuing fiscal year, the amount required to meet the obligation in the fiscal year in which the contract is made, has been lawfully appropriated for such purpose and is in the treasury or in process of collection to the credit of an appropriate fund free from any previous encumbrances. This certificate need be signed only by the subdivision's fiscal officer. *Every such contract made without such a certificate shall be void, and no warrant shall be issued in payment of any amount due thereon. * * **

When the Employer announced its intention to withhold the step increases, the parties were in the midst of negotiations. The Employer's witness, Wayne Hamilton, had been the Employer's Treasurer for the previous three years. He testified that the certificate of availability applies to all of the expenditures of the school district paid from each fund and not just to the expenditures tied to the Employer's contract with the Union. Despite the absence of such a certificate for the 2004-2005 school year, the Employer continued to pay all of its obligations, including teacher salaries, transportation costs, electricity, snow plowing, and other operating expenses. All of the Employer's ongoing obligations were paid with the exception of the step increases to the bargaining-unit members. During cross-examination, he testified as follows:

- Q. Okay. So am I correct to say that there was, in fact, a certificate of availability for the 2004-to-2005 school year?
- A. For the '04-'05?
- Q. Yes.
- A. No.
- Q. So the school didn't spend any money for the 2004-2005 school year?
- A. Oh, we spent money.
- Q. And you had no certificate of availability?
- A. We did not have a certificate of resources.
- Q. And yet, you spent money for things during the '04-'05 school year?
- A. Correct.
- Q. Is that somehow prohibited by law to your knowledge?
- A. Most likely.
- Q. And these expenditures you made, were they for items other than for items payable under the – the Crestline Education Association contract?
- A. They were for all the obligations of the district.
- Q. Give me an example of what some others might be?
- A. Well, you have an electric bill. You have snow plowing. You have,

you know, all of those types of things that it takes to operate the school district.
(T. 94-95)

Mr. Hamilton's testimony on cross-examination also yielded the following exchange:

- Q. And I'm going to ask the question again because I don't think I got an answer to it. My question was even though the teachers in the school district were paid while you were there during the 2004-2005 school year, there was no certificate of availability to pay those teachers – or I'm sorry – there was no certificate of availability of funds for that school expenditure at the time you left the district; is that correct?
- A. Correct, correct.
(T. 106-106)

The record does not contain sufficient evidence to establish why the certificate of availability was not issued. The Employer asserted in its post-hearing brief at p. 10: "Here, there was no certificate of availability; as such, there could be no 'contract extension' (whether written or *de facto*); and no expenditure of funds beyond that which had been spent per teacher in academic year 2003-2004." But the issue before us is not the inability to pay for a new contract; we are looking at an obligation – through the salary schedule – that was already established in the CBA. Further, the Employer was unable to link its limitation on the amount spent per teacher in the previous academic year to the provisions of O.R.C. § 5705.41.

Finally, the Employer asserted in its post-hearing brief at p. 11 that O.R.C. § 5705.41 "is written in binary logic. There either 'is' or 'is not' a certificate of availability. Here, there was not, and no payments can be made." Yet, the Employer's own conduct in making payments for salaries and operating expenses during the 2004-2005 school year when it did not have a certificate of availability demonstrates that this argument is specious.

Therefore, we find that when the Employer unilaterally changed a term or condition of employment by refusing to award step increases under the collective bargaining

agreement, which directly affected the wages of bargaining-unit members, the Employer committed an unfair labor practice in violation of O.R.C. §§ 4117.11 (A)(1) and (A)(5). The appropriate remedy is to order the Employer to cease and desist from unilaterally changing a term of the contract during negotiations that affected the wages of bargaining unit members by refusing to award step increases under the CBA and from otherwise violating O.R.C. §§ 4117.11(A)(1) and (A)(5), and to require the Employer to grant step increases to all eligible bargaining-unit members retroactive to the dates such raises should have been received.

III. CONCLUSION

For the reasons set forth above, we find that the Crestline Exempted Village School District Board of Education violated Ohio Revised Code §§ 4117.11(A)(1) and (A)(5) when it unilaterally changed a term of the collective bargaining agreement during negotiations that affected the wages of bargaining-unit members by refusing to award step increases under the agreement.

Gillmor, Vice Chairman, concurs.