

UNITED STATES OF AMERICA
 BEFORE THE NATIONAL LABOR RELATIONS BOARD
 DIVISION OF JUDGES

WARREN COUNTY COMMUNITY SERVICES
 HEAD START, LLC

and

Case 9-CA-42454

SERVICES EMPLOYEES INTERNATIONAL
 UNION (SEIU), DISTRICT 1199, affiliated with
 SERVICES EMPLOYEES INTERNATIONAL
 UNION (SEIU)

TABLE OF CONTENTS

	PAGE
DECISION	1
STATEMENT OF THE CASE	1
I. JURISDICTION—THE RESPONDENT’S BUSINESS	2
II. THE LABOR ORGANIZATION	2
III. THE UNIT OF EMPLOYEES	2
IV. THE RESPONDENT’S OPERATIONS	3
V. PRELIMINARY MATTERS NOT IN DISPUTE	4
VI. THE COMPLAINT ALLEGATIONS; CONTENTIONS OF THE PARTIES	5
VII. APPLICABLE LEGAL PRINCIPLES	7
VIII. THE BARGAINING SESSIONS; THE RESPONDENT’S FINAL OFFER AND DECLARATION OF IMPASSE; THE RESPONDENT’S WITHDRAWAL OF RECOGNITION AND ITS AFTERMATH	14
A. THE UNION’S VERSION OF THE COURSE AND CONDUCT OF THE PARTIES’ NEGOTIATIONS	14
1. THE FEBRUARY 2, 2005 BARGAINING SESSION; THE RESPONDENT’S ECONOMIC PROPOSAL; THE UNION’S REQUEST FOR INFORMATION	14
2. THE MARCH 2, 2005 BARGAINING SESSION	17
3. THE MARCH 23, 2005 BARGAINING SESSION	19
4. THE MARCH 28, 2005 BARGAINING SESSION	21
5. THE MARCH 31 AND APRIL 8, 2005 EXCHANGE OF LETTERS	22
6. THE APRIL 12 BARGAINING SESSION	22

7. THE APRIL 18, 2005 BARGAINING SESSION	23
8. THE MAY 9 BARGAINING SESSION	24
9. THE MAY 18, 2005 SESSION	27
10. THE JUNE 7, 2005 BARGAINING SESSION	27
11. THE JUNE 22, 2005 BARGAINING SESSION	29
12. THE JULY 12, 2005 SESSION	31
13. THE AFTERMATH OF THE JULY 12, 2005 BARGAINING SESSION	35
14. EVENTS LEADING TO THE WITHDRAWAL OF RECOGNITION BY THE RESPONDENT	37
15. THE AFTERMATH: MUELLER'S ASSESSMENT OF THE RESPONDENT'S CONDUCT DURING BARGAINING	40
B. THE RESPONDENT'S VERSION OF THE NEGOTIATIONS	42
IX. DISCUSSION AND CONCLUSIONS: SIGNIFICANT ISSUES	61
A. DID THE RESPONDENT PROPOSE AND INSIST UPON SEVERE WAGE AND BENEFIT CUTS IN GOOD FAITH	62
B. DID THE RESPONDENT MISLEAD THE UNION ABOUT ITS FINANCIAL CONDITION	64
C. DID THE RESPONDENT'S GRANTING OF A PAY RAISE AND CONTINUATION OF BENEFITS IT SOUGHT TO ELIMINATE IN NEGOTIATIONS CONSTITUTE BAD FAITH	67
D. WERE THE RESPONDENT'S ISSUANCE OF ITS FINAL OFFER AND DECLARATION OF IMPASSE INDICIA OF BAD-FAITH BARGAINING	67
E. DID THE RESPONDENT'S ATTITUDE TOWARD THE UNION INDICATE BAD-FAITH BARGAINING	69
F. DID THE RESPONDENT UNLAWFULLY FAIL TO TIMELY PROVIDE INFORMATION AND WAS THIS FAILURE INDICATIVE OF BAD FAITH	70
G. DID THE RESPONDENT MAKE CHANGES IN THE WORKING CONDITIONS OF ITS EMPLOYEES WITHOUT BARGAINING WITH THE UNION; IF SO, DID THESE CHANGES INDICATE BAD FAITH	72
H. DID THE RESPONDENT UNLAWFULLY WITHDRAW RECOGNITION OF THE UNION	77
CONCLUSIONS OF LAW	79
THE REMEDY	80
ORDER	82
APPENDIX NOTICE TO EMPLOYEES	85

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15

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 (*Frost, Brown, Todd, LLC*), of Cincinnati, Ohio, for
 20 the Respondent.
Anne Mueller, of Cleveland, Ohio, for the Charging Party.

DECISION

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STATEMENT OF THE CASE

EARL E. SHAMWELL JR., Administrative Law Judge. This case was heard before me
 in Cincinnati, Ohio, on June 19-22, and September 13-14, 2006, pursuant to an original charge
 30 filed by Service Employees International Union, SEIU District 1199, affiliated with Service
 Employees International Union (SEIU) (the Union) on November 14, 2005, against Warren
 County Community Services, Head Start, LLC (the Respondent); an amended charge was filed
 against the Respondent by the Union on December 28, 2005.

35 On March 29, 2006, the Regional Director for Region 9 of the National Labor Relations
 Board (the Board) issued a complaint and notice of hearing against the Respondent; the
 complaint was amended by the Region on May 3, 2006. The complaint as amended alleged
 essentially that the Respondent violated Section 8(a)(1) and (5) of the National Labor Relations
 Act (the Act) by failing and refusing to furnish the Union with information necessary for and
 40 relevant to its performance of its duties as the exclusive collective-bargaining representative of a
 unit of its employees; by changing its payment system and eliminating employment agreements;
 by closing one of its educational facilities and transferring employees to other facilities without
 prior notice to the Union and without affording the Union an opportunity to bargain; and failing
 and refusing to bargain in good faith with the Union by engaging in conduct during collective
 45 bargaining, including but not limited to the withdrawing of recognition of the Union, granting
 across-the-board pay increases, and continuing employee benefits the Respondent sought to
 eliminate during bargaining.¹

50 ¹ The General Counsel requested that par. 9(a) of the amended complaint be amended as
 follows:

About July 1, 2005, a more precise date being presently unknown to the General Counsel,
 Continued

On April 12, 2006, the Respondent filed its answer to the original complaint and answered the amended complaint on May 17, 2006, generally denying the commission of any unfair labor practices and asserting certain defenses to the complaint allegations.

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On the entire record,² including my observation of the demeanor of the witnesses, and after considering the briefs filed by the General Counsel and the Respondent, I make the following findings of fact, conclusions of law, and order.

10

I. JURISDICTION—THE RESPONDENT’S BUSINESS

The Respondent admits it is a corporation with an office in Lebanon, Ohio, and has been engaged in providing early childhood development services at several facilities located in Warren County, Ohio.

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The Respondent also admits that during the past 12 months in conducting its operations as stated, it received funding from the State of Ohio in excess of \$250,000. During the same period, the Respondent admits that it purchased and received at its Lebanon, Ohio facility, goods valued in excess of \$50,000 directly from points outside the State of Ohio. Accordingly, I would find and conclude that the Respondent is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

20

II. THE LABOR ORGANIZATION

The Respondent admits, and I would find and conclude, that the Union has been a labor organization within the meaning of Section 2(5) of the Act. The Respondent also admits, and I would find and conclude, that the Union was certified by the Board as the exclusive collective-bargaining representative of an appropriate unit of the Respondent’s employees on December 15, 2003.

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III. THE UNIT OF EMPLOYEES

The Respondent admits, and I would find and conclude, that the following of its employees constitute a unit (the Unit) appropriate for purposes of collective bargaining within the meaning of Section 9(b) of the Act.

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All full-time and regular part-time Head Start employees, including teachers, family advocates, teacher assistants, cooks/custodians, drivers, bus aides, maintenance specialists, family advocates/drivers, and teacher assistant/bus aides employed by the Respondent in Warren County, Ohio at the sites designated at 852 Franklin Road,

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that the Respondent eliminated employment agreements and changed its pay system by requiring part-time employees to [be] paid over nine months; and by either of these actions, eliminated part-time employees’ health insurance coverage and disability coverage during the summer months. (Tr. 809–810.)

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I approved this request. The Respondent denied this allegation. However, I denied the General Counsel’s request to amend the complaint to include the Respondent’s anticipated grant of a wage increase effective September 18, 2006.

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² The General Counsel filed her motion to correct record on November 2, 2006. The Respondent did not file an opposition. The proposed corrections are consistent with my notes on and recollection of the record testimony, and I would grant the motion.

Lebanon, Ohio; 10 North High Street, South Lebanon, Ohio; 150 East Sixth Street, Franklin Ohio; and 101 Walnut Street, Franklin, Ohio; but excluding all site supervisors, site supervisor/teachers, administrative assistants, office assistants, education managers, family services managers, disabilities managers, nutrition managers, parent training managers/acting health managers, substitute employees, confidential employees, office clerical employees, professional employees, all other employees and all guards and supervisors as defined by the Act.

IV. THE RESPONDENT'S OPERATIONS

Warren County Community Services (WCCS) is a nonprofit corporation that provides various resources, services, and programs to the underprivileged and elderly in Warren County, Ohio; its mission is to strengthen these communities by offering residents an opportunity to enjoy a quality life and, towards that end, administers various Federal and State programs, including those that serve children, the elderly, and other needful populations in Warren County. WCCS is administered by an executive director and support staff who are accountable to a board of trustees. WCCS has operated the Federal Head Start Program in Warren County since at least the early to mid-1970s. Around July 1, 2005, WCCS incorporated the Head Start Program as a limited liability corporation denominated Warren County Community Head Start, LLC (WCCS-HS) to provide Head Start programmatic services. While a separate legal entity, the Head Start entity continued to be managed by the WCCS executive director and was subject to oversight by its board. WCCS-HS is the Respondent-Employer herein.

WCCS-HS operates four centers serving about 262 children; it is funded primarily through the Federal (Department of Health and Human Services) Head Start grant program. Supplemental funding comes from the State Ohio and other sources.³ Funding received by WCCS-HS is subject to changes in amounts granted by these funding sources year to year.

The WCCS-HS collaborates with local schools and social services agencies in Warren County to provide various services; e.g., education, speech therapy, and mental health, to preschool children aged 3 to 4 years of age whose families fall within Federal income guidelines.

WCCS-HS currently operates 10 classrooms at four facilities: the Helen Center in Franklin, Ohio; the Lebanon Head Start Center, and the Happy Hearts Center in South Lebanon, Ohio; and the Louisa Wright Center in Lebanon, Ohio. For the 2004-2005 school year, the Respondent operated 11 classrooms in these 4 centers and 1 other, the Hampton Bennett Center which was closed by the Respondent in August 2005. At the time of the hearing, the Respondent was in the process of establishing another classroom at a local elementary school called the Bowman Head Start in Lebanon, Ohio.

WCCS-HS employed about 48 to 50 employees as of July 12, 2005, 38 of which were bargaining unit employees.⁴

³ For example, sometime in 2005, the State of Ohio created and implemented a major early childhood program called the Early Learning Initiative (ELI) and contracted with the Respondent's Head Start Program to provide food services for children. In other years, the Respondent has received monetary grants from the State and the Warren County United Way for day care services.

⁴ The parties stipulated and agreed that as of July 12, 2005, WCCS-HS employed 38 employees in the bargaining unit; and that as of October 3, 2005, Head Start employed 36

Continued

Most WCCS-HS classrooms are staffed with three adults, two teachers, and one assistant teacher, and operate on either single session or double session basis.⁵ The WCCS-HS program begins planning for its staffing needs for the upcoming academic year in the spring preceding the start of the new school year. For instance, for the 2005–2006 school year, the Respondent began its staffing discussions in April or May 2005. As a general matter, the Respondent would make its final staff announcements in August and would send out letters to all staff at that time.⁶ Historically, some staff return to their previous center assignment year-to-year, but positions and assignments were subject to change.

V. PRELIMINARY MATTERS NOT IN DISPUTE

Having won the election in December 2003, the Union became the exclusive bargaining representative for the Respondent's nonmanagement employees. Bargaining did not commence until April 2004, but efforts between the Union and the Respondent to reach agreement continued throughout the balance of that year. Around November 2004, the Union's lead negotiator, Julie Jones, abruptly retired from the Union and a new lead negotiator, Anne Mueller, was installed in her place. The parties met once in December 2004 but did not resume face-to-face meetings until February 2, 2005.

The Union's bargaining team consisted of Jones, then Mueller, and bargaining unit employees Sheila Rooks, Teresa Fitzpatrick, Virginia Perry, Coy Micksner, Nina Brown, Dee O'Dell, Shelby Creech, and Ruth Griffey.⁷ The Respondent was represented by its lead negotiator, Randall Ayers; Larry Sargeant, the WCCS executive director; Maureen Hird, the agency's controller/chief financial officer; Catherine Reed, attorney; and Lisa Cayard, director of the WCCS-HS Program.⁸

The parties met on 11 separate bargaining sessions beginning on February 2 and ending July 12, 2005.⁹

All of the bargaining sessions were conducted at one of two offsite locations—a Days Inn in Monroe, Ohio, or the Kings Island Conference Center in Mason, Ohio; the parties agreed to share the expenses of these facilities.¹⁰

employees in the bargaining unit.

⁵ Each classroom session lasts for about 3 hours per day; in some of the Respondent's facilities, there are two of these sessions taking place during the day—one in the morning and another in the afternoon—but taught by the same staff. The Respondent's teachers possess teaching degrees or a credential called Child Development Associate degree (CDA). The Respondent's operating policy is to have at least one fully degreed teacher in each class.

⁶ The WCCS-HS "staff" also includes not only teachers and teacher assistants, but also bus drivers, bus aides, cooks, cook/custodians, family advocates, as well as management staff.

⁷ On occasion, when Jones was unavailable, Union Representative Mike DeLore stood in for her. Neither Jones, Perry, Micksner, Brown, O'Dell, nor DeLore testified at the hearing.

⁸ Hird did not testify at the hearing. Reed also did not testify. She participated in a representative capacity at the hearing.

⁹ Hereafter, except where otherwise noted, all dates are in 2005.

¹⁰ There was initially some disagreement about where the sessions should take place. However, the parties ultimately came to agreement. I do not consider this prior matter to have had any material effect on the parties' subsequent negotiations.

On July 12, 2005, the parties met and, after a caucus recess, the Respondent presented the Union with its final offer regarding the economic issues and other matters unresolved at that time.¹¹ On about July 26, 2005, the Union conducted a vote among the Head Start bargaining unit employees, and the Respondent's final offer was unanimously rejected by these
 5 employees; the Union informed the Respondent of this result by letter on about July 27, 2005. On August 2, 2005, the Respondent informed the Union by letter that it considered the parties to be at impasse; the Union in turn responded by letter to the Respondent, advising that it did not agree with the Respondent's position regarding impasse. The parties scheduled one other negotiating session for September 21, 2005. However, on September 20, 2005, the
 10 Respondent notified the Union by letter that it was withdrawing the recognition of the Union based on individual notices from a majority of the unit employees that they no longer desired the Union to represent them.

On October 3, 2005, the Respondent granted bargaining unit employees an across-the-board pay increase and announced, effective September 18, 2006, another increase would be granted.¹²
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VI. THE COMPLAINT ALLEGATIONS; CONTENTIONS OF THE PARTIES

Consistent with the complaint allegation, the General Counsel contends that during the parties' negotiations, the Respondent engaged, with animus against the Union, in the following conduct in violation of Section 8(a)(5) of the Act:
 20

- proposed and insisted on severe wage and benefit cuts;
- 25 ◦ misled the Union about its expenditures and financial condition by inflating the employee-related costs of its operations;
- granted across-the-board-wage increases and maintained benefits it sought to reduce and eliminate, respectively, during bargaining;
- failed to provide the Union with relevant information;
- 30 ◦ made changes in unit employees' working conditions without bargaining with the Union;
- prematurely made changes in the unit employees' working conditions without bargaining with the Union;
- prematurely issued its final proposal and declared an impasse.

The General Counsel further contends that the totality of this conduct establishes overall bad-faith bargaining by the Respondent which contributed to the unit employees' disaffection for the Union which, in turn, made unlawful the Respondent's withdrawal of recognition by the Union.¹³
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¹¹ The parties had reached tentative agreement on a variety of noneconomic issues by this time.

¹² As a general proposition after withdrawal of recognition, the Respondent admitted at the hearing that it operated the Head Start Program without any consideration or regard for the Union's former representative status among the bargaining unit employees. The General Counsel's motion to amend the complaint to include the September 18, 2006 proposed increase was based on her view that this was an indicium of bad faith. It was my view that since the Respondent believed (rightly or wrongly) it had no duty to negotiate with the Union after the withdrawal of recognition, this matter could not lie as an indicium of bad-faith bargaining.
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¹³ Taken in paraphrased form from GC Br., p. 2.

The Respondent essentially argues that during negotiations with the Union, while admittedly taking a stance of hard bargaining, it, nonetheless, bargained consistent with applicable Board authorities in good faith to the point of impasse. The Respondent contends that the Union's repeated requests for information were not only voluminous, but duplicative. However, the Respondent notes that the requests were responded to fully and promptly. The Respondent further contends that its determination in August 2005 that the parties were at impasse was appropriate as the parties were irresolvably at loggerheads in the negotiations that had been going on for nearly the entire year.

However, in spite of this impasse, the Respondent submits that its final offer was never really implemented in whole or in part. In fact, the Respondent submits that it offered to meet with the Union in the very self-same letter in which it declared impasse. The Respondent further submits that after impasse, additional discussions (negotiations) were scheduled by its management, which at the same time continued to provide requested information. On balance, the Respondent submits its bargaining actions and conduct were all undertaken under the banner of good faith as required by Board law.

The Respondent, in likewise, asserts that its withdrawal of recognition of the Union was appropriate under the circumstances and consistent with Board authorities. Specifically, it argues that the Union had, in fact, lost majority status as evidenced by the cards provided to it by a majority of the represented employees. The Respondent further submits that the Union's loss of majority status was not tainted by any unfair labor practices on its part.

Regarding the closing of the Hampton Bennett Center, the Respondent contends that it was not required to bargain over this decision as the matter constituted a fundamental change in the scope or direction of the agency's operations; as such, the agency was free to close the center, especially since no antipathy to the Union was involved in the closure decision. The Respondent argues in the alternative that if there were a duty to bargain, the Union waived the opportunity to bargain over the closure and its effects by failing to protest or demand bargaining on the issue when it was fully apprised of the agency's¹⁴ intended actions.

The Respondent also contends that it did not violate the Act by requiring employees to be paid over 9 months, or by eliminating its contributions to the employees' health care insurance during the summer months.

The Respondent submits that on the record it is clear that the parties early on in bargaining agreed for the 2004-2005 school year to eliminate a key provision of the agency employment contract, giving employees the option of being paid over 9 or 12 months, with a view toward allowing them to apply for unemployment benefits during the summer months, a right the Union actively sought and whose members intended to exercise. The Respondent contends that to facilitate the matter, the parties agreed to modify the 2004-2005 contract to eliminate any claim that the employees were "employed." For purposes of making any claims for unemployment, they would officially be laid off during the summer months.

Regarding the health care changes, the Respondent further notes that, in fact, the part-year employees' health care coverage was not actually eliminated for the summer of 2005, the Respondent's having obtained a waiver from the health care provider. The Respondent submits that no changes occurred in the employees' health care coverage until the summer of 2006,

¹⁴ As is obvious, I have referred and may hereinafter refer to the Respondent as "the agency," the term used by the Respondent's management off and on during the hearing.

over a year after its withdrawal of recognition of and consequent cessation of bargaining with the Union.

VII. APPLICABLE LEGAL PRINCIPLES

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The parties submitted well-researched briefs setting out the legal principles governing collective bargaining under the good-faith standard imposed by the Act. Along with my independent research of the area, the following principles emerge.

10

It is an unfair labor practice for an employer to refuse to bargain in good faith with its employees' chosen representative.

The Act provides in pertinent part that:

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It shall be an unfair labor practice for an employer . . . (5) to refuse to bargain collectively with the representatives of his employees For purposes of this section (d), to bargain collectively is the performance of the mutual obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment, or the negotiation of an agreement or any question arising thereunder, and the execution of a written contract incorporating any agreement reached if requested by either party but such obligation does not compel either party to agree to a proposal or require the making of a concession.¹⁵

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The United States Supreme Court, in an attempt to define the employer's (and employees' representative) obligation to bargain in good faith, has stated that:

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The object of [the] Act was not to allow governmental regulation of the terms and conditions of employment, but rather to ensure that employers and their employees could work together to establish mutually satisfactory conditions . . . [I]t was recognized from the beginning that agreement might in some cases be impossible, and it was never intended that the Government would in such cases step in, become a party to the negotiations and impose its own views of a desirable settlement.¹⁶

35

However, be that as it may, good faith requires a sincere desire to reach a contract and sincere effort to reach common ground.¹⁷ Accordingly, an employer must do more than simply go through the "motions" of attending bargaining sessions and presenting proposals, and in so many words, engaging in mere surface bargaining. *CJC Holdings, Inc.*, 320 NLRB 1041 (1996).

40

In *Regency Service Carts*, 345 NLRB No. 44 (2005), the Board enunciated an analytical framework for cases, as here, involving allegations of surface bargaining. This framework, in pertinent part, was posited as follows:

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Both the employer and the union have duty to negotiate with a "sincere purpose to find a basis of agreement," *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984) (quoting *NLRB v. Herman Sausage Co.*, 275 F.2d 229, 231 (5th Cir. 1960)), but "the Board

¹⁵ Title 29 U.S.C. §158 Sec. 8(a)(5), and (d).

¹⁶ *H. K. Porter Co. v. NLRB*, 397 U.S. 99, 103-104 (1970).

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¹⁷ *NLRB v. Insurance Agents Union*, 361 U.S. 477, 485 (1960); *Public Service Co. of Oklahoma (PSO)*, 334 NLRB 487 (2001).

cannot force an employer to make a ‘concession’ on any specific issue or to adopt any particular position.” Id. (quoting *NLRB v. Reed & Prince Mfg. Co.*, 205 F.3d 131, 134 (1st Cir. 1953), cert. denied 346 U.S. 887 (1953)). The employer is, nonetheless, “obliged to make *some* reasonable effort in *some* direction to compose his differences with the union, if [Section] 8(a)(5) is to be read as imposing any substantial obligation at all.” Ibid. (Emphasis in original.) Therefore, “mere pretense at negotiations with a completely closed mind and without a spirit of cooperation does not satisfy the requirements of the Act.” *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001) enfd. sub nom. *NLRB v. Hardesty Co.*, 308 F.3d 859 (8th Cir. 2002) (quoting *NLRB v. Wonder State Mfg. Co.*, 344 F.2d 210 (8th Cir. 1965)). A violation may be found where the employer will only reach an agreement on its own terms and none other. Id.; *Pease Co.*, 237 NLRB 1069, 1070 (1978).

In determining whether a party has violated its statutory obligation to bargain in good faith, the Board examines the totality of the party’s conduct, both at an away from the bargaining table. *Public Service Co. of Oklahoma (PSO)*, 344 NLRB 487 (2001), enfd. 318 F.3d 1173 (10th Cir. 2003); *Overnite Transportation Co.*, 296 NLRB 669, 671 (1989), enfd. 938 F.2d 815 (7th Cir. 1991); *Atlanta Hilton & Tower*, supra, at 1603. From the context of the party’s total conduct, the Board must decide whether the party is engaging in hard but lawful bargaining to achieve a contract that it considers desirable or is unlawfully endeavoring to frustrate the possibility of arriving at any agreement. *PSO*, 334 NLRB at 487.

The Board considers several factors when evaluating a party’s conduct for evidence of surface bargaining. These include delaying tactics, the nature of the bargaining demands, unilateral changes in mandatory subjects of bargaining,¹⁸ efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already-agreed-upon provisions, and arbitrary scheduling of meetings. *Atlanta Hilton & Tower*, supra, at 1603. It has never been required that a respondent must have engaged in each of those enumerated activities before it can be concluded that bargaining has not been conducted in good faith. *Altofer Machinery Co.*, 332 NLRB 130, 148 (2000). Indeed, avoidance of the statutory bargaining obligation can be demonstrated without engaging in wholesale and wide-ranging activities in every one of these areas; rather, a respondent will be found to have violated the Act when its conduct in its entirety reflects an intention on its part to avoid reaching an agreement.

In *Regency Service*, it should be noted that the Board, in applying the foregoing principles to the matter before it, first, found the totality of the employer’s conduct throughout its negotiations with the union indicative of its unlawful endeavor to frustrate the possibility of arriving at any agreement. The Board emphasized the employer’s dilatory tactics and (negative) comments demonstrated bad faith and underscored its demonstrated intention to avoid reaching an agreement. The Board also noted that the Respondent’s arbitrary scheduling of meetings and its unwillingness to provide explanations for its proposals were further evidence

¹⁸ The Board has held that where the parties are in contract negotiations, an employer’s obligation to refrain from unilateral changes encompasses a duty to refrain from implementation unless and until an overall impasse has been reached on bargaining for the agreement as a whole. The Board recognizes two exceptions to the rule: when a union engages in bargaining delay tactics, and when economic exigencies compel prompt action. *Bottom Line Enterprises*, 302 NLRB 373 (1991).

of mere pretenses at negotiations and reflected a completely closed mind bereft of a spirit of cooperation.¹⁹

5 An employer's duty to bargain with the union representing its employees encompasses the obligation to bargain over the following mandatory subjects—wages, hours, and other terms and conditions of employment. *First National Maintenance Corp. v. NLRB*, 452 U.S. 666, 679–682 (1981). An employer violates Section 8(a)(5) of the Act when it makes a material and substantial change in wages, hours, or any other terms of employment that is a mandatory subject of bargaining at a time when the employees are represented by a union. *Fresno Bee*, 10 339 NLRB 1214, 1214 (2003).

The General Counsel establishes a prima facie violation of Section 8(a)(5) when he shows that the employer made a material and substantial change in a term of employment without negotiating with the union. *Chemical Workers Local I v. Pittsburgh Plate Glass Co.*, 15 404 U.S. 157, 159 (1981); *Taino Paper Co.*, 290 NLRB 975, 977 (1988). The burden is then on the employer to show that the unilateral change was in some way privileged. *Cypress Lawn Cemetery Assn.*, 300 NLRB 609, 628 (1990).

20 A “term and condition of employment,” even though not expressly provided for in the collective-bargaining agreement, cannot be unilaterally altered or abolished by the employer without affording the union notice and an opportunity to bargain. Thus, a unilateral change constitutes an unlawful refusal to bargain unless the union has waived or can be said to have waived its right to bargain over this matter. The Board has held that the right to be consulted on changes in terms and conditions of employment is a statutory right; thus, to establish that it has 25 been waived, the party asserting waiver must show that the right has been clearly and unmistakably relinquished. Whether such a showing has been made is decided by an examination of all the surrounding circumstances, including but not limited to bargaining history, the actual contract language, and the completeness of the collective-bargaining agreement. *TCI of New York*, 301 NLRB 822, 825 (1991).

30 However, the Board cautions that waivers of statutory rights are not to be “lightly inferred.” *Georgia Power Co.*, 325 NLRB 420 (1998). As the Board notes, national labor policy disfavors waivers of statutory rights by a union, and thus a union's intention to waive a right must be clear before a waiver can succeed. *C & P Telephone Co. v. NLRB*, 687 F.2d 633, 636 35 (2d Cir. 1982). Significantly, a union will not be found to have waived any right to bargain where the employer has presented it with a fait accompli. *Asher Candy*, 348 NLRB No. 60 (2006).

40 However, if the union is given timely notice of the employer's decision, then the union generally must request bargaining over the effects of the decision. *Jim Waters Resources*, 289 NLRB 1441 (1988).

Economic exigency may excuse an employer's unilateral action. Notably, the Board stated in *Van Dorn Plastic Machinery Co.*, 265 NLRB 864, 865 (1982):

45 The Board has repeatedly held that economic expediency or sound business considerations are insufficient defenses to justify unilateral changes in terms and conditions of employment. Once the General Counsel has made a *prima facie* showing of an 8(a)(5) violation . . . a respondent must demonstrate why the refusal to bargain was privileged.

50 ¹⁹ See also *Mid-Continent Concrete*, 336 NLRB 258, 259 (2001).

Thus, an employer must demonstrate compelling economic considerations or sound business considerations to justify unilateral implementation of a policy. In short, the employer must adduce credible evidence that there was a present pressing legitimate business concern or significant event to justify the move and not simply that it chose for its own reasons not to bargain over the decision.

Historically, the Board, in examining the totality of the circumstances of any given collective-bargaining case has also considered the substance of proposals to determine good-faith bargaining, but not to evaluate whether particular proposals are acceptable or unacceptable; the issue is whether they are reflective of a genuine and sincere effort to reach agreement.²⁰ However, the substance of central proposals and an employer's insistence on extreme proposals may be viewed as part of the whole picture of a party's conduct in negotiations in determining good faith.²¹ More importantly, an employer's failure to budge from an initial proposal may be indicative of bad faith. *John Ascuaga's Nugget*, 298 NLRB 524 (1990). Moreover, an inference of bad-faith bargaining is appropriate when the employer's proposals, taken as a whole, would leave the union and the employees it represents with substantially fewer rights and less protection than provided by law without a contract. *Regency Service Carts*, supra at 5.

It is axiomatic under established Board law that an employer acts in bad faith when its claims to the union during negotiations are untruthful, dishonest, or misleading. In *NLRB v. Truitt Mfg. Co.*, 351 U.S. 149, 152 (1956), the Supreme Court stated that "good faith bargaining necessarily requires that claims by either bargainer should be honest claims." In accord, an employer may violate the Act by refusing to provide financial information to the union after claiming an inability to pay. *Central Management Co.*, 314 NLRB 763, 769 (1994).²²

Regarding information requests, in the bargaining context, the union under Section 8(a)(5) is entitled to request and receive information that is relevant and necessary for it to carry out its responsibilities in representing bargaining unit employees. *NLRB v. Acme Industrial Co.*, 385 U.S. 432 (1967). This includes information relevant to contract negotiations. *Day Automotive Group*, 348 NLRB No. 90 (2006).

"Where the requested information concerns employees . . . within the bargaining unit, this information is presumptively relevant and the employer has the burden of proving lack of relevance. . . . Where the request is for information concerning employees outside the bargaining unit, the union must show that the information is relevant." *Brooklyn Union Gas Co.*, 220 NLRB 189 (1975); *Curtiss-Wright Corp.*, 145 NLRB 152 (1963), enfd. 347 F.2d 61, 69 (3d Cir. 1965).

The Board uses a broad discovery-type standard in determining what is relevant in such contexts. *National Grid USA Service Co.*, 348 NLRB No. 88 (2006). Notably, the requested

²⁰ *Public Service of Oklahoma*, 334 NLRB 487 (2001); *NLRB v. Marlen Cabinets, Inc.*, 659 F.2d 995 (9th Cir. 1981).

²¹ *Reichold Chemical*, 288 NLRB 69 (1988); *Fairhaven Properties, Inc.*, 314 NLRB 763 (1994); *Conagra, Inc.*, 321 NLRB 944 (1996).

²² The Board in *Central Management* noted that the Court in *Truitt, Mfg.* stated that, "If such an argument (an inability to pay) is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy. (See *Id.* at 152-153.)

information sought need not be dispositive of any issue between the parties, it need only have some bearing on it.

5 Once the initial showing of relevance has been made, “the employer has the burden to prove a lack of relevance . . . or to provide adequate reasons as to why he cannot, in good faith, supply such information.” *San Diego Newspaper Guild*, supra at 863, 867. Where the relevance of requested information has been established, an employer can meet its burden of showing an adequate reason for refusing to supply the information by demonstrating a “legitimate and substantial” concern for employee confidentiality interests which might be
10 compromised by disclosure. *Detroit Edison v. NLRB*, 440 U.S. 301, 315, 318–320. In resolving issues of asserted confidentiality, the Board first determines if the employer has established any legitimate and substantial confidentiality interest and then balances that interest against the union’s need for the information. *Detroit Edison*, id. at 315, 318; *Minnesota Mining & Mfg. Co.*, 261 NLRB 27, 30 (1982); Pfizer Inc., 268 NLRB 916 (1984). However, where the employer fails
15 to demonstrate a legitimate and substantial confidentiality interest, the union’s right to the information is effectively unchallenged, and the employer is under a duty to furnish the information. *Oil Workers Local 6-418 v. NLRB*, 711 F.2d 348, 360 (D.C. Cir. 1983); *NLRB v. Jaggars-Chiles-Stovall, Inc.*, 639 F.2d 1344, 1346–1347 (5th Cir. 1981); *NLRB v. Associated General Contractors of California*, 633 F.2d 766 (9th Cir. 1980).

20 As the Board noted in *North Star Steel Co.*, 347 NLRB No. 119 (2006), it is well established that information relating to wages, hours, and working conditions of employees in the bargaining unit is presumptively relevant, and an employer’s refusal to provide such information may pose a violation of the Act unless there is a showing of privilege. Notably, in
25 *North Star*, the Board stated that when an employer bases its bargaining position on an asserted inability to pay, the union is entitled to request and review the employer’s financial records to assess the employer’s representations about its dire financial condition.²³

30 An employer’s refusal to provide without undue delay requested information relevant to the union’s efforts at negotiating a contract is an indicium of surface bargaining. *Bryant & Stratton Business Institute*, 321 NLRB 1007, 1044 (1996); *Radisson Plaza Minneapolis*, 307 NLRB 94, 95 (1992), enfd. 987 F.2d 1376 (8th Cir. 1993).

35 An employer’s premature declaration of impasse may also serve as an indicium of bad-faith bargaining. *Grosvenor Resort*, 336 NLRB 613, 615 (2001).²⁴ *CJC Holdings, Inc.*, 320

40 ²³ In *North Star* above, slip op. at 7, the Board distinguished between “inability to pay” and competitive disadvantage citing *AMF Trucking & Warehousing*, 342 NLRB 1125, 1126 (2004):

[T]he phrase “inability to pay” means, by definition that the employer is incapable of meeting the union’s demands. That is, the phrase means more than the asserting that it would be difficult to pay, or that it would cause economic problems or distress to pay. “Inability to pay” means that the company presently has insufficient assets to pay or that
45 it would have insufficient assets to pay during the life of the contract that is being negotiated. Thus, inability to pay is inextricably linked to nonsurvival in a business.

To the Board, the essential difference between “inability to pay” and competitive disadvantage is the difference between claims of “cannot” and “will not”; a mere unwillingness to pay does not trigger an obligation to provide financial and competitor information to the union.

50 ²⁴ Notably, the Board in *Grosvenor Resort* also found that in addition to employer’s premature declaration of impasse, its insistence on declaring impasse on a nonmandatory subject, and unilaterally implementing new terms and conditions of employment without

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NLRB 1041 (1996), enfd. mem. 110 F.3d 794 (5th Cir. 1997). The Board notes that impasse is reached only after good-faith negotiations have exhausted the prospects of concluding an agreement and there is no realistic possibility that continuation of discussion at that time would be fruitful. *CJC Holdings, Inc.*, at 1044.

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The Board has stated:

Whether a bargaining impasse exists is a matter of judgment. 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 a disagreement, the contemporaneous understanding of the parties as to the state of negotiations are all relevant factors to be considered in deciding whether an impasse in bargaining existed. *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), pet. for review denied, *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

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Notably, the Board in *Taft Broadcasting Co.*, 163 NLRB 475 (1967), defined such an impasse as being reached after good-faith negotiations have exhausted the prospects of concluding an agreement.

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Where there are possible unremedied unfair labor practices, an employer is advised not to declare impasse. Notably, in *Dynatron/Bondo Corp.*, 333 NLRB 750, 752 (2001), the Board opined:

Generally, “a lawful impasse cannot be reached in the presence of unremedied unfair labor practices.” *White Oak Coal*, 295 NLRB 567, 568 (1989). And, in the absence of a lawful, good-faith impasse, an employer may not unilaterally implement its final contract offer. *Id.* Indeed, an employer that has committed unfair labor practices cannot “parlay an impasse resulting from its own misconduct into a license to make unilateral changes.” *Wayne’s Dairy*, 223 NLRB 260, 265 (1976).

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Not all unremedied unfair labor practices committed before or during negotiations, however, will lead to the conclusion that impasse was declared improperly, thus precluding unilateral changes. *Alwin Mfg. Co.*, 326 NLRB 646, 688 (1988), enfd. 192 F.3d 133 (D.C. Cir. 1999). Only “serious unremedied unfair labor practices that *affect the negotiations*” will taint the asserted impasse. *Id.* (Emphasis added.) Thus, the central question is whether the Respondent’s unlawful conduct detrimentally affected the negotiations over a new collective-bargaining agreement and contributed to the deadlock.

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In *Alwin Mfg. Co.* 326 NLRB 646 (1988), the Board identified at least two ways in which an unremedied unfair labor practice can contribute to the parties’ inability to reach an agreement. First, an unfair labor practice can increase friction at the bargaining table. Second, by changing the status quo, a unilateral change may move the baseline for negotiations and alter the parties’ expectations about what they can achieve, making it harder for the parties to come to an agreement.

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Applying *Alwin*, the question is whether the Respondent’s conduct made it harder for the parties to reach agreement. Notably, the view of one party that an impasse has been reached is not determinative. *Wykoff Steel*, 303 NLRB 517, 523 (1991); *Day Automotive Group*, 348 NLRB No. 90 (2006).

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bargaining to lawful impasse contributed to the finding of bad-faith bargaining.

Where it is determined that no proper impasse in bargaining occurred, the employer is legally prevented from implementing its contract proposals, and cannot rely on its implemented contract proposals to support the various changes it made in the terms and conditions of employment of its employees. *Success Village Apartments, Inc.*, 348 NLRB No. 28 (2006).

Significantly, the Board has held that a legally recognized impasse cannot exist where the employer has failed to satisfy its statutory obligation to provide information needed by the bargaining agent to engage in meaningful negotiations. A failure to supply information relevant and necessary to bargain constitutes a failure to bargain in good faith in violation of Section 8(a)(5), and no genuine impasse could be reached in these circumstances. *Decker Coal Co.*, 301 NLRB 729, 740 (1991).²⁵

Turning to the issue of the employer's withdrawal of recognition of the Union, the Board considers several factors to determine whether there is a causal relationship between unremedied unfair labor practices and the subsequent employee expression of disaffection with the incumbent union. The factors include:

(1) The length of time between the unfair labor practices and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause employee disaffection from the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.²⁶

In *Parkwood Developmental Center*,²⁷ the Board set out an analytical framework for determining an employer acted unlawfully in withdrawing recognition:

In evaluating whether the Respondent acted unlawful in withdrawing recognition from the Union on March 8, 2003, we apply the standard established in *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001), under which the Respondent must show that the Union had actually lost its majority status when the Respondent withdrew recognition. See *Port Printing Ad & Specialties*, 344 NLRB No. 34 (2005), enfd. sub nom. mem. *NLRB v. Seaport Printing Ad & Specialties, Inc.*, No. 05-60347, 2006 WL 2092499 (5th Cir. 2006).

. . . . Under *Levitz*, an "employer may rebut the continuing presumption of an incumbent union's majority status, and unilaterally withdraw recognition, only on a showing that the union has, in fact, lost the support of a majority of the employees in the bargaining unit." 333 NLRB at 725. As the *Levitz* Board explained:

[A]n employer with objective evidence that the union has lost majority support—for example, a petition signed by a majority of the employees in the bargaining unit—withdraws recognition at its peril. If the union contests the withdrawal of recognition in an unfair labor practice proceeding, the employer will have to prove by a preponderance of the evidence that the union had, in fact, lost majority support at the time the employer withdrew recognition. [Id., emphasis added.]

²⁵ See *United States Testing Co.*, 324 NLRB 854, 860 (1997).

²⁶ *Vincent Industrial Plastics, Inc.*, 328 NLRB 300, 301 (1999).

²⁷ 347 NLRB No. 95, slip op. at 2 (2006).

VIII. THE BARGAINING SESSIONS; THE RESPONDENT'S FINAL OFFER AND DECLARATION OF IMPASSE; THE RESPONDENT'S WITHDRAWAL OF RECOGNITION AND ITS AFTERMATH

A. *The Union's Version of the Course and Conduct of the Parties' Negotiations*

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The General Counsel called Anne Mueller as her main witness to establish the charges in question.

10 Mueller stated that after the unexpected retirement of Jones as the chief negotiator for the WCCS-HS employees, she took over this role.²⁸ Mueller conceded that the negotiations did not resume seamlessly. She noted that rescheduling negotiations sessions after Jones' departure were hampered by the 2004 holiday season and other conflicts in her schedule, as well as that of Randall Ayers, the Respondent's lead negotiator. Mueller also admitted she was not completely familiar with what matters had been covered or possibly agreed to between the
 15 Union and the Respondent regarding noneconomic matters when Jones was negotiating. Mueller stated that while the parties attempted to schedule negotiation sessions for December 2004, and then in January 2005, the parties did not meet until February 2, 2005, and from that point met 11 times until July 12, 2005, the date of the last negotiating session. Mueller said she attended all of the 11 bargaining sessions which were held at two neutral sites, motels located
 20 in Monroe and Mason, Ohio.

Mueller stated that the Respondent was represented at the bargaining table by Ayers, Larry Sergeant (executive director); Maureen Hird, controller (financial officer); Catherine Reed (attorney) and, for the last few sessions in 2005, Lisa Cayard (the Head Start director).
 25 According to Mueller, the Union was represented by bargaining unit employees Teresa Fitzpatrick, Virginia Perry, Coy Micksner, Neva Brown, Dee O'Dell, and Shelby Creech.

1. The February 2, 2005 bargaining session; the Respondent's economic proposal; the Union's request for information

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According to Mueller, the parties met at around 6 p.m., and while she did not have any of Jones' files or notes for previous negotiations to assist her, she and Ayers did review the list of tentative agreements the parties had reached in 2004. Ayers also presented the Respondent's first economic proposal covering wages, hours of work, and benefits for bargaining unit
 35 employees.²⁹

According to Mueller, Ayers said that the Respondent had examined its budget for the 2005-2006 school year and that the figures contained in the proposal reflected the moneys the Employer had determined were available for wages, benefits, and other working conditions for
 40 the bargaining unit.

²⁸ Mueller testified that she had been employed by the Union for about 6 years and, since 2001, has served as its public division coordinator, in which capacity she is charged with negotiating contracts for employees working primarily in the public sector. Mueller noted that
 45 while the WCCS-HS employees are not employed by a government agency, their connection to the federally funded Head Start Program puts them in this category within the Union's administrative scheme.

²⁹ See GC Exh. 2, a copy of the Respondent's economic proposal. The proposal covered wages for eight classifications of Head Start employees, their hours of work, holidays, vacation,
 50 insurance (medical, dental, optical, death, and disability), professional liability, and accumulated leave.

Mueller described the proposal as one calling for a 14-percent wage cut on average for the covered employees, no paid leave of any kind and, through Ayers, a verbal proposal calling for the staff to return to a 40-hour workweek as opposed to the 38 hours being worked at the time.³⁰ Mueller said that the unit employees at this time enjoyed paid holidays³¹ as well as a number of days covered by the winter and spring breaks during the academic year for which they were paid.

Mueller said that Ayers claimed that the Respondent anticipated an increase of about \$100,000 in unemployment premiums payable to Ohio, and that health care (insurance) costs had already gone up by 5 percent effective as of January 1, 2005.

Mueller candidly admitted that she did not like the proposal and, in order to verify the Respondent's claims, made a written request of Ayers for certain information at the February 2 meeting. Mueller noted that at the time, she could not verify the figures in the initial proposal, although Ayers said the wages were being reduced by 14 percent. Accordingly, she asked for the following information:

1. An updated bargaining unit list with the following information: name, classification, wage rate (current), date of hire, disability reserve accrual rate (per pay period), disability reserve balance, accumulated leave accrual rate, accumulated leave balance, whether or not the employee takes medical, dental, optical, optical insurance and if yes, information on the type of enrollment—single or family + [and] work location.
2. Copies of all notifications from the State of Ohio for unemployment insurance applications for all bargaining unit employees during the summer of 2004.
3. Information relating to the estimated costs of savings f or the following:
 - a. elimination of paid holidays for bargaining unit employees
 - b. elimination of paid vacation for bargaining unit employees
 - c. elimination of accumulated leave for bargaining unit employees
 - d. reduction in wage rates to management proposal of 2-2-05 for all bargaining unit employees
4. A bargaining unit list with name and the employee's 03-04 wage rate.³²

Mueller explained that her requests related to the Respondent's economic proposal for which she had no information or figures to validate or to verify the wage proposals. Additionally, since the bargaining unit employees already enjoyed paid holidays to include the winter and

³⁰ Mueller said because a 40-hour workweek was not expressly stated in the proposal, she tried to pin Ayers down on the point. According to Mueller, Ayers said that the Respondent's intent was indeed to increase the workweek by 2 hours, but it did not want to put this in the written proposal.

³¹ According to Mueller, prior to the proposal, Head Start employees were paid for eight holidays that correspond to those recognized by the Federal government, plus the day after Thanksgiving and Christmas Eve.

³² See GC Exh. 3. Mueller's handwritten request ended by asking the Respondent to contact her if there were any questions about the request.

spring breaks for the academic year, and at least one employee in the bargaining unit worked 52 weeks, these employees in effect were having their holiday pay and accumulated vacation leave taken away by the proposal. Mueller noted that at the same time the proposal gave the Respondent the option of taking away the various insurance benefits at any time and did not indicate the WCCS contribution to health care benefits,³³ which she felt should be included in the standard collective-bargaining agreement. Also, Mueller said that she was concerned that the proposal indicated that any employee laid off for 30 consecutive days—which could basically include all of the Head Start bargaining unit employees—would not have insurance coverage then provided by the Employer. Accordingly, Mueller said that her request for information related to the Respondent’s initial economic proposal, which she felt in essence called for not only a severe wage cut applicable to all bargaining unit classifications but also a wiping out of all the employees’ existing benefits.

Mueller testified that while she had anticipated an economic proposal from the Respondent on February 2, she, nonetheless, was surprised about the nature of the initial proposal and had not, in fact, ever before experienced such a severe proposal from an employer.³⁴

Mueller noted that the session ended at around 9 or 9:30 p.m. on February 2.

Mueller testified that on about February 8, 2005, Ayers sent her a letter purporting to deal with her handwritten request for information.³⁵ Mueller said the February 8 letter referred to materials that Ayers said on February 2 that he had provided Jones in April 2004—about 100 pages of information. Mueller related that in the February 8 letter, Ayers, as he had at the February 2 bargaining session, advised if she did not have the materials to let him know. Mueller said that Ayers did not provide the materials either at the February 2 session or as enclosures to the February 8 letter.

Regarding her request for cost savings information, Mueller stated that Ayers only provided a copy of the Respondent’s proposed budget for the 2005–2006 academic year. Mueller testified that this was not an adequate response because the budget reflected merely aggregate numbers. For instance, she noted, there was no information provided regarding the

³³ It is undisputed that at this time the Respondent contributed 80 percent of the health care premiums; the employees’ share was 20 percent. It should also be remembered at this juncture that the Respondent, in the limited liability corporate form, did not come into existence until July 1, 2005.

³⁴ Mueller said that she had negotiated 4 to 6 contracts per year for the Union since 1999, about 20 to 42 in total. She also noted that the Union presently was party to about 18 Head Start contracts, for which she acted as chief spokesperson for 7 of these contracts.

³⁵ See GC 4. In this letter, in pertinent part, Ayers referred Mueller to an enclosed copy of a letter he sent to the Union (Jones) in April 2004, in which he says he had enclosed copies of the Respondent’s personnel policies; a list of employees enrolled in the health plan, including costs; copies of Head Start Federal grants for 2001–2002; Head Start Federal financial assistance awards for (academic) years 2002/2003 and 2003/2004; Head Start State (of Ohio) Allocations (for) 2003; Head Start table of organization; Head Start 2003 and 2004 budgets; and the Head Start training plan. Ayers related that these materials included much of the information Mueller had requested. Ayers stated that he did not include this information with the letter but asked Mueller to let him know if she could not locate Jones’ file. Ayers provided the Respondent’s “working budget” for the Head Start Program for 2005–2006 school year in response to Mueller’s request for cost savings information.

bargaining employees' current wages, a matter relevant to her request in paragraph 3(d) which sought cost savings information to justify or explain the wage reductions of bargaining unit employees in the Respondent's February 2 proposal. Mueller maintained that simply giving aggregate numbers in a budget document did not explicate what was being saved by reducing wage rates, or to "cost out" what was being saved by eliminating all forms of paid leave for bargaining unit employees.

Mueller identified another letter she said she received from Ayers on February 28, 2005, this one purporting to be in response to her February 2 information request. Mueller testified that this letter and its enclosure was responsive to her request in paragraph 1 in that Ayers did provide a list of bargaining unit employees by name, their wage rates, job classification, date of hire, annual leave, accrual rate, accrued leave balance, disability reserve accrual rate, and disability reserve balance as of February 16, 2005. However, Ayers' response did not include as requested the names of employees enrolled in the health care programs and whether the employee was a single or family participant.³⁶

Mueller explained her need for the health insurance information, stating that for purposes of bargaining she might need to communicate with unit employees and solicit their feedback regarding the design for their health care coverage plan, as well as meeting the specific needs of individual members currently enrolled in the Respondent's health care plan.

2. The March 2, 2005 bargaining session

Mueller said that parties met at around 6 p.m. at the Days Inn in Monroe, Ohio, to resume their negotiations. Mueller stated that the Union presented its counterproposal to the Respondent's February 2 economic proposals³⁷ and its counterproposal regarding hiring, promotions, and transfers of bargaining unit employees.³⁸ According to Mueller, the Respondent provided the Union with a number of contract proposals—noneconomic—on which the parties had agreed when Jones was the Union's lead negotiator, as well as those on which the parties had not reached agreement to date.³⁹

³⁶ See GC Exh. 5. The letter from Ayers included the Employer's current contribution rate and costs for medical and dental coverage for the period July 1, 2004, through June 30, 2005. By enclosure, the letter did identify the total number of employees with family and health and dental insurance, and the number of those with single and family dental coverage. The enclosure also provided the number—four—of bargaining unit employees who had filed for unemployment during the summer of 2004. However, as requested by par. 2 of Mueller's request, this letter did not address or provide "copies of all notifications from the State of Ohio for unemployment insurance applications for all bargaining unit employees during the summer of 2004."

³⁷ See GC Exh. 6, the Union's economic counterproposal dated March 2, 2006.

³⁸ See GC Exh. 8.

³⁹ See GC Exh. 7, a document entitled "Agreement Between WCCS, Inc. Head Start and District 1199, etc.", in which the Union, by Jones and bargaining unit employee Sheila Rooks, and Randy Ayers and Larry Sargeant for the Employer tentatively agree to certain provisions to be included in the collective-bargaining agreement. The tentative agreements were reached during the period covering May 7 through December 3, 2004. This exhibit also included a number of clauses on which there was no agreement, such as nondiscrimination, the definition of employee, union activities and representation, management rights, work stoppages; and the aforesaid hiring, promotion and transfer, and job descriptions.

Mueller said that at the session, she also raised the subject of the Federal cost of living (COLA) increases and whether this was a possible source of revenue for the 2005–2006 Head Start Program; specifically, whether WCCS was going to request the COLA from the Federal authorities. According to Mueller, Ayers responded by asking her if she thought this was required of Head Start agencies. Mueller said she told Ayers that it was not required, but she had never heard of a Head Start agency not asking for additional funds when available from the Federal government.

According to Mueller, Ayers said that he did not believe the COLA always covered the full cost of the COLA amount; that is, the FICA taxes. Accordingly, Ayers said that the Respondent might not ask for the COLA. Mueller stated that she thought this to be ludicrous, that she had never heard of any Head Start agency not asking for funds the government made available by way of wage supplements for its programs. Furthermore, in her experience, while FICA costs do rise where wages are increased, these costs are minimal as compared to the benefits of the wage increase. Mueller said that Ayers did not respond further to her comments. However, he did later admit that the Respondent's 2005–2006 budget proposal provided to the Union did not reflect the COLA in the revenue section.

Mueller said that she also asked Ayers whether the budget proposal's line item, "mandatory payroll taxes for 2005–2006 in the amount of \$192,746," reflected the Respondent's anticipated costs for unemployment contributions to Ohio. According to Mueller, Ayers said that it did.⁴⁰

Turning to the Union's counterproposal for economic issues, Mueller stated that essentially the Union was proposing a 40-hour workweek for the 2005–2006 academic year, and no change in hours per week worked for the balance of the 2004–2005 year. Regarding wages, Mueller said that the Union proposed:

- a 3-percent wage increase (based on the 2003–2004 rate) effective the first day of work for the 2004–2005 school year;
- an increase in pay equivalent to the federal COLA effective July 1, 2005, along with other funds that may come available for the 2005–2006 school year;
- an increase in wages based on the 2004–2005 wage scale as increased by the agency under the contract terms effective July 1, 2006;
- bargaining unit members would receive a pay increase equivalent to the federal COLA supplemental by any additional monies from the state or federal grants, subject to bargaining relative to allocation of the additional funds;
- for 2006–2007, the wage scale will be the 2005–2006 wage scale increased by any amount of wage increase provided the agency;
- effective July 1, 2007, employees would receive an increased based on the federal COLA and any additional funds made available to the Employer through state and federal grants subject to bargaining over allocations of these funds;
- and the 2007–2008 wage scale would be based on the 2006–2007 wage scale as increased by any increases provided by the agency.

Regarding insurance, Mueller stated that the Union proposed that health care premiums paid by the employees be capped at the current contribution rate payable based on their pay

⁴⁰ The Respondent's budget work sheet for 2005–2006 (GC Exh. 4) indicates an increase in Head Start related mandatory payroll taxes from \$94,000 in 2004–2005 to \$192,746 estimated for 2005–2006.

periods (not monthly). As to other insurance, according to Mueller, the Union simply wanted these benefits to remain at the then current cost levels offered to employees.

5 Regarding holidays, vacations, and accumulated leave, Mueller stated that the Union wanted no change in the existing policies; the Union opposed the Respondent's proposal to eliminate all forms of paid leave.⁴¹

10 As to health coverage, the Union's position was that unit employees would not lose eligibility for insurance coverage during any period of temporary layoff, including the summer months.

15 Mueller also stated that she verbally advised Ayers that the Union was also opposed to the Respondent's proposal to eliminate the disability reserve. According to Mueller, Ayers responded, saying the Respondent intended to eliminate this.

20 Mueller said that she also expressed her view at the March 2 session that the Union did not think that there were any additional costs to the agency by virtue of the current vacation and sick leave policies; that the Respondent should continue to provide these.

25 Mueller conceded that at that point in the negotiations the Union was not really interested in wage and benefits cuts, and that the Union maintained that position throughout the negotiations with the Respondent.

30 Mueller said this session ended and the parties scheduled another meeting for March 23, 2005.

In the interim, Mueller said that she was notified on March 22 (by letter) that the Respondent wanted to discuss a proposed drug-free workplace policy at the March 23 meeting.⁴²

3. The March 23, 2005 bargaining session

35 Mueller stated that the Union and the Respondent discussed a number of noneconomic issues, including the drug-free work policy proposal, and the Union made several counterproposals to those offered by the Respondent during the early (2004) negotiation sessions.

40 Mueller identified the Union's counterproposal to the Respondent's proposal on seniority, which Ayers gave to her on March 2, and off of which she worked and made handwritten notes of her proposals.⁴³ She also identified her counterproposals to the Respondent's submission

45 ⁴¹ The Union here proposed no specific contract language to address their concerns, opting instead to state its position of no change in terms of holiday, vacation, and leave benefits currently enjoyed by the unit employees.

⁴² See GC Exh. 9, a letter from Ayers to Mueller dated March 22, 2005, advising her that the Respondent desired to make the drug-free workplace matter the first item on the agenda for the next session that would take place on March 23. The letter included a copy of the Employer's proposal for the drug-free workplace policy that would presumably be included as a provision in any collective-bargaining agreement. Mueller said the letter was telefaxed to her on March 22.

⁴³ See GC Exh. 10, the Union's counterproposal on seniority dated March 23, 2005.

covering problem solving, grievances and arbitration,⁴⁴ nondiscrimination, and the definition of employees;⁴⁵ and a new proposal dealing with employee layoffs and recalls.⁴⁶

5 Mueller noted that the parties did discuss the Employer's drug-free workplace policy and she proposed a counterproposal on March 23.⁴⁷ Mueller stated that the parties discussed this matter but only to a minor extent in her view; the discussions focused mainly on the savings that would inure to the Respondent's State workers' compensation insurance premiums by implementing such a program. However, according to Mueller, Ayers told the Union that these savings were already anticipated in the 2005-2006 budget. Mueller said this session ended at
10 around 9 p.m.; the parties scheduled another round of bargaining for March 28.

During the March 23 session, Mueller submitted another written request for information to Ayers by way of a follow-up to her previous requests, along with some additional requests.⁴⁸

15 ⁴⁴ See GC Exh. 11, the Union's counterproposal including Mueller's handwritten proposals and redactions.

⁴⁵ See GC Exh. 12. Regarding nondiscrimination and definition of employees, the Union proposed that these topics not be included in the collective-bargaining agreement.

20 ⁴⁶ See GC Exh. 13. Mueller said that she was not sure if the Union had previously submitted contract language regarding layoffs and recalls and apologized to Ayers and the management team for not having Jones' files.

⁴⁷ See GC Exh. 14, the Union's counterproposal regarding the drug-free workplace policy proposal sent to Mueller on March 22.

25 ⁴⁸ See GC Exh. 15. Mueller's letter (in pertinent part) reads as follows:
RE: REQUEST FOR INFORMATION – WARREN COUNTY COMMUNITY SERVICES HEAD
START and SEIU DISTRICT 1199.

This is to follow up on previous requests for information and to make some additional requests.

30 1. With regard to the Union's hand-written request of February 2, 2005, the information provided on or about February 8, 2005 and on March 2, 2005 is not responsive for the following reasons:

35 ° The Union requested copies of the notifications from the State of Ohio for unemployment insurance applications for all bargaining unit employees during the summer of 2004. On March 2, 2005, the Agency provided the number of total applications – without any information as to on who the applications were, or if they were all bargaining unit employees. Please provide the information as requested on February 2, 2005.

40 ° The Union also requested information related to the estimated cost savings related to the Agency's proposal to eliminate paid holidays, paid vacation, paid accumulated leave and to reduce the wages of bargaining unit employees. The information provided on or about February 8, 2005 is non-responsive to the Union's request.

45 2. On March 2, 2005, the Union asked several questions related to the bargaining unit information provided on that day. Some of the information provided was different [from] that information contained on our negotiating team members pay checks. If you were not prepared to provide the information relating to this at our meeting on March 23rd, please be prepared to do so on March 28, 2005.

3. Copies of the Federal Head Start Grant and Supplemental Grants(s) for fiscal years 2004-2005.

50 4. A copy of the Agency's application for the Federal Head Start Program for fiscal year 2005-2006. If the grant application has not been submitted to the Department of Health and Human Services yet, please provide us with the date the application is due, and please also consider this a request to be provided the grant application immediately following its

Continued

4. The March 28, 2005 bargaining session

5 Mueller said that the Union presented a number of proposals/counterproposals as a package and received a counterproposal from the Respondent regarding the drug-free workplace policy.⁴⁹ Mueller noted that while the parties did not reach agreement on the covered topics—management rights, union security, and the drug-free workplace policy—she felt that the Union made a significant concession to the Respondent in terms of granting it the right to fire an employee for a first-time positive drug test. In exchange, the Union sought the Respondent’s agreement to the union rights and security proposal, which she said is traditionally tied to the management-rights clause.⁵⁰ Mueller said there was a substantial discussion of these matters, but no clear resolution was reached.

15 However, Mueller stated that there was some urgency to resolving the drug-free workplace issue because the Respondent indicated that the policy had to be implemented by March 31 to secure workers’ compensation savings benefits from the State of Ohio. Mueller said she informed Ayers that she would make herself available between March 29 and 31 to get the entire “package” resolved. According to Mueller, Ayers said that he would not be available until March 31, but would submit a counterproposal on March 31.

20 Mueller stated that toward the end of this session she announced that the Union wanted to establish April 30 as a bargaining deadline to conclude the negotiations and have a contract in place by the time the unit employees left for the summer break.⁵¹ According to Mueller,

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 submission to HHS.

5. Copies of all of the information provided to former Union representative Julie Jones on or about April 21, 2004. It is my understanding that you have a copy of the complete set of information provided to Ms. Jones; therefore, we do not consider this request to be overly burdensome on the Agency.

30 6. Information relating the Agency’s current workers’ compensations costs and the anticipated savings in those costs should be Agency’s proposed drug and alcohol policy be implemented. Please also provide information relating to when the cost savings will be realized.

35 7. Information relating to the Agency’s unemployment insurance costs paid to the State of Ohio in fiscal years 2002–2003, 2003–2004, and 2004–2005.

8. Information relating to the Agency’s estimated unemployment insurance costs to be paid to the State of Ohio for fiscal years 2005–2006. Please also provide all information relating to how the Agency arrived at the estimation provided pursuant to this request, and the date(s) that the unemployment insurance will be paid to the State.

40 Please provide the requested information within 14 calendar days. Feel free to contact me if you have any questions regarding this request.

45 ⁴⁹ Mueller identified GC Exh. 17, the Union’s counterproposal to the Employer’s proposed union security and union rights, and GC Exh. 18, its counterproposal to the Employer’s proposal on management rights. Mueller said these were “packaged” together. She also identified GC Exh. 16, the Employer’s proposal for the drug-free work policy, and GC Exh. 74, the Union’s counterproposal on this subject.

50 ⁵⁰ Mueller explained that at this point of the negotiations, her goal (thrust) was to the union security-rights clause to the management-rights clause to insure that there was no waiver of rights guaranteed the employees under the National Labor Relations Act. She was willing to accede to the Employer’s drug-free workplace policy proposal on this basis.

⁵¹ Mueller explained that she recognized that the negotiations had been going on for about a
Continued

Ayers objected to this but did agree to her further suggestion that a mediator begin attending all bargaining sessions. Mueller noted that no economic matters were discussed at this session.

5. The March 31 and April 8, 2005 exchange of letters

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The parties did not meet again until April 12, but in the meantime exchanged letters regarding, inter alia, the current state of the negotiations and their relative positions on outstanding issues. Mueller identified a letter Ayers sent to her on about March 31, and her response to him on about April 8, 2005.⁵² Mueller testified that Ayers' letter contained inaccuracies, especially in terms of the information he claimed to have provided the Union pursuant to her previous requests for documentation of the unemployment costs asserted by the Respondent in its 2005–2006 budget worksheet provided on February 8. Mueller said that in her response to his letter, she both clarified her information requests and supplemented them. She also contested certain assertions made by Ayers regarding the Union's conduct of the negotiations heretofore.

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6. The April 12 bargaining session

Mueller said this session began at about 6 p.m.

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Mueller stated that the Union presented its counterproposal to the Respondent's proposal on hiring, promotion, and transfers (GC Exh. 22). The Union received from the Respondent the latest proposals on management rights (GC Exh. 23); the drug-free workplace policy; seniority (GC Exh. 25);⁵³ and nondiscrimination (GC Exh. 26).

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Mueller said she also made a request for additional information regarding the Respondent's workers' compensation costs as part of a follow-up to her April 8 letter and March 23, 2005 request for information at the April 12 session.⁵⁴

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year, that employees would be leaving at the end of the academic year. She felt that a contract should be in place by the fall of 2005. Mueller noted that her intention was not to have a final offer but, with compromise by the parties, an agreement by April 30.

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⁵² See GC Exh. 19, Ayers' letter to Mueller dated March 31, 2005, and Mueller's letter, GC Exh. 20, dated April 8, 2005. These letters are fairly lengthy but, more importantly, I would note that they suggest that Mueller and Ayers' relationship was becoming strained and negative. The contents of the letters are self-explanatory and will not be set out herein. In general, these letters reiterate the parties' positions and highlight with a measure of reciprocated vitriol their points of disagreement. Mueller's April 8 response also informed the Respondent that in view of Ayers' opposition to her April 30 deadline, the Union has reconsidered its position and the matter would be discussed at the negotiation session scheduled for April 12.

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⁵³ Mueller noted that she wrote the Union's counterproposal to the seniority language on the copy she was provided by Ayers at this session.

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⁵⁴ Mueller's information request to Ayers is contained GC Exh. 21. Mueller, referring to her March 23, 2005 request, in item 6, on April 8 asked for copies of all invoices received from the Ohio workers' compensation bureau during fiscal years 2002–2003, 2003–2004, and 2004–2005. On April 12, she requested written information on the percentage of total costs and actual dollar amount of workers' compensation costs charged to the Head Start Program for these fiscal years.

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Mueller also queried the Respondent as to whether workers' compensations costs were included in the mandatory payroll taxes line item of the (2005–2006) budget worksheet provided on February 8, 2005; and if not, what line item was covered.

Mueller said that the parties did not come to any agreements at this session, and there was no discussion of economics.⁵⁵ The next bargaining session was scheduled for April 18.

5 7. The April 18, 2005 bargaining session

Mueller said the parties began this session at around 6 p.m., and both sides exchanged proposals and counterproposals. Mueller said the Union presented its counterproposal to the Respondent's proposal regarding management rights on a copy of the proposal given it on April 10 12 by the Respondent (GC Exh. 23). The Union also presented its counterproposal on seniority (GC Exh. 27); hiring, promotion, and transfer (GC Exh. 28); job descriptions (GC Exh. 29); and work stoppages, strikes, and lockouts (GC Exh. 32), in all cases annotating copies of the Employer's proposals on these topics to make her suggestions.

15 According to Mueller, the Respondent presented the Union with its counterproposal on union activities and representation (GC Exh. 30).⁵⁶

Mueller said that she also presented the Union's proposal on work stoppages, strikes, and lockouts (GC Exh. 32) in response to the Employer's proposal submitted to her on March 2, 20 and informed Ayers that this proposal was "packaged" with the grievance procedure proposals he submitted on March 23.

Regarding economic issues, Mueller related that there was no discussion between the parties on April 18. She noted that the Union had presented the last economic proposal on 25 March 2, so she felt the ball was in the Respondent's court. Mueller was also concerned that the Respondent had not provided the information she thought was vital to the Employer's assertions regarding its financial condition. In this regard, Mueller noted that in her March 23, 2005 letter, she specifically requested information regarding unemployment applications for bargaining unit employees by name for 2004, and the estimated cost savings the Respondent 30 hoped to achieve by eliminating paid holidays and leave, and reducing bargaining unit wages, because the information provided to date was, in her view, unresponsive. In this regard, Mueller noted that she had requested in her March 23 letter to the Respondent information regarding the estimated cost savings from eliminating paid holidays and vacations, etc., but this had not been provided by April 18.

35 Additionally, Mueller noted that the Respondent had not provided information regarding the agency's unemployment insurance costs for the academic years covering 2002 through 2005 and its anticipated costs for the 2005-2006 school term.⁵⁷

40 ⁵⁵ Mueller noted that on April 13, she faxed the Respondent a copy of an addendum to her proposal of March 28 regarding union rights and security.

⁵⁶ Mueller noted that she considered this to be the Respondent's counterproposal to the Union's proposal governing union rights and security. She noted that Ayers would use the terms union activities and representation as opposed to union rights and security. Mueller 45 added that Ayers not only changed the title but made many substantive changes to the proposal.

⁵⁷ It is perhaps useful to note that by April 18, according to Mueller, the Respondent had provided a substantial amount of information called for by her March 23 request for information 50 (GC Exh. 15). For example, she identified a number of documents contained in GC Exh. 33, a cover letter, and GC Exh. 34, that had been provided to the Union (Jones) in April 2004 per her March 23 request; also, the Respondent had provided information regarding the agency's Head

Continued

Mueller said that the parties scheduled their next bargaining session for May 9, 2005.

8. The May 9 bargaining session

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Mueller said the parties met at around 6 p.m., but on this occasion there was a mediator present.⁵⁸

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At this session, Mueller stated that a number of issues were addressed and proposals exchanged.

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Regarding the latter, the Respondent provided its latest proposals on problem solving, grievances, and arbitration on which she and Ayers reached tentative agreement. In likewise, Mueller said that parties reached agreement on the latest employer proposals regarding job descriptions, hiring, promotions, and transfers.⁵⁹

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Regarding the outstanding issues, Mueller said the parties discussed fringe benefits and unemployment costs, wages, and workers' compensation. Mueller identified an employee document entitled "Warren County Head Start Fringe Benefit Computation School Year 2005–2006."⁶⁰ Mueller asked Ayers about the document's unemployment tax computations for each bargaining job classification listed under the mandatory fringes caption, specifically as to how they were arrived at. According to Mueller, Ayers said the Respondent anticipated that each bargaining unit job classification would experience a .063 contribution (to the unemployment tax) for 2005–2006 and that the same percentage was applied to nonunit employees and then totaled to arrive at a figure of \$98,739 for the unemployment taxes the agency would be paying the entire agency.

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Mueller said she responded, telling Ayers that to her numbers were too high and did not reflect what she felt would be the actual unemployment taxes imposed by the State. Mueller said her quick calculations suggested to her that the figures reflected unemployment benefits employees possibly might receive in the summer, but that the agency is not taxed on a one for one (dollar for dollar) basis for benefits paid the employees.

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According to Mueller, Ayers did not offer a response to her concerns and thoughts. Mueller said that she also raised questions about the health care costs contained in the document, specifically whether the estimates were based on actual enrollment. Referring to the

Start application for the 2005–2006 school year on April 18.

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However, I would note that it is clear that by April 18, certain economic issues in particular—paid leave and unemployment costs—were becoming a major component of the discussions between the parties. Mueller felt information covering these concerns was not forthcoming but was vitally important to the negotiations. Mueller noted, however, that the Respondent provided the items called for in item 4 of her March 23 letter—the Respondent's Head Start application for the 2005–2006 school year.

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⁵⁸ Mueller testified that actually there was a mediator at all of the bargaining sessions, except one which session he/she could not attend because of a scheduled vacation. (Tr. 185.) It should be noted that the mediator was not identified by name at the hearing and, of course, he/she did not testify there. On this record, it is unknown what the mediator contributed to the negotiations aside from his/her presence.

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⁵⁹ GC Exhs. 39 and 40, respectively.

⁶⁰ See GC Exh. 35.

notes she made on her copy, Mueller said that Ayers responded affirmatively and estimated 17 employees would enroll in the health care program.

5 Mueller also identified a document she claimed was provided by the Respondent on May 9 purporting to reflect an analysis of the rates the agency paid for unemployment taxes covering January 1, 1995, through December 31, 2004.⁶¹ Mueller says that she queried Ayers about the document and Ayers related that it represented an historical perspective on the agency's unemployment contribution rates covering the entire agency (as opposed to only the Head Start Program unit employees). Accordingly, Ayers said that based thereon, the Respondent was
10 anticipating an .063 contribution rate for the 2005-2006 Head Start school year, commencing July 1, 2005, for the Head Start employees who would be claiming unemployment benefits for the summer as they had done in other years.

15 Mueller said that she had doubts about this because Larry Sargeant (WCCS executive director) had told her the agency was taxed only on the first \$9000 of an employee's salary and not the entire amount as contemplated by this document and Ayers' explication.⁶² However, according to Mueller, Ayers was insistent and firm, saying that the .063 rate (for 1995) was applicable to the Respondent's projected unemployment costs for 2005-2006. Accordingly, for purposes of the negotiations, she used his .063 percentage. Mueller noted that she could not
20 recall Ayers saying that the .063 rate was the highest Ohio could charge for the contribution rate.

25 Mueller stated that at no time during negotiations was she ever told by Ayers or management that WCCS was going to create a limited liability corporation for the Head Start Program to insulate the main agency from Head Start unemployment experience and attendant contribution tax rate, something that ultimately was done effective July 1, 2005. Moreover, Mueller stated that the Respondent never discussed or mentioned the relationship between the creation of the Head Start LLC and its effect on the unemployment tax contribution rate. Then, too, according to Mueller, the Respondent did not mention that once the LLC came into being,
30 Ohio would require the new entity to pay an unemployment contribution tax for the last half of 2005, and then another beginning January 1, 2006.⁶³

35 Mueller volunteered that these documents—General Counsels Exhs. 35 and 35—were partially responsive to her March 23 information request, but still they did not inform when the State taxes had to be paid nor did they explain how the Respondent arrived at the figures contained thereon.⁶⁴

⁶¹ See GC Exh. 36.

40 ⁶² Mueller noted that the document (GC Exh. 26) lists gross wages and taxable wages for any given year. However, the taxable wage is substantially less than gross wage because the employee's entire wage is not taxed for purposes of the unemployment contribution.

45 ⁶³ The State of Ohio requires that the unemployment tax rate be paid on a calendar year basis, that is January through December 31. The State notifies the taxpayer around November of the preceding year what its contribution rate will be for the coming year. For instance, Mueller said that she determined in November 2004 that the WCCS contribution rate was estimated by Ohio to be .020 (2 percent) for 2005. This corresponds to the document (GC Exh. 36) provided to her by the Respondent.

50 ⁶⁴ Mueller, referring to GC Exh. 35, cited as an example the Respondent's estimate that for all family advocates, it would pay \$11,178 in unemployment taxes and the contributions for the other position classifications would total \$98,739. Mueller said that the Respondent provided no documentation to explicate or justify the estimates.

Mueller testified that she never received any information that would support the Respondent's numbers regarding unemployment taxes, which essentially it claimed were going to increase by about \$100,000. Mueller said that she reasoned if she had the underlying information, then perhaps this \$100,000 could be utilized to provide a wage increase or at least no wage cuts as proposed by the Respondent. On balance, at this point, Mueller concluded that the Respondent was intentionally and significantly inflating its estimates.

Mueller also identified a document provided by Ayers on May 9, entitled "Salary and Wages Worksheet With Adjusted Pay Rates School year 2005-2006."⁶⁵

Mueller stated that Ayers presented this document to explicate the wage information the Respondent produced for the April 8 session. Ayers stated that the agency still contemplated a 40-hour workweek with the staffing numbers included in the worksheet for the 2005-2006 school year. Mueller stated that the Respondent was proposing the addition of three bargaining unit staffers and an additional nonunit employee.⁶⁶

Regarding the workers' compensation issue, Mueller said that Ayers provided a document he said was prepared by the agency's financial officer (Hird) that purported to reflect costs and savings to the agency relative to the State workers' compensation insurance.⁶⁷ Mueller said that she asked Ayers whether these figures related to the entire agency or the Head Start Program. According to Mueller, Ayers said the computations related to the entire agency.

Mueller said that before the session ended, she reminded Ayers that the Union still needed information (as requested) regarding the agency's claim that the costs associated with paid leave would add to their overall costs. According to Mueller, Ayers said that he was not prepared to answer this concern that day, especially with respect to Mueller's assertion that there would be no additional costs associated with paid leave.⁶⁸ Mueller said this session ended around 9 p.m. and another session was scheduled for May 18, 2005.

⁶⁵ See GC Exh. 41.

⁶⁶ Mueller noted that at the time, as she recalled, the Respondent carried 38 unit employees and 11 supervisors. The worksheet indicated a unit staff of 41 and a management staff of 12. Mueller said the Respondent said these staffing levels were necessary to run a quality program. Mueller allowed that during negotiations the unit staffers' numbers changed from 41 to 40; the management number remained at 12.

⁶⁷ See GC Exh. 37. This document deals with the premium costs of the workers' compensation coverage for the premium periods covering January 1 through June 30, 2004, and July 1 through December 31, 2004. The document purports to show a 10-percent reduction in those premiums associated with the drug-free workplace program. The reduction is stated as \$14,096 ($\$140,963 \times .10$).

⁶⁸ Mueller said that she had informed Ayers in previous sessions that it was her view that the agency did not incur extra wage related costs in providing paid leave for illness or holidays, including the winter and spring breaks, that its wage costs were fixed and, as a policy and practice, it did not hire substitutes for unit staff absences.

9. The May 18, 2005 session

At this session, Mueller said that the Respondent, among other things, presented its latest economic proposal dealing with wages, hours of work, and benefits.⁶⁹ Mueller said that Ayers commented during the sessions that there were not many changes in this proposal in comparison to the Respondent's February 2 economic proposal. Mueller stated that she observed that the only wage (hourly) changes related to three positions—cook, bus driver, and bus aide—which she noted were respectively presented in the proposal as \$8.84, \$9, and \$8.75. However, during the session, according to Mueller, Ayers said that the cook position was to remain at \$8.50, as would the bus aide wage rate. On balance, Mueller noted that the only wage change was for the bus driver position—a 25-cent reduction from the Employer's February 2 proposal.

Mueller said that she asked Ayers about the number of hours per week he was including in the proposal and he said that the Respondent still wanted employees to work 40 hours. Noting there were no changes in the Respondent's proposal regarding holidays, vacation, and leave, Mueller said that she could not recall asking Ayers specifically about the elimination of all paid leave during this session.

Mueller said that the parties also discussed and reviewed the Respondent's latest proposal on union activities and representation (union rights and security to Mueller). Mueller and Ayers arrived at an agreement on sections 3 and 4 of the proposal.⁷⁰ Mueller said she reserved the opportunity to present a counterproposal for the balance of the proposal at the next scheduled bargaining session, which was ultimately scheduled for June 7, 2005.

10. The June 7, 2005 bargaining session

Mueller stated that at this session the parties discussed a number of outstanding issues, both economic and noneconomic.

Regarding the latter, Mueller said the Union offered its proposal on employee development (GC Exh. 43); its counterproposal on union security, union rights, and union representation (GC Exh. 44); and its counterproposal on seniority (GC Exh. 45). Mueller said no agreements were reached on these items on June 7.

Regarding the economic issues, Mueller stated Ayers submitted a revised budget worksheet that reflected less revenues, and consequently less money for unit wages and benefits.⁷¹ According to Mueller, Ayers represented that the Respondent's financial condition was worsening. Along those lines, Ayer submitted for the Union's consideration a revised salary and wages worksheet.⁷²

⁶⁹ GC Exh. 42, the Respondent's May 18, 2005 proposal for wages, hours of work, and benefits. Mueller stated that the handwritten portions of this exhibit were hers based on the verbal representations of Ayers.

⁷⁰ See GC Exh. 73, the Employer's May 18, 2005 proposal. Mueller identified her handwritten "ok" of sections 3 and 4.

⁷¹ See GC Exh. 46(a), a copy of the revised budget, and GC Exh. 46(b), a copy thereof on which Mueller said she made notations.

⁷² See GC Exh. 47. It is noteworthy that the document includes a projected unit complement of 40 employees. The proposed wages were consistent with the Respondent's May 18 wage proposal.

Mueller said that she asked Ayers whether the agency's revenue projections on the revised budget included the Federal COLA. According to Mueller, Ayers said that they did not.⁷³ Rather, Ayers said that the State contributions to agency revenues were expected to be reduced in 2005–2006, which accounted for the reduced revenue amount (about \$16,530 less) as compared to 2004–2005. Mueller also commented that on June 7, the Respondent's unit staffing number was now 40 as opposed to the 41 offered in other proposals and discussions. She noted that yet and still, the unit employed only 38 at the time. Moreover, the current proposal was for 12 nonunit employees; while there were currently less than that.⁷⁴

Mueller said that she questioned why the Respondent was creating new positions—positions not currently filled—when these funds could be utilized for the existing staff. According to Mueller, Ayers merely said that staffing numbers were necessary to run a quality program for 2005–2006, and that employees had to work 40 hours to achieve this objective.

Turning to the issue of holidays, Mueller said that Ayers provided her with the Respondent's computations for costs associated with providing the unit employees paid leave; Ayers said this was in response to the Union's information requests on the topic.⁷⁵ Mueller stated that Ayers explained the rationale of his computations and concluded that a single paid holiday costs the Respondent \$9358.20. Mueller said that she told Ayers his methodology was flawed because he had not included all of the days unit employees work, only those they were working with the children and that Ayers had reckoned on a 4-day workweek as opposed to the 5-day workweek unit employees customarily worked. Mueller also said that Ayers had included in the holiday cost figure the salary, wages, and fringe benefits of *all* WCCS employees, not solely Head Start workers. Moreover, he had included costs that have nothing to do with wages; e.g., health care costs to the agency. Ayers responded, according to Mueller, telling her that unless the paid holidays were economically neutral, the Respondent could not grant them. Mueller said she then told Ayers, as she had maintained all along, that the paid holidays would be economically neutral.⁷⁶

Mueller testified that she informed Ayers that this approach and the costs he projected was an example of the agency's attempt to inflate costs associated with its proposals, and that the Federal authorities would not support a proposal not to pay Head Start employees for Federal holidays.

Mueller said that the Respondent presented its third proposal for wages, hours of work, and benefits. However, Mueller noted that this latest proposal first did not change much at all from the Respondent's May 18 proposal and, in fact, basically was identical to the February 2 proposal.⁷⁷

⁷³ Mueller said that she had determined on her own that a Federal COLA was going to be made available for the 2005–2006 term.

⁷⁴ Mueller volunteered that it seemed to her that regarding its staffing projections, the Respondent was presenting "moving targets."

⁷⁵ See GC Exh. 48. Mueller identified this document captioned "Warren County Head Start Computation for Cost of Holiday Pay," as the computations presented to her on June 7.

⁷⁶ Mueller long held the view that because of the way the Respondent conducted its operations, with fixed wages and little or no use of substitute personnel, when an employee was absent, the agency incurred no additional work related expense. In short, irrespective of whether the Head Start Program was in operation, the agency's costs for wages did not change.

⁷⁷ See GC Exh. 49. According to Mueller, the June 7 proposal differed only in terms of

Continued

Mueller conceded that the Union (and the Respondent) did not discuss this proposal at length because the agency had just given the Union a proposal on May 18 suggesting worsening financial condition, about which there were still significant questions as well as questions about the agency's unemployment costs and staffing numbers. Mueller said then, too, there was the Federal COLA which had not been factored into the anticipated revenues of the agency for reasons that were unclear to the Union.

Mueller said that this session ended without resolution of these issues. However, Mueller noted that Ayers announced on this date that the Respondent wanted to create a separate legal entity for the Head Start Program in order for WCCS to assure that Head Start funds were being used solely for the program. Mueller said that Ayers said this move had nothing to do with or would have no effect on the Union. Mueller said that Ayers did not connect the creation of this entity with unemployment costs or savings in general to the agency's operations.⁷⁸

11. The June 22, 2005 bargaining session

Mueller said the parties again met to resume bargaining negotiations on June 22 at around 9 a. m. and again discussed both noneconomic and economic issues.

Among the former, Mueller said the Union considered the Employer's proposal on seniority (GC Exh. 51); union activities and representation (GC Exh. 52); education assistance (GC Exh. 53); and in-service training (GC Exh. 54). Mueller said the parties reached agreement on the latter two proposals after some deliberation and signed off on these items.

Mueller also identified another request for information she made of Ayers at this session, this time for an updated bargaining unit roster.⁷⁹ Mueller said that Ayers provided this information to her on June 22, 2005.⁸⁰

Regarding the economic matters, Mueller said that the Respondent provided its fourth economic proposal covering wages, hours of work, and benefits at this session.⁸¹ Mueller testified that while the proposal was for all intents and purposes identical to the previous proposals, with perhaps minor changes, she nonetheless asked Ayers what the agency meant in the proposal by reference to minimum straight time hourly rates. According to Mueller, Ayers said that the agency intended to pay the unit employees according to the proposed wage rates

removing a provision, the term "30 days or more" from sec. 5, the insurances provision. Mueller also testified that this proposal, also by its terms, confirmed Ayers' verbal representation in February that the Respondent intended to eliminate accrual of accumulated leave and disability (disability reserve) leave.

⁷⁸ See GC Exh. 50, a copy of a letter dated June 10, 2005, from Ayers to Mueller, advising her of a letter to be distributed by Larry Sargeant to the agency's employees announcing the formation of Warren County Community Services – Head Start, LLC, and advising them among other things that the conditions of their employment were not anticipated to change and to complete tax withholding forms.

⁷⁹ See GC Exh. 55, Mueller's June 22, 2005 request to Ayers for an updated roster of bargaining unit employees to include the name, position, wage rate, date of hire, address, current number of weeks per year, and current number of hours per week.

⁸⁰ See GC Exh. 56. This response seems complete and responsive to Mueller's request.

⁸¹ See GC Exh. 57.

but that the agency also reserved the right to have a probationary rate less than the listed wages.

5 Mueller noted that because this proposal, like the ones that preceded it, reflected no changes, the Union saw no reason to submit another economic proposal at this session even though the Respondent, now for the first time, indicated a lesser probationary rate was contemplated in its proposed schedule of wages.

10 Mueller said that she again asked Ayers about the Federal COLA, specifically whether the proposed rates would be adjusted by the COLA. According to Mueller, Ayers said that the proposed wage rates contemplated the COLA, that the COLA had been received and incorporated in these rates. Ayers also said the rates contemplated a 40-hour workweek for full-time employees and overtime pay for hours worked in excess of 40.⁸²

15 Regarding the insurances covered by the proposal, Mueller said that Ayers, in response to her question, said that eligible employees meant any employees who worked 30 or more hours per week. Ayers also explained that as to this proposal, employees are covered by the applicable insurances, but that in practice only until May 31 of any given year; May 20 would be the recognized layoff date and health care coverage, for example, would end on May 31.

20 Mueller identified a document captioned "Warren County Salary and Wages Worksheet, School year 2005-2006" that Ayers provided on June 22.⁸³

25 Mueller testified that on receipt of this document she compared it to a similarly captioned document (GC Exh. 41) the Respondent had provided to her at the May 9 session. She noted that the bargaining unit staff numbers had changed from 41 then to 40 on June 22 and a position description had changed from teacher's assistant to CDA teacher assistant.⁸⁴ Mueller testified that she complained to Ayers that the staff numbers kept changing and questioned him regarding the change in the position description.

30 According to Mueller, Ayers again said that the staffing numbers reflect the Respondent's concern about running a quality program as required by the Federal government. Regarding the position description change, Mueller said Lisa Cayard said that the agency was required to have a teacher in every classroom who possessed an associate's degree. A person who possessed only a CDA certificate could not be classified as a teacher; she could only be a teacher's assistant.

40 Mueller said this full-day session ended at around 3 p.m., with her informing the Respondent that it would be presenting a counterproposal to include (among other items) one for a 38-hour workweek, which would save money in the Union's view. The next meeting was scheduled for July 12, 2005.

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⁸² Mueller said that currently the employees were working 38 hours per week and this led her to ask about overtime pay for hours worked over 40 hours.

⁸³ See GC Exh. 58.

50 ⁸⁴ CDA teacher assistant was a position also listed in GC Exh. 57, the June 22, 2005 economic proposal.

12. The July 12, 2005 session

5 Mueller said the parties met and discussed a number of noneconomic issues to include union rights and security, the Union's request that the Respondent make deductions for its political action program, and a September 30, 2008 duration date for the contract.⁸⁵ However, no agreements were reached on these issues.

10 Mueller said that she raised the issue of the educational requirements of Head Start teacher, noting that Cayard at the last session had stated that WCCS was required to have a degreed teacher in all classrooms; Mueller said she thought this was not the case (her word, "strange"). Mueller said that she personally had researched this point and determined that the nationwide Federal standards required only 50 percent of Head Start teachers in center-based programs to have (associate, bachelor, or advanced) degrees in early child education or in a related field. Thus, to Mueller, Cayard's assertion that the Respondent was required to have 15 100 percent of its classrooms covered by a degreed (associate) was simply not accurate,⁸⁶ and she expressed her findings to the management team.

20 According to Mueller, Cayard thereupon said that the agency did not find out until May 2005 that the regulation on which she based her assertion on June 22 did not change after all. At this, Mueller said that she told the Respondent's team that Cayard had claimed the regulations currently required a teacher with an associate's degree in every single classroom, and she viewed this as an attempt to mislead the Union with inaccurate information regarding the agency's staffing needs.⁸⁷

25 Mueller said that she then demanded that the Respondent rescind any transfers of employees made based on this mistaken interpretation of the regulations. According to Mueller, Ayers countered, saying that the management-rights provisions of the contract proposal permitted such transfers; to which she countered, saying that the transfer article negated this action. Mueller, noting that Ayers was speaking as if the contract were in place (and it was not), 30 said she insisted that all transfers⁸⁸ based on the Respondents' erroneous view of the credentialing regulations should be rescinded and that the Respondent not change the title of classroom teacher to teacher's assistant, since these unit employees were entitled to that title.

35 Turning to the economic issues, Mueller said that the parties discussed the Head Start revenues anticipated for 2005-2006. According to Mueller, Ayers identified the following revenue sources for 2005-2006:

40 ⁸⁵ Mueller noted that the September 30 duration or termination date was proposed because the Union's contracts with other Ohio Head Start Programs terminated on September 30, 2008.

⁸⁶ Mueller identified GC Exh. 59, a document entitled "Federal Regulations and Teacher Credentialing," purporting to deal with the pertinent teacher credentialing provisions of the Head Start Act, 42 U.S.C. 9835, which she presented at the bargaining session.

45 ⁸⁷ According to Mueller, Cayard further explained on July 12 that she had considered some proposed legislation in the Congress which would require a higher level of teacher credentialing for Head Start, but that she did not learn that the legislation did not pass until May 2005. However, Mueller said she was told as early as the June 7 session that by regulation the agency was required to have a teacher with an associate degree in every classroom.

50 ⁸⁸ Mueller said that she made it clear that the transfers she was concerned about did not relate to the closing of the Hampton Bennett center, which she discovered later did not occur in August 2005. Mueller insisted that her concern on July 12 related to any transfers made under the credentialing regulations cited by Cayard.

a. HHS Basic grant	\$1,593,456
b. Basic grant COLA	15,935
c. PA20 grant	23,156

5 This resulted in a total of \$1,632,547 in Federal Head Start funding. Ayers also identified additional funding as follows:

10 a. United Way	\$25,000
b. U.S. Department of Agricultural	77,886
c. Day Care	20,000
d. School	18,000

15 Additional funding totaled \$204,534. The total amount provided by Ayers for revenues was \$1,837,000.⁸⁹

20 Noting that on June 7, the Respondent had reckoned on revenues of around \$1,836,535, Mueller said that both she and Ayers agreed that in terms of available revenues they were fairly close in their respective computations.⁹⁰

25 Mueller said that she again raised the paid leave issue on July 12. According to Mueller, Ayers merely said that there was no room in the agency budget for paid leave. Mueller testified that she again told Ayers that there were no additional costs associated with some forms of paid leave because, as she had said before, the agency did not employ, or only rarely paid, substitutes for absent employees; therefore, there were no additional wages or salary costs incurred when unit employees were not working.⁹¹

30 Mueller said that the Union also presented its economic counterproposal at the July 12 session. Mueller said this was presented to keep the dialogue moving, but also to demonstrate that it was still flexible on a number of issues.⁹²

35 ⁸⁹ Mueller noted that on June 22, Ayers, for the first time, acknowledged that the agency was anticipating revenue from the Federal COLA for 2005–2006; however, there was no corresponding change in the wage proposal. Accordingly, Mueller wanted Ayers to “walk through” the sources of revenue as identified by the Respondent to clarify the revenue picture.

40 ⁹⁰ Mueller testified, however, that the budget worksheet (GC Exh. 46) provided by management on June 7 did not include the Federal COLA, at least according to Ayers who also said then that the Ohio contribution was going to be less, so the State’s day care grant—\$20,000—was going to go down from the original projection. As of July 12, this did not evidently occur. However, Mueller noted that in spite of this nonevent; the revenues did not increase appreciably, which led her to conclude that some other category of projected revenues must have declined.

45 ⁹¹ As previously noted, Mueller had earlier argued that since the Respondent’s wage costs were fixed in its budget, it incurred no extra wage costs for any of the paid holidays or breaks in the school year.

50 ⁹² Mueller identified GC Exh. 60 as a copy of the Union’s counterproposal which covered in various articles, hours of work, wages, insurance coverages, paid leave, unpaid leave, disability insurance, and short-term absences. Mueller noted that the proposal highlighted changes from its earlier proposals in italics or raised print.

According to Mueller, the Union's counterproposal included a change from a 40-hour week to a 38-hour week to save money; the addition of paid and unpaid meal breaks; eliminated the retroactive pay increase (for 2004-2005); sought a 1-percent wage increase effective July 1, 2005 (the equivalent to the anticipated Federal COLA amount); clarified the insurance coverages and employee contributions; added a retirement provision to confirm the retirement benefits unit members currently received.

Regarding paid leaves, Mueller said the basic provisions with some modification were taken from the Respondent's own personnel policy⁹³ Mueller testified that she told Ayers that, basically, the Union wanted the agency's leave policies included in the contract.

Mueller said that once these matters were discussed in the morning session, the parties caucused for about 3 hours.

When the parties resumed, Mueller said Ayers presented the Respondent's final offer to the Union.⁹⁴

According to Mueller, Ayers in announcing the final offer stated that the agency had been contemplating its program and the design thereof for many months and was also faced with an uncertain financial future. Accordingly, the agency could not provide any form of paid leave; it had concerns about a 3-year agreement in this light; that its unemployment costs projects were historically based and reasonable; and the agency insisted that it needed 40 (unit) employees working 40 hours per week.

According to Mueller, Ayers at the time more or less walked the Union through its final offer, identifying the parties' tentative agreements as well as the outstanding issues, including some changes the agency was proposing.⁹⁵

Mueller noted that part of the final offer regarding the economic issues—specifically wages, hours of work, and benefits—basically was identical to its proposal of February 2, 2005, with some exceptions.⁹⁶ For instance, Mueller said the July 12 proposal dealing with

⁹³ Among other changes, the Union proposed specific holiday observations for which unit members would be paid, to include New Year's Day, Martin Luther King Day, President's Day, Memorial Day, Independence Day, Labor Day, Thanksgiving Day and the Friday afterwards, Christmas Eve, and Christmas Day.

⁹⁴ The final offer is incorporated in GC Exh. 61. The document is dated July 12, 2005, and signed off on by Larry Sargeant for the Respondent.

⁹⁵ Mueller pointed to the management-rights article (p. 26) of the final offer, noting here that the agency added language clearly allowing management to change employees' work locations for the academic year.

⁹⁶ Mueller pointed out that in sec. 1 of this wage proposal, the Respondent revised its June 22 position and changed CDA teacher assistant back to CDA teacher. In sec. 5 (insurances), Mueller said the agency added language indicating that eligible employees would not pay more than 50 percent of the monthly premiums for medical and/or dental coverages. The Respondent otherwise continued in this proposal to eliminate health care coverage during the summer months. Ayers' verbal assertion on leave time, made February 2, was incorporated in the final offer. Mueller also noted that the February 2 proposal was supplemented on July 12 by a new sec. 7 wherein overtime, based on a 40-hour workweek, was included along with a new sec. 8 that allowed for a retirement savings plan that permitted the Respondent to match at its sole discretion any employee contributions.

medical/dental/optical, death, and disability insurance was identical to the Respondent's February 2 opening proposal.

5 Mueller commented that while the Union (through and by Jones) had agreed on the contract's duration and termination in May 2004, Ayers had inserted a termination date of August 11, 2008, a 3-year term—August 12, 2005, through August 11, 2008. However, Mueller testified that this was a "first" from Ayers, as he had not mentioned this before in her negotiations with him.

10 Mueller stated that her reaction to the Respondent's final offer was one of shock and dumbfounded surprise and, in her view, highly inappropriate given the then current stage of the negotiations; there were too many (unanswered) questions regarding the agency's economic and final condition for any employer to conclude their final offer was reasonable.

15 Mueller said that she told Ayers that the Union thought it needed to get to the bottom of what funds the agency had available before either party should resort to final proposals. Mueller said that she also informed Ayers that the Union remained flexible on salient issues, such as health care and the important issue of unemployment,⁹⁷ union security,⁹⁸ and reopener clauses in the contract to meet the agency's concerns about economic concerns that could
20 come up in the second and third year of the contract.

Mueller also said that during the 3-hour caucus she had "crunched some numbers" associated with the Respondent's unemployment costs, a clear wage or economic stumbling block in the negotiations, and advised Ayers that the agency's numbers were wholly inaccurate, that the agency had over-projected its unemployment costs by around \$54,000.⁹⁹ Mueller said
25 she asked Ayers to explain the discrepancy. According to Mueller, Ayers merely said that he would look into the matter.

Mueller again questioned Ayers on the staffing numbers. Mueller said she argued that
30 the current staffing levels of 38 would result in savings, but Ayers insisted on 40 on July 12. Mueller said she insisted that the agency was running a "quality program with 38 employees

35 ⁹⁷ Mueller, noting that the Respondent had projected a \$100,000 increase in unemployment costs, said she proposed to Ayers on July 12, as a showing of union flexibility, a requirement that employees receive their pay on a 12-month basis which would disqualify them from filing any unemployment claims and therefore there would be no additional unemployment costs. According to Mueller, Ayers said then he would consider this.

40 ⁹⁸ Mueller said that while there was "movement" here, the basic unresolved issues centered on the payment of union dues or service fee, whether unit employees would be required to pay these, whether there would be an open shop—the agency view—and whether the Union would have to reimburse the agency for costs of the dues deduction.

45 ⁹⁹ Mueller testified at some length about how she arrived at this conclusion. In essence, Mueller said that by using the Respondent's projection of an .063 computation rate on the first \$9000 of a unit employee's wages (by job classification) for purposes of arriving at unemployment costs to the agency, the total costs were \$22,680 as opposed to the Respondent's projection of \$76,303. Mueller testified that after the July 12 session, she realized that she had omitted the teacher assistants from her calculations. However, the agency had included this classification in the calculations. Mueller said that her calculations for the teacher
50 assistants were \$4500; the agency projected \$16,767. So, on balance, the agency had projected around \$76,383 in total unit unemployment costs; the Union had projected around \$27,180.

and if the work were continued at the present 38 hours, savings on both counts would be realized. Mueller said that she represented to Ayers that if the agency would add up the realistic unemployment costs, keep the staff at 38—working a 38-hour workweek—the Union and the Respondent were not very far apart by her calculations.¹⁰⁰

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Mueller testified that the Respondent's final offer in her view eliminated all paid holidays, including the time off at the winter and spring breaks; eliminated all vacation leave (at least for one unit employee who worked year round); made health care—dental, death, disability, optical—optional, while declaring that employees would pay no more than 50 percent in premiums when they currently paid 20 percent; eliminated currently provided health care insurance during the summer months; eliminated accumulated leave and disability leave then currently available to the unit employees; declared that the agency would make matching retirement contributions in its sole discretion, as opposed to the current 50 percent matching up to 6 percent of the unit employees' wages. Mueller stated that there were severe and drastic reductions of most employee benefits; that the proposed wage rates were about 14 percent less than those currently in place and were no different from those proposed initially by the Respondent on February 2, 2005.¹⁰¹

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According to Mueller, Ayers responded to her proposals by saying that the agency would consider a counterproposal from the Union. However, Mueller said that she told Ayers because the Respondent's proposal was final in nature, the membership would have to vote on it. According to Mueller, Ayers said to let him know about the results.

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Mueller said that the July 12 session ended on this note. The parties have not negotiated since July 12, 2005.

13. The aftermath of the July 12, 2005 bargaining session

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Mueller said her next step was to inform the membership of the Union's nonacceptance of the Respondent's final offer, and toward that end distributed a notice¹⁰² to the Head Start employees, inter alia, setting out the details of the agency's proposal as compared with the employees' current wages and benefits; asking them to vote to reject the offer; and authorizing a strike. On July 26, Mueller said the union membership voted on the final offer and unanimously rejected it.

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Mueller testified that on July 27, she sent a letter to Ayers not only informing him of the vote of the members, but to remind him of the Union's continued flexibility on many of the outstanding issues and its belief that further negotiations would be productive and conducive to arriving at an agreement. Toward that end, Mueller said she requested in this letter information relating to the issues still outstanding between the parties—particularly those which dealt with the matters of unemployment costs, health care, disability costs, accumulated leave, and paid

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¹⁰⁰ Mueller noted that the Respondent's figures resulted in unit employee costs to be \$537,783 (GC Exh. 58). Mueller said her reckoning of the costs with the 1-percent increase included were \$614,052, a difference of \$76,269. Notably, however, the estimated cost savings of keeping the staff at 38 and on a 38-hour week were not stated by Mueller.

¹⁰¹ Mueller stated that in her view, every bargaining unit employee except perhaps one (unnamed) would have received on average a reduction in her wages.

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¹⁰² See GC Exh. 62, a copy of the Union's notice to the Warren County Community Services Head Start employees. Mueller noted that her notice referred to a letter the Respondent had distributed to unit employees setting out the terms of the agency's final offer.

leave for the winter and spring breaks, and other miscellaneous matters covered in the negotiations. Mueller's request called for a response by August 5, 2005.¹⁰³ Miller testified that the Respondent did not provide the information she requested in this letter and, in particular, never provided information explicating the agency's projection of \$76,383 in unemployment costs for the 2005-2006 term.

On about July 29, Mueller stated that she sent a follow-up letter (to the July 27 letter) to Ayers requesting information relating to the agency's proposed assignment of staff for the upcoming term to include name, shift location, classroom number, and certain Federal tax information.¹⁰⁴

Mueller stated that on August 2, she received a letter from Ayers in which he acknowledged receipt of her July 27 and 29 letters and took issue with her characterizations of the agency's final offer and its efforts in general regarding the negotiations, but more importantly advised the Union that the Respondent declared the parties to be at impasse.¹⁰⁵

Mueller said she responded to Ayers by letter on August 5,¹⁰⁶ in which she criticized the agency's last economic proposal in particular as being essentially the same as its February 2 initial proposal, especially in terms of the unexplained projection of around \$99,000 in unemployment costs.¹⁰⁷ Mueller noted that she, accordingly, requested additional information from the Respondent to aid her in resolving the questions surrounding the unemployment tax contributions matter.

Mueller identified a letter she received from Ayers dated August 10, 2005, advising her that the agency would continue to gather information in response to her letter and would complete its response early in the following week.¹⁰⁸

¹⁰³ See GC Exh. 63, a copy of this letter. For instance, Mueller's request on July 27 in items 4 and 5 requested information about the number of unit and nonbargaining unit employees who applied for unemployment during the summer of 2005. Mueller testified this was relevant to the Respondent's claim of a projected increase of around \$100,000, a major item in the budget. Mueller wanted to determine if the Respondent's high projections included nonunit members and in what numbers. Mueller believed that the projected increase of .020 to .063 contribution rate was only in part attributable to bargaining unit members.

¹⁰⁴ See GC Exh. 74, a copy of this letter. Mueller requested copies of the agency's Internal Revenue Service (Federal) for 990 forms for 2002 and 2003. Mueller did not explain clearly—at least to my ken—what the forms covered or why she needed them. I note that Mueller's testimony did cover the issue of agency employees' taxable wages as reflected in documents provided by the Respondent in GC Exhs. 35 and 36.

¹⁰⁵ See GC Exh. 65, a copy of this letter. Ayers' letter concluded with the statement "that should the Union desire to make a counterproposal the Employer will consider it."

¹⁰⁶ See GC Exh. 66. A hole was regrettably punched through the date part of this letter when it was placed in the exhibit file. Mueller testified, however, as to the date of the letter.

¹⁰⁷ Regarding these costs, Mueller specifically questioned the Respondent's claim that it would spend \$99,000 in unemployment costs as opposed to the Union's projection of around \$29,800 based on the agency's projected tax rate of .063 and Ohio's tax computation methodology which taxed only the first \$9000 of an employee's salary. Mueller noted that this approximately \$70,000 difference would provide that much more in terms of reaching agreement on the economic issues.

¹⁰⁸ See GC Exh. 67, a copy of this brief letter.

On August 15, Mueller said she received a letter and enclosures purporting to respond to her requests of July 27 and August 5.¹⁰⁹

14. Events leading to the withdrawal of recognition by the Respondent

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Mueller testified about events and circumstances that preceded the Respondent's withdrawal of recognition of the Union on September 20, 2005.

10 Mueller stated that on September 1, 2005,¹¹⁰ she received a letter from Ayers informing her that the financial position of the Head Start Program continued to erode and that certain steps were being contemplated to meet the situation, among them a possible reduction of staff and/or hours, along with a definite plan to consolidate the Hampton Bennett Center and other existing centers, but with no involuntary reductions among the employees or other forced changes in jobs. Ayers also proposed to meet on September 12 or 23 to discuss these issues.

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20 Mueller testified that she was very concerned about this information because the Respondent had already proposed drastic (to her) wage and benefits cuts and now the agency's financial situation was said to be worsening. Accordingly, on September 2, Mueller e-mailed Ayers to schedule a meeting for either September 13 or, in the alternative, September 20 or 21 in the evening. Mueller also reminded Ayers that the Union had not received the information requested by letter on July 27 and August 5 and would he provide same at the meeting. Ultimately the parties agreed to meet on September 21.¹¹¹

25 On September 19, Mueller said that she received a letter and certain enclosures from Ayers purporting to supplement the Respondent's earlier responses to her information requests of July 27 and 29, and August 5.

30 Mueller testified that this letter and the related enclosures were not responsive to the outstanding issues covered by her previous requests. She explained that with reference to costs associated with unemployment taxes, the Respondent's projections previously provided related to the entire agency, not solely to the Head Start Programs (unit) employees.¹¹²

35 ¹⁰⁹ See GC Exh. 68. This exhibit contains a number of documents which seem to be responsive to the Union's requests of July 27 and August 5. Mueller, however, testified that the Respondent in this letter did not provide requested information relating to nonbargaining unit employees' unemployment filings during 2005 as she requested in item 5 on July 27. Mueller also stated that the agency also did not provide requested information regarding the unemployment compensation costs projections for 2005-2006 for both unit and nonunit employees—items 10 and 11 of the July 27 letter. In her August 5 letter, Mueller requested information from the agency explaining its continued projection of a .063 tax rate for unemployment effective July 2005, when the agency had indicated a rate of .020 through December 31, 2005, on a May 9, 2005 document given the Union on that date (item 3). The agency did not provide any explanation in this letter, according to Mueller.

40 ¹¹⁰ See GC Exh. 69.

45 ¹¹¹ See GC Exhs. 7(a) and 7(b), a series of e-mail messages between Mueller and Ayers' office.

50 ¹¹² See GC Exh. 71, a copy of the September 19 letter from Ayers. This letter included brief discussions of the Respondent's positions on unemployment compensation costs and costs projections for holiday pay, disability reserve, paid leave, and accumulated leave.

See also GC Exh. 71(a), copies of the Warren County Community Services contribution rate determinations by the State of Ohio for the years 2003-2005; notices of (unemployment

Continued

5 In a similar vein, Mueller felt that the contribution rate documents Ayers provided dealt with the entire agency's unemployment experience, and thus were irrelevant to the Head Start budget. Mueller also noted that documents provided by Ayers indicating a \$50,000 unemployment charge to the agency for July and August 2005 was not a cost to the Respondent, but the actual amount of benefits paid to all agency employees who applied for unemployment.

10 Mueller said that the September 19 letter was not responsive to her requests for an explanation from the Respondent regarding its claim that the unemployment contribution rate as projected by the agency would be .063. By way of background on this point, Mueller said that all along the Respondent did not adequately explain to her its projections on how the Ohio unemployment contribution process worked. So she undertook her own research and investigation of the matter between July 27 and August 5.

15 Mueller testified that her research revealed that the Ohio unemployment authorities notify agencies such as the Respondent as to what their contribution rate will be for the next year at the end (around late November) of any given year. Accordingly, Ohio should have informed the Respondent around the end of November 2004 what its contribution rate would be for 2005. Mueller's research determined that as of November 2004, the agency's contribution rate was determined by Ohio to be 2 percent, not 6.3 percent.¹¹³ Based on this research, Mueller said that she requested in her August 5 letter that the Respondent explain or support its projections.

25 Mueller said the documents provided by Ayers on September 19 as well as his written comments merely recited the entire agency's high rate experience costs for 1995 through 1997 (before the agency's use of employment contacts which curtailed unemployment claims), and the aforementioned \$50,000 benefit payout¹¹⁴ in response to her August 5 request which asked for the justification for the .063 projection.

30 Mueller noted that in his September 19 letter Ayers said that with respect to the cost projections for holiday pay, the disability reserve, paid leave, and accumulated leave, the Respondent had made no cost projections because of the way it prepared its budget for 2005-2006. Mueller testified that she felt this response was irresponsible (and unresponsive to her requests).

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compensation) benefits paid (to agency claimants, never removed) and charged to WCCS for the period June 7 through August 21, 2005. These documents were included in the September 19 letter.

¹¹³ It should be noted by way of a reminder that the Respondent had not been set up as a limited liability corporation in November 2004.

45 ¹¹⁴ Mueller conceded that while the \$50,000 payout in July and August 2005, as she understood the unemployment contribution rate process, could ultimately affect the Respondent's tax rate, she, nonetheless, considered this payout of benefits irrelevant to her concerns about the Respondent's seemingly high .063 percentage and the reasons therefore. She noted that this was especially an issue, considering the Respondent's estimate of a nearly \$100,000 increase in costs for unemployment based on this .063 percentage which even if
50 considered a supportable as applied to the Respondent's employees, the Respondent's computations seemed erroneous.

Mueller explained that in her view, the agency was representing to the Union (and the membership) that it proposed to wipe out all forms of leave but it had no idea if there were any savings associated with this move; they had evidently performed no analysis about possible savings or costs associated with their position.

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Mueller noted that at this juncture, what with the Respondent's final offer in place, she needed to have the sought-after information which she felt was critical in order to present a thoughtful and complete counterproposal, one which could incorporate an analysis of costs associated with the parties' respective positions.¹¹⁵ Mueller said that she was prepared to find a compromise on economics and union security but did not want to rush the process. At the time of Ayers September 19 letter, the needed information from the agency had not been received or was incomplete. Furthermore, Ayers had indicated in early September that the agency's condition had worsened. Mueller said, nonetheless, that the Union was flexible and that progress was being made in preparations to meet with the Respondent on September 21 as per Ayers' letter.

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However, by letter dated September 20, Mueller said that she was informed by Ayers that the Respondent was withdrawing recognition of the Union and that all planned bargaining sessions were canceled.¹¹⁶

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On about September 30, Mueller said she became aware that the Respondent had announced a pay increase for the unit employees effective October 3, 2005, and notified them that many of the benefits proposed for elimination during bargaining would be continued.

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¹¹⁵ Mueller explained that because of the final offer and declaration of impasse, the entire negotiations went to another level that would obligate the Union to ask the membership to take other pressure tactics to include a possible strike; she wanted to avoid this if possible. In her view, the effect of the final offer was in her words "huge" and unnecessary in her experience. According to Mueller, most employers know that the union will be forced to react along these lines and try to avoid a final offer which basically connotes a this-is-the-best we can do position. Mueller said that the members were alarmed (scared) over the magnitude of the Respondent's proposals, specifically the drastic wage cuts. Mueller said that in fact, she received letters from members who said they were withdrawing their membership after the July 12 final offer. (See GC Exh. 110, various letters sent to the Union by members seeking to withdraw from union membership between July 19 and August 22, 2005.)

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¹¹⁶ GC Exh. 72, Ayers' letter dated September 20, 2005, informed Mueller that its withdrawal was based on copies of signed statements of 18 unit employees indicating that they individually no longer wanted the Union to represent them; copies were included with the letter.

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Shelby Creech testified at the hearing, stating that she submitted a resignation statement to the Respondent on September 13, 2005. Creech said the agency's final proposal which she recalled reduced hours, pay, paid holidays, and eliminated insurance during the summer months influenced her decision to disaffiliate from the Union. Another unit employee, Barbara Howard, testified, stating that she recalled the agency's final offer, specifically the proposed pay, holiday, sick leave, and accumulated leave cuts. Howard said she had never received a pay cut prior to the Union nor any elimination of all forms of paid leave. Accordingly, she signed the petition to get rid of the Union. She reasoned that if we ousted the Union, then everything would go back to the way it was. (Tr. 453.)

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15. The aftermath: Mueller's assessment of the Respondent's conduct during bargaining

Consistent with the charges in the complaint, Mueller testified that she felt the Respondent's overall conduct constituted bad-faith bargaining which directly contributed not only to no agreements being reached, but also a majority of the unit employees' opting to withdraw from the Union, which in turn led to the Respondent's withdrawal of recognition of the Union.

Mueller stated that her feelings were predicated on the following conduct of the Respondent, which she characterized as false, misleading, incomplete; or nonresponsive to the legitimate concerns of the Union during negotiations.

- ° At no time before withdrawal of recognition did the Respondent inform the Union that it was filing a separate tax identification number of the Head Start Program for unemployment compensation purposes and never informed the Union that the new LLC Head Start entity was or would be paying either a .020 or .027 contribution rate. The agency never moved from its .063 contribution rate projection during the entire negotiations.
- ° The Respondent at no time during negotiations said it would have to pay unemployment taxes twice in 2005, one for the entire agency and another for the new LLC.
- ° At no time prior to September 20 did the Respondent inform the Union that it intended to grant pay increases for the 2005-2006 school year.
- ° At no time prior to withdrawal of recognition did the Respondent propose a 1-year contract or any agreement less than 3 years.
- ° The Respondent never advised the Union that the agency's financial condition was actually improving because of vacancies and resignations.
- ° The agency and the Union never reached agreement relative to terminating the employment contracts in their entirety. Also, the Respondent never advised the Union that it had informed unit members by letter they would be required to be paid over 19 pay periods as opposed to the 26 payments¹¹⁷ when, in fact, the parties had not reached agreement on this point.
- ° The Respondent notified her on September 1, 2005, that it was closing the Hampton Bennett Center without giving the Union an opportunity to bargain over the closing and its effects.¹¹⁸

¹¹⁷ Mueller said that she first learned of this from a union member who told her she had received a letter to the effect around August 31, 2005. (Tr. 309.) Notably, Sheila Rooks, a member of the Union's bargaining team, testified that the parties did not reach any agreement to no longer use employment agreements after the 2004-2005 school year, only to remove the clause wherein the employees agreed not to file unemployment claims.

¹¹⁸ Mueller said that Theresa Fitzpatrick, a member who worked at Hampton Bennett, called her and informed her of the closing of Hampton Bennett. Fitzpatrick testified at the hearing. Fitzpatrick corroborated Mueller, stating that she attended a meeting in her home where her supervisor, about a week before returning to work on August 24, told her that Hampton Bennett

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5 ° The Respondent never presented any additional proposals after its final proposal of July 12 in spite of the Union's stated and apparent flexibility on outstanding issues and willingness to continue with negotiations.

10 ° The Respondent told the Union on June 7, and later on June 22 during negotiations that the agency's wage projections did not include a federal COLA, when in fact unknown to the Union, the Respondent had applied on May 25 for a COLA and represented to the federal authorities that it planned to increase the salary schedule by at least 1.5 percent effective October 3, 2005.¹¹⁹

15 ° The Respondent did not furnish requested information regarding the number of nonbargaining unit employees who applied for unemployment compensation for the summer of 2005.

20 ° The Respondent eliminated unilaterally its contribution to unit employees' health care coverage for the summer months.

25 ° The Respondent insisted during bargaining that for 2005-2006 academic year that it could only operate a quality program with 40 unit employees when, in fact, it started that year with 35-36 employees.

30 ° The Respondent during bargaining disingenuously inflated its unemployment projections for the 2005-2006 academic year by insisting on utilizing taxes it paid in the past for the entire agency (140-160 employees) when in fact the Head Start Program involved only 40-50 employees.

35 ° The Respondent willfully failed and refused to provide relevant and vital information requested by the Union on July 27 and August 5.¹²⁰

40 had been closed and she and others were being transferred to other facilities. Fitzpatrick said she reported for work on August 29 to her new assignment, Louisa Wright.

45 ¹¹⁹ Mueller referred to the Respondent's application for Federal assistance dated May 25, 2005, a copy of which Ayers provided to her on August 15. (See GC Exh. 68.) Mueller said she asked Ayers on June 7 whether the agency's budget projections included the COLA and he said no. But this document indicated that the agency had applied for the COLA and represented to the Federal authorities that the salaries were to increase by 1-1/2 percent as of October 3, 2005. Mueller said this proposal was never made to the Union and Ayers told her on June 22 the agency was not going use the COLA to increase the wage rate proposal for 2005-2006.

50 ¹²⁰ Mueller stated that with respect to her July 27 request for information, the Respondent at no time before withdrawal of recognition provided information called for by items 5, 10, and 11, all of which related to the agency's projections of the unemployment issue. Regarding the Union's request for information on August 5, Mueller said the agency never provided information called for in par. 3 relating to the unemployment contribution rate and, among other items, an explanation of the agency's use of the .063 rate when the documents submitted to the Union dated May 9, 2005, indicate a rate of .020.

B. The Respondent's Version of the Negotiations

The Respondent called Randall Ayers, Larry Sargeant, and Lisa Cayard as its principal witnesses; these individuals along with the Respondent's financial officer, Maureen Hird, 5 comprised the Respondent's negotiating team.¹²¹

Ayers testified that he has represented the WCCS since around 1995, and was retained by the agency around January 2004, almost immediately after the Union was certified by the Board, to represent it in the collective-bargaining negotiations; his role was to be the chief 10 spokesman for the Respondent.¹²²

Ayers related the bargaining history with the Union, beginning with the Respondent's initial contact with the Union's first lead negotiator, Julie Jones.

According to Ayers, the first months of the negotiations, which began in the early spring 15 of 2004, were in his view "good"; the Union, in his view, was professional and the negotiations proceeded in the normal and orderly way. The Union made information requests prior to making proposals, to which Ayers said the Respondent timely and cooperatively responded. 20 Additionally, the agency agreed with the Union that the Union would present its noneconomic proposals first. Accordingly, in the spring of 2004, Ayers said that Jones made a series of noneconomic proposals and the negotiations began in earnest on a professional and courteous note at that time.

Ayers stated that during the late spring, perhaps the early summer of 2004, the issue of 25 unemployment became a major issue for the Union. Jones was very concerned about the unit employees' right to apply for unemployment benefits, which to her was precluded by a clause in the standard employment contract utilized¹²³ by the agency wherein employees agreed not to apply for unemployment benefits. Ayers said that the parties resolved the issue by agreeing for the 2004-2005 academic year to remove this clause from the contract.

Ayers noted, however, that he informed Jones at the time that there would be a variety 30 of ramifications¹²⁴ if the employees sought unemployment because the clause had historically resulted in cost savings to the Head Start Program. Furthermore, Ayers said that he told the Union (Jones) then that without the unemployment clause, there actually was no need for the contract. According to Ayers, Jones initially said the Union still wanted the employment contract 35

¹²¹ As a reminder, Hird did not testify at the hearing.

¹²² Ayers, an attorney, stated that the Respondent's management had no collective-bargaining experience. Accordingly, he was responsible for managing all aspects of the 40 negotiations to include contacting the Union, making proposals and counterproposals, and generally speaking on behalf of the agency.

¹²³ Ayers explained that since around 1990, the WCCS had utilized an employment contract that included a voluntary waiver by the employee of unemployment compensation. The clause was included in part 1(f) of the agreement. See GC Exh. 92, a copy of the agreement which 45 Ayers testified to at the hearing. Ayers said part 1(f) was deleted for the 2004-2005 school year.

¹²⁴ Ayers testified that he told Jones that one such "ramification" related to the agency's financing of the employees' 403(b) retirement benefits through the lack of unemployment 50 claims. Ayers said he told Jones that the elimination of the clause would affect the way the agency administers pay and handles pay. Ayers said that Jones responded by saying not to threaten her. These conversations took place at the initial bargaining sessions.

in place, but without the unemployment waiver provision. However, according to Ayers, Jones ultimately agreed that there would be no employment contracts and the Head Start employees could apply for unemployment for the 2004–2005 school year.¹²⁵

5 Regarding the conduct of the negotiations, Ayers said that Jones, while not as timely as he would want, was generally responsive to the Company’s proposals, but she did not attend all meetings in 2004. Ayers said that a union representative, Mike DeLore, would stand in¹²⁶ for her at various sessions but he was not prepared, had no understanding of the various proposals and, where tentative agreements were reached, did not have the authority to validate them.
10 According to Ayers, DeLore would have to consult with Jones for her approval. Ayers stated that this held up the progress of negotiations. Then in late 2004, the Union (through Mueller) advised the agency that Jones would no longer be representing the Union. Ayers said this caused additional delays in the negotiations. According to Ayers, the parties tentatively
15 scheduled a meeting around the 2004 Thanksgiving-Christmas holiday period but because of scheduling conflicts, the parties did not meet again until February 2005.

 Ayers testified that by February 2005, the parties had been negotiating for over a year and, while the parties had reached tentative agreements on certain matters, the agency felt the need to move the negotiations along toward an economic proposal. Accordingly, the agency
20 took the unusual (in Ayers’ experience) step of making the initial economic proposal on February 2¹²⁷ based on a sustainable 3-year contract.

 Ayers stated that the agency’s approach to the economic issues included what he described as a reverse budgeting process whereby management identified its fixed costs—for
25 example, rent, utilities, and fuel for the buses—to run the program, and then once these are accounted for, the balance of available funds would be utilized for staff expenses. Accordingly, the agency in February identified the funds thought to be available for staff for the 2005–2006 academic year, allocated these to cover the number of employee classifications needed to run the Head Start Program, estimated the appropriate wage rates, and calculated these costs. The
30 agency then attempted to address key fringe benefits, such as paid time off and health insurance, with the remaining funds.

 Ayers said that the unemployment costs were also factored in this process. Ayers noted that the agency anticipated increased unemployment experience and a concomitant substantial
35 increase in the premiums charged by Ohio—the unemployment contribution rate—over the 3-year period of the contract, mainly because employees were now free to apply for unemployment benefits.

40 ¹²⁵ Ayers noted parenthetically that he believed only a handful (four to five) of employees applied for unemployment benefits for this time. It should be noted that Jones’ alleged agreement to eliminate the employment contracts in their entirety was not committed to written form.

45 ¹²⁶ Ayers said that DeLore attended about three bargaining sessions in place of Jones.

¹²⁷ Ayers explained that the agency not only was concerned about the slow progress of the negotiations but, more importantly, was facing a deadline to prepare its budget for the State and Federal funding authorities for the coming year—the 2005–2006 academic year. Also, Ayers said that because the Head Start Program usually experiences a great deal of turnover, the agency must assiduously plan its staffing needs in terms of available positions and funds, the
50 location of facilities, and the children to be served there. According to Ayers, the agency usually begins this effort in the spring before the new academic year.

Ayers testified that the goal of the agency was to run a quality Head Start Program with a staff in number and position classification that would promote that goal. Ayers stated that in the final analysis, the reverse budgeting process for the 2005–2006 budget resulted in a decrease in wages and benefits as reflected in the agency’s initial economic proposal. Ayer said the reverse budgeting process, its underlying reasons, and the agency’s stated needs and goals for the Head Start operation were discussed with the Union on February 2; the agency also solicited the Union’s thoughts on the proposal.

Ayers said that at this February session the parties discussed the contract generally in terms of a 3-year term because the agency wanted the stability (and predictability) of a 3-year deal, as well as the savings in legal costs associated with the negotiations process.¹²⁸

Ayers stated at that time he became aware the agency was facing a budgetary crises of sorts in terms of both the Federal and State funding of the Head Start operation. There was a heightened Federal scrutiny of Head Start budgets, generally with no anticipated increase and perhaps even a cut in funding. On the State level, the Ohio governor was embarking on a new education initiative, the Early Learning Initiative (ELI), with a new application process which could affect State funding of the Head Start; State funding at the time was unclear.

Ayers agreed that the Union’s reaction to this initial proposal was essentially negative, mainly because there was a reduction in wages and benefits. As a consequence, the Union in response made additional requests for information which required the agency to expend additional time to collect.

Ayers stated that while he understood that the Union required the sought-after information in order to present its counter-economic proposal, he, nonetheless, viewed the requests as duplicative of information he had provided to Jones about a year earlier; Ayers said he later learned that Mueller did not have Jones’ file.¹²⁹ In any case, Ayers said the parties exchanged information in the following weeks and then about a month later met for the second time in 2005.

Ayers acknowledged that the Union presented its first economic proposal in early March and the parties engaged in substantial discussion over this proposal. Ayers said that the Union’s proposal included a retroactive wage increase which surprised him, as this was not a customary response from unions with which he had dealt. Ayers said this component of the Union’s proposal was instantly problematic for the agency and its budgetary processes; the agency simply could not provide wage increases retroactively.¹³⁰ Ayers said he asked Mueller what was its rationale or justification for this, and, according to Ayers, Mueller said that was what the Union desired.

¹²⁸ Ayers noted that while the initial written proposal did not contain specific beginning and ending dates—either he or Jones suggested that the dates be left out—the parties’ discussion centered on a 3-year deal. Ayers noted further that collective-bargaining process is notoriously expensive and time-consuming, especially for a first contract, and the Head Start budget in the agency’s view could not sustain “massive” legal expenses. A 3-year deal thus was less costly.

¹²⁹ Ayers said that, in view of the time that had passed, he told Mueller that he had admonished Jones on her departure to be sure to update the Union on the negotiations to date and provide copies of the proposals and counters that had been submitted by the parties.

¹³⁰ Ayers said he believed the Union’s proposal addressed fringe benefits but could not recall, as he testified. I would note that the Union’s initial proposal is of record and speaks for itself.

Ayers said that he told the Union that its economic proposal was impractical but the agency would and did take it under advisement for further study.

5 Ayers could not recall how many meetings the parties had in the spring of 2005 but conceded that they were “difficult” because in part Jones evidently had not given information to Mueller with the result that Mueller presented regressive proposals, that is her proposals raised new issues he thought had been discussed many months before—for instance, the grievance procedure proposal.¹³¹

10 Ayers said that of note along these lines was the issue of the drug-free workplace policy. Ayers thought that this matter was raised with the Union in the first March session (but was unsure). However, by mid-spring, there was a certain urgency associated with the matter. Ayers stated that under Ohio law, an employer could receive a discounted rate on its workers’ compensation premiums if it implemented a qualifying drug-free workplace policy by a certain deadline in the spring. According to Ayers, the agency wanted to accelerate the discussions to meet the deadline and hopefully save money. However, this issue was the source of a great deal of friction between the parties and required much effort and time.

20 Ayers recalled that through the early spring the parties discussed economics and budgeting but did not come to any agreement with respect to economics. Ayers stated that probably by the early spring of 2005, but certainly around the May/June 2005 time frame, the Union did not spend much time negotiating or making counterproposals relative to the staffing numbers or even the wage rates. According to Ayers, the central dispute on economics revolved around the issue of unemployment and the costs associated with this matter in the Head Start budget; the parties exchanged numbers regarding their respective calculations and projections and the basis therefor.

30 Ayers noted that Maureen Hird, the agency’s financial officer, using an historical approach going back to the mid-1990s and determined by virtue of the employment contract clause, the agency’s unemployment experience went down and freed agency funds for application to wages and benefits. However, without the clause, Hird projected a substantial cost increase in the area of \$90,000 to \$100,000 for the agency as of May, June, and July 2005. Hird’s rationale and calculations were shared with the Union, according to Ayers.

35 Ayers stated that in spite of this, the parties made no significant progress on economic issues as of July 12, 2005, on which date the parties convened for further bargaining, with an especial focus on economic issues.

40 Ayers acknowledged that at the July 12 session, the parties talked at length about the Employer’s economic proposal, and the unemployment issue and its effect on the agency’s budget. According to Ayers, the Union (Mueller) was noticeably frustrated and actually made overtures to return to the way things were back in 2003 and 2004. According to Ayers, the Union suggested even a return to the unemployment contracts with the voluntary agreement not to apply for unemployment. Ayres came to believe that the Union wanted seemingly to go back to the situation before the arrival of the Union.

50 ¹³¹ Ayers cited as an example the Union’s grievance procedure proposal. In this case, Ayers said management had to devote time and energy to determine what was new and what had been addressed in prior sessions in order to address the Union’s current proposal.

5 Ayers said management was shocked over this and informed the Union that as for the employment contracts, the agency viewed them as being of no significance, the unemployment waiver was not legally enforceable and would therefore offer no protection to the Head Start budget. Ayers said the parties continued in their discussions over these points but decided to recess the negotiations to allow both sides to caucus beginning at about 12 noon.

10 Ayers said that the parties resumed the negotiations after about a 3-hour break. Ayers said that while it had not been the agency's intention at the break, when he and the management team returned to negotiate he presented the Union with its final offer.

15 Ayers said that he explained to the Union that (at this point) the parties had been negotiating for months and that each side had had the opportunity to discuss all issues, particularly what he described as the economic realities facing the Head Start Program. Furthermore, the start of the new academic year was looming and the agency needed to finalize the offer and make other preparations for the academic year.¹³²

20 Ayers said that the Union's reaction was negative and Mueller questioned, however, without rejecting, the contents of the proposal. Ayers conceded that the Union was surprised by the final offer and Mueller asked why the final offer was being made at this stage of the negotiations. Ayers stated that he told the Union that the agency's position was firm. Ayers noted that the final offer was not well received by the Union but Mueller said they would consider the offer.

25 Ayers said he was later advised by Mueller that the Union had had a ratification meeting and that the final offer had been rejected. Ayers testified that he considered the parties to be at impasse and advised the Union of his position. Ayers explained that impasse in his view means, in essence, that the parties' positions were firmly fixed; they were at loggerheads on the (important) issues; basically, the parties' respective positions were unalterable.

30 However, Ayers acknowledged that the Union did not consider the parties to be at impasse and by e-mail informed him as such in their request for additional information. Ayers could not recall if the information was supplied by the agency, but thought that management worked on a response and provided some information prior to the next scheduled session in September. Ayers noted this last bargaining session did not take place because the
35 Respondent determined that the Union no longer represented a majority of the employees and withdrew recognition. Ayers said he notified the Union of these developments and all bargaining ceased.

40 Ayers conceded (on cross-examination) that at the July 12 session, as well as at the preceding bargaining sessions, more was discussed and covered than he was able to relate in

45 ¹³² Ayers testified that the school year started in late August for staff; the children would start in early September. As he understood the practice and policy of the Head Start Program, the Head Start director needed to issue offers to staff and make job assignments with established rates of pay and benefits. Ayers said because Head Start tends to hire more entry level employment, the operation must be in a position to convey what the pay rates and benefits will be. Ayers stated that Head Start Programs generally have a high turnover rate due to the entry level nature of many positions. However, he did not know the retention rate at WCCS-HS, and he admitted that he was never advised by management that the programs had retention issues.
50 He also conceded that cutting employee wages and benefits would lend not to encourage retention, that in fact this is a negative factor for purposes of retention of workers.

his testimony at the hearing. He noted that the Respondent wanted a 3-year contract and that this reflects his “default” position in negotiating first contracts. He further noted there was no strong urgency by either the Union or the agency for a longer contract, only the concerns from the agency about one of a shorter duration. He noted that the agency never proffered a wage or benefit reopener proposal, presumably because in his view these can create additional negotiations and attendant expense.¹³³

Regarding the Union’s information requests, Ayers admitted that the agency provided a list of nonbargaining unit employees to the Union but did not at any time provide the number of those employees who applied for unemployment, but he insisted that the Union, in his view, was given extensive information relative to the bargaining unit employees who filed for unemployment, the historical and current and projected costs to the agency for unemployment.¹³⁴

Ayers admitted that the history of unemployment costs that were part of the negotiations referred to the entire agency and not solely the Head Start Program. Nonetheless, Ayers stated that management expected that the removal of the unemployment clause from the employees’ contract would result in a “hit” of around \$90,000 to \$100,000 and this point was operative in the negotiations covering the 2005–2006 school year, as well as the Respondent’s economic proposal for a 3-year agreement.¹³⁵

Larry Sargeant, the executive director of the WCCS since about 1972, testified that he is responsible for the general oversight of the various programs and services provided by the agency, including assuring that all such agency programs are in compliance with contracts and the rules and regulations of both Federal and State agencies with and from which WCCS interfaces and receives funding. Sargeant said his duties include involvement with and oversight of the entire agency’s budgetary process, which included the Head Start Program. Accordingly, Sargeant said that he, along with his financial officer, and the Head Start director, Lisa Cayard, comprised the WCCS bargaining team in negotiations with the Union. Sargeant said he participated in the bargaining sessions which began on April 2004, and attended all of the sessions, with the possible exception of two.

¹³³ Ayers conceded that reopener clauses could be feasible and the occurrence of certain “trigger” events could determine their application. Ayers said that he did not favor reopeners, stating that these clauses contribute uncertainty as to wages and are unpredictable in the outcome of these applications, at least from the employer’s point of view. Ayers also stated that reopeners add to the cost of bargaining over the reopeners themselves. Notably, Ayers identified his law firm’s billing records (GC Exh. 138) for its representation of the Respondent before the Board covering November 5, 2005, through July 31, 2006, totaling \$68,589.87. Ayers said the agency wanted the stability (and predictability) that a 3-year agreement afforded. Ayers, while not sure, recalled that Mueller verbally suggested a reopener clause at some point during negotiations.

¹³⁴ Ayers was shown a copy of a letter the General Counsel sent to him on December 20, 2004, during the investigatory stage of the proceeding and his response to her (GC Exh. 125, not received) wherein he acknowledges not providing the subject information to the Union during negotiations.

¹³⁵ Ayers noted that the unemployment projections were determined by the agency’s fiscal office, presumably Hird. Ayers stated the projection was realistic to him because the agency had unemployment costs experience in the mid-1990s of around \$60,000 to \$80,000.

Sargeant stated that around December 2004, based on advice of the agency's attorney (Ayers) and himself, the WCCS board of trustees decided to incorporate the Head Start component as a separate legal entity, a limited liability corporation (LLC) to be operated by a board of managers. Sargeant explained that the agency's fiscal department determined that within a few quarters, the agency was headed toward a \$120,000 payout in unemployment benefits for the Head Start staff that would be chargeable to the WCCS account with the State of Ohio. Thus, according to Sargeant, the Head Start Program was incorporated to deal with the unemployment issue that ultimately became of paramount importance in the negotiations with the Union.

Sargeant explained that based on the past experience of Head Start staff when drawing unemployment, and taking into account Ohio's maximum allowable contribution rate which in the 1990's was 6.7 percent (or .067), management deemed the separation of the Head Start operation from the agency's other functions a necessary move to avoid what Sargeant termed a devastating financial hardship for the Head Start Program and the agency as well.

Sargeant also cited another reason for the legal separation of the Head Start Program from the rest of the agency. According to Sargeant, the Head Start Program around that time (late 2004) had been the subject of unfair labor practice allegations, but these were settled. However, the agency was chastened and he saw that there was a risk of potential litigation, irrespective of how carefully WCCS proceeded in its operation of the Head Start Program; and there were agency assets—housing developments and other programs—that were exposed to litigation.

Sargeant said that in December 2004, therefore, the potential for litigation liability and elimination of the employment waiver weighed heavily on the agency's board of trustees so the decision was made to set up the Head Start Program under a separate legal entity effective July 1, 2005, the beginning of the 2005–2006 Head Start Program year.¹³⁶

Sargeant also explained at some length the funding sources for the Head Start Program, which primarily consisted of the Federal (health and human services) grant¹³⁷ with supplements

¹³⁶ Sargeant testified at length about management's reasoning employed in calculating the unemployment estimates/projections to which the agency would be amenable if the agency did not create the LLC. On balance, Sargeant stated that by creating the LLC for the Head Start Program, the WCCS was able to isolate and protect the entire agency's account balance—avoiding a negative balance—with the Ohio unemployment authorities. Eventually, according to Sargeant, the Head Start, LLC would eliminate a charge to the WCCS if the Head Start employees, who applied for unemployment, caused a payout in benefits in excess of the amount the agency paid in the Head Start. In such a case, the LLC would have its own State unemployment account and if, as anticipated, the Head Start staff applied for unemployment benefits there would be no effect on the WCCS account balance. It is noteworthy that Sargeant did not testify that he explained this to the Union during negotiations.

¹³⁷ Sargeant stated that the HHS basic grant, the PA 22 (program account 22), operates on a 3-year cycle that is applied for annually; the HHS PA 20 is a separate Federal grant used for training and technical assistance, also applied for annually; COLA (cost of living) increases are determined by the Federal government and also are applied for annually. The HHS grant is awarded in several awards during the year. Sargeant identified R. Exh. 4 as the WCCS HHS application notice for the 2005–2006 academic term; it is dated December 2004, and indicates that HHS was eligible for \$1,616,612 in funding. The COLA is not included in this application notice. According to Sargeant, as part of the 3-year cycle, the Head Start Program would

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coming from the State and other grants. Sargeant stated that the Head Start funding application process is the responsibility of the program's director (Lisa Cayard) who begins submitting applications around the March or April preceding any given academic year which begins July 1; and the agency usually has its responses from the various funding sources around May or June. Sargeant noted that Head Start related grants operate July 1 through June 30—for example, July 1, 2005, through June 30, 2006.¹³⁸

Turning to the Head Start employment contracts, Sargeant recalled that these were first utilized in the mid-1990's because the Head employees wanted to be treated more like public school employees; they wanted to be treated more professionally and wanted certain benefits, including retirement and 12-month contracts that regular teachers received. According to Sargeant, the agency respected these concerns from the staff and tried to accommodate the workers' desires in this regard.

Sargeant stated that the agency also felt the employment contracts presented an opportunity to reduce its costs, and at the same time provide more in the way of staff benefits.

Sargeant said that after discussions with the Head Start staff, the WCCS board of trustees, aided by the input of study groups, the agency decided that employment agreements could help reduce the unemployment contribution rate by and through the waiver clause, which in turn allowed the agency not only to increase its contribution to employee health care insurance and supplement health care insurance but also to put in place for the first time a retirement system and a wage and salary study program which allowed staff wages to increase substantially, or at least at a rate exceeding the COLA mechanism through which wage increases were achieved historically in the Head Start Program.¹³⁹

Sargeant said that the unemployment waiver clause in the contracts caused unemployment claims year to year (at least among the Head Start staff) continuously to decrease. Sargeant volunteered that prior to the use of these contracts, 90 percent of the payouts for unemployment on the WCCS State account went to the Head Start employees; there was little comparable unemployment experience for the rest of the WCCS employees. Sargeant said that Head Start employees stopped applying for unemployment except in the case of year-end resignations in which case they were advised to apply by management.

receive this base amount plus any applicable COLAs for the 2006–2007 academic year.

¹³⁸ See R. Exhs. 5–8, HHS financial award notices to WCCS covering the Head Start academic years 2002–2003, 2003–2004, 2004–2005, and 2005–2006. Sargeant testified that the process for awards did not change over these years.

It is noteworthy that the agency received notice that it was receiving a cost of living award of \$15,935 by July 26, 2005 (see R. Exh. 8, the award notice for 2005–2006 term). The agency's total award was \$1,669,077.

¹³⁹ It is noteworthy that, according to Sargeant, the Head Start employees evidently in effect engaged in bargaining over the implementation of the employment contracts and arrived at a mutually satisfactory and beneficial result as a consequence. Sargeant identified R. Exh. 9, a copy of the WCCS Letter of Agreement that all Head start employees would sign for each school year. Par. 1(f), relating to the employees' agreement not to apply for unemployment compensation during the term of the contract, and par. 3(b), dealing with payment of their annual wage basically in 26 or 19 increments, according to Sargeant, reflect in particular the Head Start staff preferences for a "package" resembling that which obtained in the public school system. Sargeant said that in his experience, public school teachers always had a choice of receiving their pay over 9 or 12 months. (Tr. 608.)

Sargeant added that the contract clause allowed an employee to apply for unemployment if either the agency or employee terminated the contract.

5 Regarding the issue of wages, Sargeant related first that the board of trustees conducted a wage study in 1999, and in 2000 developed a wage table to ensure that WCCS was paying wages comparable to other nonprofits throughout the Midwest. The study was conducted by an independent association which reevaluated and updated job descriptions and established wage bands or ranges for each job. Sargeant said the study was implemented in 2000 (and updated by management in 2004) and the wage rates derived therefrom became the basis for the numbers in each individual employee's job classification contract.¹⁴⁰ Sargeant testified that the board of trustees each year will review its table of wages to ensure that the agency remains competitive with other nonprofits in the region. The wage tables apply to all WCCS employees.

15 According to Sargeant, the WCCS board approved the wage table that became effective October 3, 2005, in September 2005. Sargeant admitted, however, that the October 3 wage table was actually developed and approved by the board of trustees in draft form earlier in 2005.¹⁴¹

20 Sargeant directed himself to the bargaining sessions, stating that the agency's retained legal counsel was the WCCS primary spokesperson and the one who prepared most of the agency's proposals and counterproposals; Sargeant and Maureen Hird,¹⁴² the agency's controller and the in-house certified public accountant, comprised the Respondent's bargaining team.

25 Sargeant testified that after a shaky start, the first face-to-face¹⁴³ session took place in April 2004, with Jones as the lead negotiator for the Union and about 10 Head Start employees

30 ¹⁴⁰ Sargeant identified R. Exh. 10, a document entitled "Warren County Community Services Pay Level/Range," approved by the WCCS board of trustees on May 19, 2003, effective on September 22, 2003. Sargeant explained that every position in the agency (to include the Head Start employees) has a range beginning with the entry level at which all but certain exceptional (in skill and experience) employees are hired. Sargeant also identified a document entitled "Wage and Salary Study," dated October 25, 2004 (R. Exh. 16), which was authored by him pursuant to the agent's policies.

35 ¹⁴¹ Sargeant recalled that the wage adjustment (increase) reflected in the October 3 wage table had been determined in February or March 2005; he believed it was made at the WCCS board's March meeting. He believed that the wage increase was approved for implementation at the Board's August 2005 meeting. Sargeant did not testify that the Union was informed of these actions by the WCCS board at any time during negotiations.

40 Also, see GC Exh. 134, minutes of the WCCS board meeting dated September 16, 2005, indicating that the October 3 wage and salary table was discussed by Sargeant and a copy of which is attached. Sargeant admitted that the October 2005 pay increase was in principle approved in February 2005 (Tr. 617-18).

45 ¹⁴² Sargeant testified that Hird is no longer employed by WCCS, having departed around April 2006.

50 ¹⁴³ Sargeant identified correspondence between the parties' bargaining with a February 16, 2004 request for information by Jones for the Union (R. Exh. 11) and her response thereto on March 30, 2004 (R. Exh. 12), in which he informs Jones that the agency did not receive the February 16 letter. Sargeant's letter included what he called preliminary documents in response to her request.

comprising the union team; this first session occurred at the WCCS facilities in South Lebanon. Sargeant related that it was mutually agreed by the parties that these facilities were not comfortable or commodious, especially for breakout or caucus meetings. The parties agreed to use convenient hotels and split the costs. Sargeant could not recall in detail the negotiations that
 5 took place but believed the parties laid out some parameters of the negotiations after a “gentleman’s agreement” fashion. He recalled in particular that economic issues had to be subject to a “costing out” process.¹⁴⁴

10 Sargeant recalled that the unemployment issue came up fairly early in the negotiations and Jones insisted that the Head Start employees were entitled by State law to apply for unemployment benefits irrespective of the waiver clause in the employment contracts.

15 Sargeant related that the management team agreed in principle with the Union, but explained to the Union the history of the employment agreements and the benefits the employees derived from them.¹⁴⁵ Sargeant said the Union was told if the employees were allowed to apply for employment, the agency would have to review its budget and determine a way to pay for the anticipated costs associated with these unemployment benefits. Sargeant said that Jones became angry over the Respondent’s stance and said not to threaten her. According to Sargeant, Ayers calmly told her that the parties had to deal with economic realities,
 20 that unemployment applications would entail certain costs, and that the agency would have to budget these out of funds available after the overhead costs here were accounted for. Ayers stated that, for instance, these other costs could not come out of the children’s supplies.

25 Sargeant noted that from the beginning, the agency’s intention was to arrive at a contract that would in so many words fit within the WCCS corporate structure, by which he meant a contract somewhat similar to the existing personnel policy in the agency handbook in order to avoid, as he put the matter, “an administrative nightmare.” (Tr. 623.) Thus, the economic component to any contract had to fit within the Head Start grant structure—the agency could not spend more money than the grant funds received for the Head Start
 30 Program.¹⁴⁶ Other than the basic concerns, Sargeant said the agency had no “burning agenda” going into the negotiations.

35 ¹⁴⁴ Sargeant explained that this meant that the economic proposals (or the economic package) were subject to reverse budgeting; that is, all overhead administrative costs of the Head Start Program had to be calculated first and the remaining balance of funds would be utilized for wages and benefits. Sargeant believed this component to the negotiations was broached at the first or second session and mutually agreed to by the parties.

40 ¹⁴⁵ Sargeant stated that the management team prepared a sheet showing these benefits—increased wages, increases in the employer’s contributions to medical insurance, the establishment of a retirement plan, and disability insurance. This sheet was not adduced at the hearing.

45 ¹⁴⁶ Sargeant also noted that at the time of the early negotiations there were clouds over the Head Start Program at both the State and Federal levels in the form of restructuring the program to a block grant funding approach to be administered by the States, which could result in a total elimination of the program. There was also talk of placing the Head Start Program in the U.S. Department of Education. According to Sargeant, talk about budget cuts was on the table because of the Iraq War. (Tr. 624.) Sargeant also noted the agency anticipated a significant increase in medical insurance costs, and legal fees.

50 Sargeant also identified a report from the National Head Start Association released in June 2004, which indicated that for fiscal 2006, the current administration was planning on funding and enrollment cuts in the Head Start Program. (See R. Exh. 15.) Sargeant stated that WCCS

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Sargeant testified that the agency did not want to see wages and benefits dwindle or be “given up.” So its approach was to leave the door open and allow the Union to determine, after the reverse budgeting process was implemented, how the remaining available funds would be used for employee wages and benefits. Sargeant said that in this fashion the Union was essentially charged with developing a structure for the wages and benefits it sought.

Sargeant stated that the parties met throughout the summer and fall of 2004, and usually discussed noneconomic issues with the agency presenting most of the proposals, some of which were agreed to immediately; others came about through compromise.

Notably, for the 2004–2005 academic year, the parties agreed to eliminate from the employment contracts paragraph 1(f), by and through which employees agreed not to apply for unemployment benefits, and a revised contract to take effect in late August or early September 2004 was offered to the Head Start employees.¹⁴⁷

Regarding the agency’s economic proposals, Sargeant said the first such proposal was made on February 2, 2005,¹⁴⁸ and reflected the agency’s effort to get “something out” and to get the Union to think about an economic package consistent with the reverse budgeting approach, with a particular emphasis on the finite nature of the funds available for wages and benefits. According to Sargeant, through this proposal, Ayers wanted to force the issue in this regard to forecast anticipated revenues, insurance costs, and to highlight the significant increases anticipated for the unemployment contribution. Sargeant stated that the agency’s point of view in this economic proposal was explained to the Union.¹⁴⁹ According to Sargeant, the Union said it would take the agency’s economic proposal under advisement and turned the negotiations back to noneconomic issues.

is a member of this association and the report, along with other information, was factored in the negotiations with the Union.

¹⁴⁷ Sargeant identified R. Exh. 13, a copy of a letter incorporating this agreement which was signed off on at the June 24, 2004 bargaining session by Jones and unit employee Sheila Rooks. Sargeant noted that the unit employees’ wages and health insurance, then current, were continued under this revised contract. Sargeant also identified a document (R. Exh. 14) indicating four unit employees who applied for unemployment for the summer of 2004, a copy of which was provided to the Union.

¹⁴⁸ Sargeant identified GC Exh. 2 as the agency’s February 2, 2005 initial economic proposal. Sargeant stated that this economic proposal reflected the rates contained in a document entitled “WCCS Pay Level/Range,” approved by the board of trustees on May 19, 2003, and effective September 22, 2003). (R. Exh. 10.)

¹⁴⁹ Sargeant related that at this time the agency knew that because it was going to incorporate the Head Start operation under a separate LLC, that the agency would have to pay unemployment premiums twice in 2005—one for the WCCS and another for the Head Start, LLC—because technically the Head Start employees would be working for both entities during 2005. Thus, beginning January 1, 2006, another payment should be due. Therefore, according to Sargeant, management had to prepare a budget knowing the unemployment contribution bill for 2005–2006 would be paid twice. Notably, Sargeant did not testify that management informed the Union of these specific concerns when the economic proposal was presented on February 2, 2005.

Sargeant parenthetically noted that unemployment premium rates apply only to the first \$9000 of an employee’s salary. According to Sargeant, the unemployment numbers were the work of Hird.

5 Sargeant said that on June 7, 2005, the agency presented its 2005–2006 Head Start budget. (GC Exh. 46(a).) Sargeant agreed that the Union was disappointed (as he termed it) with the agency’s benefits and wages proposals. Mueller questioned the calculations which, in turn, triggered information requests by her. Sargeant said the agency provided information, and Hird gave an explanation of the budget several times during the negotiations in 2005, and on June 7 as well.

10 Sargeant testified that the projected unemployment rate was determined by the knowledge that the agency was going to pay premiums twice, by published articles that Ohio’s mutualized fund and its unemployment accounts were falling below the minimums safe levels, and that maximum contribution rate for employers was on the rise; e.g., the rate was 7.5 percent of payroll for 2004 and 8 percent for 2005 based on the first \$9000 of the employee’s salary.¹⁵⁰

15 According to Sargeant, Hird attempted to explain all of the factors that she considered in coming up with the unemployment calculations, and even put together a spreadsheet to give detailed explication for all of the calculations, including the unemployment numbers. Sargeant testified that Mueller’s testimony did not reflect the accurate methodology to calculate unemployment costs.¹⁵¹

20 Sargeant said that he was familiar with the Union’s March 2, 2005 economic counterproposal (GC Exh. 6). However, he said especially with respect to the articles on wages, there were many elements missing in the agency’s view so that it was not possible to pin down the exact costs associated with the proposal. Sargeant said management felt, moreover, that the union proposal would not work within the Head Start budget and needed a lot of additional work. Sargeant believed this proposal was merely a starting point.

25 Turning to the Respondent’s final negotiating efforts, Sargeant related that the parties were able to identify the noneconomic issues that needed resolution and worked diligently, as he recalls, at resolving these; tentative agreements were reached on some of these; others needed additional work but agreement was deemed possible. However, for some other noneconomic matters, the parties were still far apart. As to economic issues, Sargeant said that none had been submitted after the March 2, 2005 proposal by the Union.

30 Sargeant acknowledged that the parties met for what turned out to be the last time on July 12. He recalled that management at the time was frustrated by the lack of movement in the negotiations during the last sessions; that at least on one such occasion, the Union had not made good on its promise to work on certain items. Consequently, management felt that the time was ripe for a final offer on its part, but at the same time to leave the door open for further discussion; that the agency would still be open to negotiation. According to Sargeant, the final

45 ¹⁵⁰ Sargeant said the contribution rate in 2005 was 9 percent, and at the hearing stated that it was 9.1 percent.

50 ¹⁵¹ Sargeant said that Hird prepared this spreadsheet during a 3-hour breakout session during the negotiations, but he could not recall the exact date of the session. Sargeant said that Hird’s spreadsheet represented the agency’s attempt to answer the Union’s request for supporting documentation regarding the unemployment calculation. This spreadsheet was not produced at the hearing and, as previously noted, Hird did not testify at the hearing. I have perused all of the many papers contained in the exhibit files and this document does not exist, at least as far as I can determine.

offer on July 12 was presented as such, but the real purpose was to move the negotiations along, to get the Union to negotiate more earnestly.

5 Regarding the Union's request for information by letter on July 27, Sargeant stated that he is certain, contrary to Mueller's testimony, that the Respondent provided information relating to the number of nonbargaining unit employees who applied for unemployment for the summer of 2005 by providing on September 19, 2005, documents showing the WCCS employees for whom unemployment benefits were paid by Ohio from about June 1 through August 29, 2005.¹⁵² Sargeant stated that the Respondent provided the number of bargaining unit
10 employees who applied for unemployment during the summer of 2005.

Turning to the closure of the Hampton Bennett Center, Sargeant stated that he learned of this around late August, possibly early September 2005, from Head Start Director Lisa Cayard. Sargeant noted that at the time, Cayard was attempting to find ways to cut costs to
15 meet the Head Start budget goals. According to Sargeant, Cayard told him that the agency's financial officer (Hird) suggested closing Hampton Bennett, a small facility leased from a local public school system. At this time, coincidentally, there also had been unexpected resignations from the Head Start Program. Cayard, who was also working on staffing for the 2005-2006
20 academic year, determined that Hampton Bennett could be closed with no adverse effect on the program or the children. Sargeant testified that he agreed with Cayard because the budget had to be reduced and so Hampton Bennett was closed.¹⁵³

Sargeant said that the workers' compensation/drug-free workplace policy had been a sticking point during negotiations, but now was no longer an impediment to savings. Sargeant
25 noted that after the withdrawal of recognition of the Union, some of the previously enjoyed employee benefits were continued but some were eliminated. In that latter regard, Sargeant stated that employer-provided medical coverage during the summer months was eliminated as the employees were not considered employees during the summer because they were considered "no longer employed."¹⁵⁴

30 ¹⁵² See par. 5, Mueller's July 27 letter (GC Exhs. 63 and 71(a), Ohio State documents entitled "Notice of Benefits Paid and Charges to Employer (WCCS, Inc.)," which lists the employee claimant's name (redacted) and social security number (redacted), the date for which, and the amount of unemployment benefits paid to the employee in question.

35 ¹⁵³ Sargeant did not address whether he notified the Union prior to the decision to close Hampton Bennett or gave it an opportunity to bargain over the closing or its effects. Notably, Theresa Fitzpatrick, a bargaining unit member and current employee—teacher—and a member of the union bargaining team, testified that Head Start Supervisor Carla Hensley called her on August 24 to meet with her about Hampton Bennett. The following day, Hensley, three other
40 unit employees assigned to Hampton Bennett, and Fitzpatrick met at Fitzpatrick's house where Hensley informed them that Hampton Bennett had been closed and they would all be transferred to other centers. Fitzpatrick had worked at Hampton Bennett for 14-15 years; this center was only a short distance from home where she cared for her ailing husband. Fitzpatrick said that the facility to which she transferred, Louisa Wright, was a considerable distance from
45 her home. Fitzpatrick said she discussed the matter with Cayard who said she was sticking to her decision. Fitzpatrick reported to Louisa Wright on August 29, 2005. Fitzpatrick noted that the Hampton Bennett children and families were reassigned to the Helen Center which was only 2 minutes from her home. Fitzpatrick said that she would have preferred to be transferred there.

50 ¹⁵⁴ Sargeant recalled that employees were advised to set up a savings program through the agency's credit union to meet their insurance needs for the summer. Sargeant identified a notice

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On bottom, Sargeant said the confluence of these events and circumstances, including the withdrawal of recognition of the Union, allowed the agency to implement the wage and salary table earlier approved by the board of trustees. Sargeant volunteered that the implementation of this wage structure reflected the board of trustees' long-term commitment to pay the fair wage and provide the fairest benefits to agency employees within limitations of the budgetary framework of the Head Start and other agency operations.¹⁵⁵ Sargeant testified that very late in the year, things just seemed to fall into place to make the pay increase a reality.

Sargeant acknowledged that the Respondent withdrew recognition of the Union, explaining that Cayard showed him the withdrawal cards from 19¹⁵⁶ unit employees, and after Hird had Cayard verify the signatures (by reference to employee W-4 tax forms), he notified Ayers who sent a letter to Mueller on September 20.

Sargeant also acknowledged that by September 30, the Respondent notified the Head Start Program (and other WCCS employees) that effective October 3, they would receive a pay increase.¹⁵⁷ He also readily conceded that the Respondent's July 12 final offer included wage reductions for these self-same employees.

Sargeant explained that the agency's July 12 proposal dealt with a 3-year contract period, accompanied by escalating costs in various areas of the agency's operation, e.g., medical costs, fuel costs, so the offer took an ultra conservative track. However, after the withdrawal of recognition of the Union, the agency operated on a different tack, that of a 1-year time frame in which the agency could operate as it had before the Union and continue its current program for the employees. Also, the agency had cost savings associated with the closing of Hampton Bennett and has decided not to fill the employee slots assigned to that facility. Sargeant said that the agency realized savings in workers' compensation costs through the implementation of drug-free workplace policy at the agency.

Sargeant stated that the agency viewed the unemployment contracts as meaningless without the unemployment waiver clause, so the Head Start employees did not sign one for the 2005-2006 academic year. Sargeant stated that the agency wanted it perfectly clear that employees were to be considered unemployed (during the summer) and were entitled to file for

he sent to the Head Start employees on October 7, 2005, which advised them of the agency's stance on medical insurance and the recommended savings program among other matters. (See R. Exh. 17.)

¹⁵⁵ In an answer to a question posed by me, Sargeant conceded that the wage and salary studies utilized by the board of trustees to determine appropriate wages for WCCS employees took into consideration information including pay rates of the Ohio nonprofits, and the WCCS study did not refer to the budget process utilized by the agency in arriving at appropriate wage and salary rates for covered employees. Sargeant agreed that WCCS board approved of this approach.

¹⁵⁶ Sargeant believes there were 19 employees but was not completely sure. However, once shown the letter and enclosures of 18 copies of the employee cards sent by Ayers, Sargeant recalled that at least 18 of the 35 unit employees no longer wanted the Union to represent them and this was a majority.

¹⁵⁷ See GC Exh. 90, a letter Sargeant sent to each Head Start bargaining unit employee informing them of the pay increase, a step increase based on the agency's most recent wage and salary table. (See. GC Exh. 101.) Sargeant noted that both bargaining unit and nonbargaining unit employees received a pay increase on October 3, 2005. (Tr. 77.)

unemployment benefits. The 12-month option in the old contracts, according to Sargeant, could produce “confusion” in these respects.¹⁵⁸

Sargeant testified about the employer-provided benefits Head Start employees enjoyed as of July 12, 2005. Sargeant stated that prior to July 12, 1005, WCCS:

- ° provided health care insurance premium payments equaling 80 percent; employees who worked 30 or more hours per week paid 20 percent. Health care coverage was for the entire year, including the summer months.
- ° provided dental/vision coverage for employees who worked 30 or more hours per week. The employer paid 50 percent and the employee paid 50 percent of dental costs.¹⁵⁹
- ° provided life insurance for employees. Employer paid 100 percent of the premiums for the entire year of coverage.
- ° provided a 403(b) retirement plan.
- ° provided a disability reserve benefits plan which covered the employee until the age of 65.
- ° provided accumulated leave (to cover personal leave, sick leave, sick leave, holidays and vacations) that the employee could use at her discretion.¹⁶⁰
- ° provided paid leave of 2 weeks for the winter break; and 1 week for the spring break.
- ° provided paid leave for all federal holidays.

Sargeant stated that as of October 3, 2005, the agency provided most of these benefits with some exceptions. According to Sargeant, as of October 3, the agency did not provide paid leave for the winter and spring breaks; employees could apply for unemployment during these periods. Health care coverage was no longer provided to the bargaining unit employees during the summer months. Disability insurance was limited to a 2-year period.

Sargeant also noted that prior to July 2005, part-year employees (like the Head Start employees) had the option of being paid over 12 or 9 months; in other words, 26 or 19 pay periods.¹⁶¹ Specifically, according to Sargeant, this option was available in the 2003–2004 and

¹⁵⁸ Sargeant did not offer any testimony as to whether he informed the Union of the agency’s decision prior to implementing the elimination of the employment contracts and allowing the Union the opportunity to bargain over the decision or its effects. On cross-examination, Sargeant did say the decision to eliminate the contracts was reached in concurrence with its insurance carrier, not the Union. (Tr. 36–37.)

¹⁵⁹ According to Sargeant, the agency did not provide vision insurance per se, but there was some discounting for vision-related services in the plan.

¹⁶⁰ See GC Exh. 99, a section from the Respondent’s handbook which explains accumulated leave and how it worked. Head Start employees accrued leave under the system somewhat differently from other WCCS employees because they received paid leave during the winter and spring breaks. Notably, the Head Start employees’ individual employment contracts, according to Sargeant, governed the accrual rate for accumulated leave of these employees, mainly because Head Start employees do not work as many hours annually as other WCCS workers. (Tr. 65–67.)

¹⁶¹ Sargeant identified certain employee contracts wherein the option appeared. (See GC Exhs. 92 and 93, contracts of unit employees Kari Meuxner and Annette Laver, respectively, for the 2003–2004 school year.)

2004–2005 school years. (Tr. 87.) Sargeant admitted that in July 2005, the agency decided to eliminate this option. (Tr. 87–88.)

5 Regarding the unemployment issue, specifically the agency's contribution rate that Ohio determined on an annual basis, Sargeant conceded that the WCCS 2005 contribution rate projected by Ohio for 2005 (for January through December 2005) was to be 2 percent (.020) as of November 2004.¹⁶² Sargeant also agreed that the 2005 unemployment contribution rate for the Head Start, LLC was 2 percent (.020).¹⁶³ Sargeant also conceded that prior to the creation of the Head Start, LLC and the administrative transfer of the Head Start operation to that entity, 10 the contribution rate attributable to WCCS was 2.7 percent (.027); after the transfer, the contribution rate for Head Start, LLC was 2 percent (.020) as determined by Ohio in November 2005 when the final rate determination was made for the LLC.¹⁶⁴

15 WCCS-HS Director¹⁶⁵ Lisa Cayard testified at the hearing. Cayard stated that she participated in the negotiations with the Union as a management representative, but actually only attended two sessions—June 22 and July 12, 2005, fairly late in the bargaining.

20 However, Cayard said that she was familiar with the Union's organizing campaign that occurred in late 2003. Cayard said that it was the WCCS position that a union or the representation of Head Start employees by a union was not in the best interests of the employees, or the Head Start Program. She said the agency encouraged, as she put it, a "no" vote against the Union in the election that followed the campaign.

25 Cayard acknowledged that the WCCS has used employment contracts for the Head Start employees for a number of years to include in particular academic years 2003–2004 and 2004–2005; however, for the 2004–2005 term, the contracts excluded paragraph 1(f), the unemployment waiver provision.¹⁶⁶ As a general practice, Cayard noted that Head Start contracts are executed in the late summer before the school year commences; employees were given the contractual option of being paid over 19 or 26 pay periods.

35 ¹⁶² See GC Exh. 96, the Ohio 2005 contribution rate determination for WCCS as of November 24, 2004.

40 ¹⁶³ See GC Exh. 104, the Ohio 2005 contribution rate determination for the Head Start, LLC as of November 7, 2005. Sargeant explained that from July 1, 2005, when the LLC was established, until November 2005, the LLC paid at the rate of 2.7 percent (.027). In November 2005, Ohio informed the agency that the Head Start, LLC should have been paying at the 2-percent rate. Sargeant noted the LLC contribution rate was changed to the 2-percent rate for October, November, and December; the 2.7-percent rate applied for July, August, and September 2005.

¹⁶⁴ It should be noted that the Head Start, LLC 2006 contribution rate as determined by Ohio was .030 or 3 percent (see GC Exh. 105) as of November 18, 2005.

45 ¹⁶⁵ Cayard testified that she has been the Head Start director for about 16 years; she reports directly to Larry Sargeant. Cayard stated that her responsibilities included administering the annual Head Start budget, which is about \$1.6 million. She supervised, as of June 2005, a staff of around 48 employees to include 38 hourly employees, and about 10 administrative/supervisory staff. (See GC Exh. 97, a document entitled "Warren County Community Service Head Start Managerial Supervisory Employees" as of June 7, 2005.)

50 ¹⁶⁶ Cayard also identified GC Exhs. 92 and 93, employment contracts that were representative of those in use in 2003–2005 and 2004–2005, respectively.

After explaining at some length the general purpose and mission of the Head Start Program under the auspices of the WCCS, Cayard expressed her concerns and thoughts about what a “quality” Head Start Program entails. According to Cayard, the two most important indicators or components of a quality program are the training of teaching staff and the staff/child ratio in the classrooms—more adults in classrooms translate into more individualized attention and services for the preschool age (3 to 4 years old) participants.

Cayard stated that most classrooms are staffed with three adults, including two teachers and one assistant teacher. Some teachers have degrees and some are credentialed with a Child Development Associates Degree. Cayard said that the WCCS-HS Program’s policy is to have at least one degreed teacher in each classroom.¹⁶⁷ In addition to the teaching staff, the Head Start Program hires bus drivers, bus aides, cooks, cook/custodians, and family advocates.

Cayard testified that the Head Start Program’s primary funding comes from the Federal government, the State of Ohio through the State’s recently instituted Early Learning Initiative (ELI),¹⁶⁸ and the Warren County United Way which contributes a \$25,000 grant to support the program during the summer months. Cayard stated that, historically, the available funding varies from year to year and may include cuts, one of which occurred for the 2005–2006 term. Cayard noted that since 2000, the political climate, as she termed it, changed, and there was increasing scrutiny of Head Start Programs nationwide, which made Federal funding less secure and predictable. According to Cayard, COLAs steadily decreased from a high of 3-1/2 percent in 2001, to 1 percent in 2004 and 2005. She noted that State funds also decreased. At the same time, the Head Start (and other agency) employee-related expenses have steadily and dramatically increased, along with expenses for supplies, utilities, and gasoline for the buses.

Cayard testified that the agency has to submit a complete and detailed application to the Federal authorities, including community assessments and descriptions of program options every 3 years, and the in-between years the agency submits a shorter version of the application.¹⁶⁹

Cayard stated that her duties as Head Start director include preparing the program’s yearly budget, which includes the available grants and contracts. Cayard said that she works with the agency’s controller in this effort. Accordingly, for the 2005–2006 term, Cayard stated that the controller, Hird, and she worked up estimates of the costs associated with the Head Start Program such as therapy services for children, supplies, materials, utilities, and fuel, as

¹⁶⁷ Cayard noted that the first year she had enough teachers to provide a degreed teacher in classrooms was the 2005–2006 program year. She further noted that teacher qualifications are a recurring thorn with the U.S. Congress, which has been seeking to increase teacher qualifications for the Head Start Program.

¹⁶⁸ Cayard stated that the ELI program is now a contract as opposed to a grant program. Head Start contracts to provide services to covered children and is reimbursed by Ohio based on the number of children enrolled and their attendance rate. The ELI contract was executed for the 2005–2006 term. (See R. Exh. 23, the WCCS ELI application dated April 26, 2005). Prior to the ELI program, the WCCS would apply to the Ohio Office of Education for funding. See R. Exh. 24, the WCCS application for Head Start funding for the 2003–2004 term. The ELI contract for 2005–2006 is \$141,500. (See R. Exh. 26.)

¹⁶⁹ Cayard identified R. Exh. 22 as a copy of the WCCS application it submitted to Health and Human Services on March 25, 2005, for the 2005–2006 term. Cayard says this document reflects the annual application format for each year.

well as the fixed costs.¹⁷⁰ Cayard said that Hird prepared spreadsheets, setting these expenses out and then determining what funds were left for salaries. This 2005–2006 budget was submitted to the Union in the bargaining process.

5 Cayard further testified that the preparation of the Head Start budget in the bargaining context was more involved than that for the grant application process because in bargaining she had to plan for 3 years, whereas the grants process envisions a 1-year term. Thus, according to Cayard, in the doubtful political climate of 2005, in which Head Start found itself, future Federal funds were not secure or predictable. By reason of this fact along with the ever-increasing costs of utilities, fuel, and the like, Cayard stated that management felt that it would be irresponsible and unrealistic to continue to anticipate that current salaries and benefits would be obtained for a 3-year period. Cayard remarked that (calendar) 2005 was simply not a typical year in her view to plan the Head Start budget. (Tr. 852.)

15 Cayard said she attended two bargaining sessions, but not including the March 2 session, at which the Union presented its economic counterproposal. However, she became aware of it later, noting that essentially the proposal called for a 3 percent COLA increase and health benefits being continued at the same (current) costs to the Employer. Cayard stated that in her view, the then-current funding for Head Start could not handle these proposals.

20 Directing herself to the July 12 negotiating session, Cayard said there was “quite a bit” of discussion about whether the agency needed to maintain the current number of employees. However, the primary concerns of management centered around its perception of being in a very difficult financial situation, in part caused by the legal costs incurred at the negotiation sessions. Under these circumstances, management felt the negotiations needed to be drawn to a close inasmuch as they had been going on for many months. Also, according to Cayard, the agency wanted a contract in place so that the program would essentially be in place to begin the new school year.

30 Turning to the closing of the Hampton Bennett Center, Cayard admitted that management, with her input and involvement, decided to close this center in August 2005 to save the costs of leasing and filling three employee slots there and consolidate the services to the community. Cayard testified about the events leading to the closure and its aftermath.

35 According to Cayard, between July and August 2005, one of her teachers resigned and two other employees—a cook and a teacher assistant at the Lebanon Center—announced that they were taking other jobs. Cayard said she then began interviewing their positions. However, around August 22, Sargeant and Hird informed her that Head Start had gone significantly over-budget the previous term and there was heavy pressure to cut costs and bring the program back in line with the budget.¹⁷¹ In this light, Cayard concluded that she could not hire a teacher and, in discussions with Sargeant and Hird, the Hampton Bennett Center, the smallest of the Head Start centers, was deemed expendable. The managers decided on August 23 to close the center and transfer the employees to another center. Cayard characterized the decision as sudden. Hampton Bennett was closed; its students were reassigned to the other Franklin Center; another double-session classroom was opened at the Lebanon Center so as to enroll more children.¹⁷² Cayard noted that no staffer lost pay or her job or had hours changed as a

¹⁷⁰ Cayard stated that unemployment costs were considered fixed costs by Hird.

50 ¹⁷¹ Notably, the Respondent did not adduce at the hearing any documentation to support the claim that the Head Start Program was operating over budget at this time.

¹⁷² Cayard said that the Head Start Program operates at some of its facilities’ classrooms on
Continued

result of the closing and consolidation; Hampton Bennett's two teachers, an assistant teacher, and a family advocate were transferred to the Louisa Wright facility; a teacher assistant and cook were offered positions at the Lebanon Center. Cayard stated that the staff were informed in a meeting with the site supervisor at Louisa Wright and Lebanon on August 24.

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Cayard testified that this move was not irrevocable and, if the Union had suggested an alternative that would save money, the agency would have reconsidered the plan.

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Cayard noted that there was some urgency, however, because the students were to return to school on September 7, 2005. Still, in her view, Cayard thought that the Union could have proposed an alternative.¹⁷³ Cayard also added that the agency had to give the Hampton Bennett School superintendent 60 days' notice to terminate the lease.¹⁷⁴

15

Cayard was familiar with the agency's withdrawal of recognition of the Union. Cayard testified that on September 20, 2005, she was given 18 cards from unit employees who expressed their desire not to be represented by the Union by unit employee Dorman Kidd, a maintenance employee.¹⁷⁵ Cayard said that she gave them to Sargeant who compared the signatures to a staff training attendance sheet.¹⁷⁶ At that time, Cayard said there were 36 members in the bargaining unit.

20

Cayard was also aware that the Head Start employees received a pay raise in October 2005 and testified how the agency could afford this in light of the agency's final offer of July 12.

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According to Cayard, some employees resigned, thus freeing up their salaries, and the closing of Hampton Bennett and reassigning staff to open positions saved about \$10,000 in rent and around \$50,000 in salary and benefits.

30

After the recognition of the Union was withdrawn, the agency took other steps to cut costs. For instance, Cayard said that she cut the hours of the administrative staff which saved about \$5300. The agency also implemented the drug-free workplace policy which garnered another \$1800 in savings in State workers' compensation premiums; reduced the number of years for disability insurance coverage to 2 years which saved about \$2500;¹⁷⁷ decided to lay off unit employees during the winter and spring breaks so they could file for unemployment

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a single or double session basis, one session in the morning and another in the afternoon but utilizing the same staff.

40

¹⁷³ Cayard testified that the teachers were due back on August 29, and the former Hampton Bennett teachers helped with the move to Louisa Wright. She noted that in the move the children's slots were transferred to Louisa Wright. The children themselves were not necessarily part of the Hampton Bennett closure—as children leave preschool, new children take their places in the program. Some slots were transferred to Louisa Wright, others to the Helen Center.

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¹⁷⁴ Cayard said the lease was officially canceled on August 29; the 60-day notice ran from that time.

¹⁷⁵ Cayard identified copies of the cards in question. (See R. Exh. 27.) Actually, there are 19 cards. Employee Dawn Blevins' card was turned in by Kidd on September 21, according to Cayard. Cayard said the originals were put in the agency safe.

¹⁷⁶ See R. Exh. 28, a copy of a sign sheet for "all staff meeting," dated September 6, 2005.

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¹⁷⁷ Cayard conceded that for the summer of 2006, employees had no disability leave insurance, which was available during the time negotiations were ongoing. Cayard said that the disability insurance plan was to be reestablished in September 2006.

benefits, with a savings of \$5000;¹⁷⁸ and decided not to cover the employees' share of the health insurance premiums during the summer months which saved around \$50,000.

5 Cayard also noted that without the Union the agency did not have to plan for a 3-year contractual commitment and could now use existing funds for the programs and plan its budget for just 1 year at a time. Essentially, according to Cayard, without the Union the agency did not have to plan for an uncertain and unpredictable 3-year contract period.

10 Cayard admitted that she was aware of the WCCS's tentative approval of the October 3 wage increase previous to the final approval in September 2005.¹⁷⁹

IX. DISCUSSION AND CONCLUSIONS: SIGNIFICANT ISSUES

15 Before launching into the discussion and conclusions section of this decision, I believe a few preliminary remarks and observations are in order. First, it is important to note that, as I see the record in its totality including my observation of the demeanor of the witnesses, their tone and tenor, and my careful consideration of the voluminous documentation presented at the hearing, the Respondent cannot be said to have generally engaged in bad-faith bargaining. To be sure, there was especially in the beginning of the negotiations serious and meaningful negotiations, but not without some friction, between the parties. It seemed that it was not until the economic matters presented themselves did the parties' bargaining relationship falter. Accordingly, in my view, consistent with the discussion to follow, this case rises or falls for purposes of the good-faith bargaining allegations on the resolution of the issues discussed as follows.

25 This brings me to another point, the credibility issue. I must say that I was most impressed with the testimony and demeanor of Mueller in terms of my effort to gain a reasonable understanding of what transpired during the parties' negotiations. I found that Mueller was an exceptionally good historian of the events, with good memory backed up by her notes and other documentation. Mueller also impressed me with her sincerity and candor. She did not overstate her case and candidly admitted that the Union, especially after Jones' evidently unanticipated departure, was not necessarily on top of things in the negotiations. She readily conceded that there was some slippage on the Union's part in this regard. Basically, because of her testimony and documentation, I would tend to accept her version of the main—
35 that is the most pertinent and relevant—aspects of the negotiations, the parties' handling of the economic concerns.

40 While finding Mueller to be highly credible, I would be at pains to say that I did not find the Respondent's witnesses incredible. Ayers testified about the negotiations, but in my view he was not as precise and comprehensive in presenting the agency's version as was Mueller in presenting the Union's. Sargeant and Cayard testified earnestly but more to the agency's mission and rationales along with its justifications for positions taken. It was not clear to me whether the information they presented to me at the hearing was also presented in the negotiations. This was significant to me. Mueller, on the other hand, left no doubt that matters
45 she was testifying to at the hearing were also that which she discussed or presented during the

¹⁷⁸ Cayard did not explain exactly how this cut saved the agency \$5000 or what effect this reduction in benefits had or may have had on the agency's unemployment contribution rate.

50 ¹⁷⁹ Cayard could not recall precisely when she became aware of the approval of the wage increase and could only say that it was prior to October 2005.

negotiations. Thus, on balance, I believe that Mueller provided a more accurate version of the negotiations so I would in the main credit her account thereof.

5 I would note in passing that two witnesses who could have shed more light on the parties' negotiations did not testify, namely Jones for the Union and Hird for the Respondent. Both of these witnesses seemingly had significant roles for their respective sides—Jones for the early negotiations and any possible agreements she might have made with the agency, and Hird who was, it seems, most responsible for the agency's economic stance in the negotiations. Regrettably, neither of them testified and, while I take no adverse inference therefrom, the record is the poorer for their absence.

10 Regarding the employee witnesses, I found them each eminently credible. They were all current employees and thereupon entitled to some deference testimonially. However, irrespective of their status as current employees, they each appeared to be honest, sincere, and forthright irrespective of their individual support for or opposition to the Union. They did not embellish their testimony in any way and simply presented their testimony in a matter-of-fact fashion.

20 With these prefatory matters out of the way, I turn to the issues at hand.

A. Did the Respondent Propose and Insist Upon Severe Wage and Benefit Cuts in Good Faith

25 To be sure, as argued by the General Counsel, a central aspect of the bargaining between the Union and the Respondent related to the economic proposals, mainly the wage and benefits components proposed by each.

30 The General Counsel submits that from its first economic proposal to its fifth and final proposal, the Respondent did not make a single economic concession in spite of the Union's concessions and stated flexibility on the issue. She argues further that the Respondent's economic package was not only extreme—calling for drastic cuts in pay, eliminating all forms of paid leave and health insurance during the summers, to name a few salient points, but was unnecessary as later events—the October pay raise—proved. On bottom, the General Counsel contends that the Respondent's economic proposals were offered only to frustrate an agreement and ultimately get rid of the Union.

40 The Respondent contends, however, that while its economic proposal indeed included reductions in both wages and benefits, this fact in and of itself does not reflect bad-faith bargaining on its part. The Respondent asserts that in order to be considered in bad faith, the proposals must be totally lacking in legitimate business purpose and so necessarily at odds with intent to settle the difference and to arrive at agreement. The Respondent contends that such a finding is not supportable on this record because the Respondent had legitimate concerns about reduced funding for the program and the increased costs of its operations, including the all-important costs associated with unemployment.

45 The Respondent further submits that these concerns and objective facts were presented to the Union throughout the bargaining process, and the Union was invited to present its ideas to either increase funds or implement staffing patterns or levels, or in any other fashion assist the agency in its efforts to run a quality program within the restrictions posed by the extant funding process. The Respondent argues that its proposed budget was offered pursuant to a legitimate business purpose and reflected its customary practice of determining the amount of funding, deducting the costs of the operations, and using the remainder for wages and benefits.

The Respondent concedes that while it did not change its proposals, nonetheless, it contends that it acted within its rights to insist on them; that its insistence was merely a lawful firm stance on a position it honestly maintained was conducive to running a quality program.

5 The Respondent, meeting the General Counsel's claim that its bad faith was demonstrated by the unnecessary nature of the economic proposals, asserts that between September 1 and October 3, several cost saving measures were put in place—including employee resignations, the closing of facilities, instituting the drug-free work place policy, laying off of employees during the winter and spring breaks, and eliminating health care coverage in
10 the summer—that ultimately saved the agency around \$160,000. These savings were implemented before the pay increase and presented a significant change in circumstances that permitted the wage increases effective October 3.

15 The Respondent argues that, on balance, it provided justification for its economic proposals to the Union and at the same time insisted on them, all in good faith.

20 I would first find and conclude that the economic proposals of the Respondent, when compared to the wages and benefits the unit employees enjoyed prior to the Union's advent, were drastic and more importantly unprecedented. It is clear beyond any shadow of a doubt that prior to the Union, the Head Start employees never received a pay cut or reduction in wages of benefits, irrespective of the Respondent's budgetary process or the uncertainty of funding or the vicissitudes of the politics surrounding its funding sources. It seems that
25 whatever budgetary constraints were operative with the Head Start Program, they seemingly only came to be a manifest issue when the Union came on the scene. In short, over the years, the Respondent has been able to run what it termed a quality program, and it seems a large component to its concept of quality was ensuring that it remained on par with other nonprofits by offering competitive wages and benefits as well as treating the staff like public school teachers and support personnel.

30 On the issue of wages, the General Counsel included as an attachment to her brief a comparison of the Respondent's and Union's wage offers between July and October 2005.¹⁸⁰ The document in stark relief demonstrates the wage cuts listed employees would have received by virtue of the Respondent's final offer in July 2005 and the increases they received in October. When one considers the wage cuts and the loss of the other fringe benefits (paid leave and
35 medical insurance primarily) associated with the Respondent's proposals, one has to conclude that the employees here were economically in a much worse position with the Union's representation than without it.

40 The Respondent has offered what I would ordinarily consider plausible and hence reasonable justification for its stance on the economic issues. Furthermore, as the Board recognizes, an employer may engage in hard bargaining even to the point of making regressive proposals. Here, the Respondent and, I might add, the Union engaged at various points in the negotiations what I would term hard bargaining. The question, of course, is did the Respondent
45 cross the line into such conduct that could be characterized as bad faith. I believe that the Respondent did cross that line with respect to the bona fides of its economic proposals.

First, in agreement with the General Counsel, I would find and conclude that the Respondent's economic proposals in substance essentially never varied from the first to its last

50 ¹⁸⁰ I would find and conclude that in all material respects, the compilation reflects the evidence of record.

proposal. To me, the Respondent insisted that this was the best it could do and later represented that its economic situation was worsening, and that in particular it anticipated a particularly hard “hit” regarding unemployment costs. In my view, the record does not support either of these assertions. The Respondent presented no economic data to support a
 5 worsening financial condition, and its calculations regarding unemployment are highly suspect.

The Union, faced with this wall of resistance, could only ask the Respondent for information to explicate or justify these proposals. Whether this major information was provided timely, if at all, will be discussed later in this decision.
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Be that as it may, the Respondent was adamant that it could not improve on its economic offerings. However, unknown to the Union, the Respondent’s management and its board of trustees were planning to implement a wage increase for the 2005–2006 academic year. In his testimony, Sargeant stated that the wage increase was planned in about February or March 2005, and was approved in August 2005. In my view, if the concept of bad-faith bargaining has a line of consanguinity, then the willful nondisclosure of a material fact must be its first cousin. In this regard, the Respondent did not inform the Union of its parallel and contradictory actions on the wage issue, but incongruently, if not strangely, insisted that a quality program could only be vouchsafed by its approach to wages and benefits—that is by cutting wages and benefits. In my view, this tack was disingenuous at the least, and certainly not emblematic of good faith.
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I note that the Respondent argues that other events and circumstances (some of which bear in a material way with my ultimate decision) coalesced to make the wages cuts and some benefits unnecessary. However, this is beside the point since these events basically took place after the final offer and declaration of impasse. In my view, the Respondent here insisted to the Union that wages and benefits cuts were an immutable fact and that the Union should come up with a plan or proposals to meet the issue. However, in point of fact, the Respondent’s management, consistent with its own past practice, was planning to implement wage increases, not wage cuts, to maintain a quality program. The Respondent’s failure to disclose its plans to the Union in the bargaining session was not in my view consonant with the Act’s mandate to bargain in good faith. I would find a violation of Section 8(a)(5) in this regard.
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B. Did the Respondent Mislead the Union About Its Financial Condition
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Related to the issue of the wages and benefits is that of the Respondent’s financial condition. Essentially, the General Counsel contends that the Respondent was dishonest with the Union regarding its financial condition in order to justify its proposal to cut employee wages and benefits and, in fact, the Respondent’s action was tantamount to deception.
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The General Counsel asserts that the Respondent in particular engaged in deceptive conduct with respect to its claim of a significant increase in its unemployment costs which were at the center of the proposed cuts in wages and benefits. She submits that the Respondent tried several dodges to providing the Union an explication of its position; first, dishonestly telling Mueller that the information had been provided presumably to Jones. Then, when this was refuted by Mueller, the Respondent provided its fringe benefits compilations, a purported analysis of unemployment rates and taxes along with a salary and wages worksheet which assumed a 6.3-percent rate for unemployment premiums for the 2005–2006 year.
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The General Counsel contends these documents and the calculations, as established by Mueller, were fallacious and simply did not “add up.” Moreover, as Mueller testified, the Respondent based its projections for unemployment on not just the unit employees but also
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nonunit employees. The General Counsel submits these actions are not consistent and consonant with good-faith bargaining.

5 The General Counsel notes that once Mueller's calculations, using the Respondent's percentage along with the Ohio tax methodology, showed a \$60,000 difference and were presented to the Respondent, Ayers refused her entreaties for an explanation. Furthermore, Mueller asked for information regarding the Respondent's unemployment projections, how its calculations were arrived at, and an explication of the discrepancy in the parties' bottom line cost assessments up to and after the Respondent made its final offer and declared impasse. It was not until September 19 that Ayers revealed that the Respondent's calculations were based on unemployment costs for the entire agency for 1995 through 1997 and that the agency felt the cost projections were reasonable. However, she contends that Ayers never explained the discrepancy Mueller had discovered in the cost analysis conducted by the Union.

15 The General Counsel asserts that the Respondent's actions with respect to unemployment issue were not emblematic of good-faith bargaining, and were calculated by the Respondent to frustrate the parties reaching agreement on the economic issues, the main stumbling block to resolution of the negotiations. In short, the General Counsel argues that the Respondent was simply trying to inflate its costs through a deceptive manipulation of unemployment cost estimates based on dated experience covering the entire agency when the issue under consideration by the parties solely related to the Head Start employees under the LLC entity.¹⁸¹

25 The General Counsel also contends that the Respondent's dishonesty and deception were evident in its insistence on having a staff of 40 employees, claiming that regulations required this and that this number was necessary to run a quality program. Compounding this, she argues that the Respondent disingenuously insisted that the employees work 40 hours a week as opposed to the 38 they were working. She submits that in fact, as was disclosed at the hearing, the Federal regulations did not require 40 staffers. Significantly, she notes that after the Union was gone, Head Start employees numbered around 36 working a 38-hour week. In this fashion also, the General Counsel argues that the Respondent was in bad faith attempting to inflate its costs to frustrate reaching an agreement.¹⁸²

35 The Respondent, however, claims that it repeatedly explained to the Union the realities of its financial condition and that that "reality" included its anticipated costs related to unemployment based on its historical data supplied to the Union during the negotiations. The Respondent asserts that the 6.3-percent figure was derived from its 1995 experience and it was reasonable to assume that its unemployment costs would run to at least that same amount since the Head Start employees were as of the 2004-2005 school year free to apply for unemployment benefits, an entitlement the Union successfully sought in earlier negotiations.

45 ¹⁸¹ The General Counsel notes parenthetically that the Respondent actually never told the Union it was creating a new tax entity for Head Start and, of course, never informed the Union of the tax implications of this decision. Moreover, she notes that the Head Start rate never reached anywhere near the 6.3 percent and actually, as the Respondent knew, was closer to 2 percent.

50 ¹⁸² The General Counsel also asserts that the Respondent engaged in misleading and dishonest conduct by refusing to explain the effect on its operational costs of the elimination of paid leave for unit employees.

The General Counsel's assertion that during negotiations the Respondent either misled or was dishonest with the Union, in support of its claim that the Respondent engaged in bad-faith bargaining, in my view is not made out or supported in the record as I view this particular allegation. First, regarding the unemployment calculations of the Respondent, the Union was
 5 not misled or deceived because it, almost from the outset, questioned the Respondent's unemployment calculations and Mueller, before all was said and done, did her own research and arrived at different conclusions about the costs of unemployment. It cannot be said, therefore, that she was misled or deceived. To the extent that the Respondent could be said to have inflated these costs, that presents a debatable point. I would liken the Respondent's
 10 position here to permissible hard bargaining. The Respondent chose to use valid or at least undisputed historical data to justify its stance on unemployment. I will not interpose my opinion regarding this choice of a bargaining gambit. Clearly, the Union did not accept this approach, but I cannot say this was dishonest or reflective of bad-faith bargaining. As to whether the Respondent's alleged refusal to explain its position on, or provide information about the
 15 unemployment matter as requested by Mueller, is emblematic of bad faith, I leave to later discussion herein. I note here again the Respondent's unemployment calculations are suspect.

The Respondent determined that 40 employees and a 40-hour workweek made for a quality program and took that stance in the negotiations. The Union disagreed, and the parties
 20 bargained over the point. I do not think based on later events—after the final offer and after the withdrawal of recognition—that the Respondent's utilization of less than 40 employees and having them work less than 40 hours establishes bad-faith bargaining. Here, it would be my conclusion that the number of hours and staff present simply a debatable point for negotiations and there was no bad faith in the Respondent's taking the position it did.

On bottom, the Union's representative, Mueller, presented to me as a very able representative, and I would be hard put to conclude she was misled or deceived by the Respondent's representations and its respective positions. In this regard, I cannot conclude
 25 that in the instances cited by the General Counsel, the Respondent engaged in dishonest, deceptive, or misleading conduct so as to constitute bad-faith bargaining. Generally, Mueller, when confronted with the Respondent's positions and calculations and other representations during negotiations with which she disagreed, she acted accordingly. She questioned Ayers; she did her own research; and she sought information verbally and written to gain an understanding of the Respondent's proposals. For example, Mueller, to the very end of the
 30 negotiations, pressed Ayers for his justification for eliminating all or practically all paid leave. She also countered at every opportunity what she viewed as Ayers' attempts to lump the cost of the entire agency's operations into the Head Start budget. Throughout the negotiations in which she was involved, in my view Mueller was not deceived or misled by the Respondent.

Moreover, I do not view the Respondent's positions as having emanated from a dishonest motive, or to inflate its costs through a deceptive practice in an attempt to derail the negotiations, the position asserted by the General Counsel.¹⁸³ In my view, regarding the salient
 40 points of the economic matters, both parties engaged in permissible, albeit perhaps hard bargaining and, on bottom, the Union was not misled or subjected to any dishonesty on the Respondent's part.

¹⁸³ I am loathe to impute dishonesty or deception to the actions of the Respondent here
 50 because to do so would be highly conjectural, as well as subjective. The Board authorities, as I read them, instruct judges to avoid such a subjective appraisal of the parties' behavior in the bargaining context.

C. Did the Respondent's Granting of a Pay Raise and Continuation of Benefits It Sought to Eliminate in Negotiations Constitute Bad Faith

5 The General Counsel contends that less than a month after Ayers sent a letter to the Union asserting that the Respondent's financial condition was worsening, it granted an across-the-board wage increase for not only unit employees but also nonunit employees. The Respondent also continued providing essentially all forms of paid leave except for the winter and spring breaks, as well as all forms of insurance and matching employee retirement contributions. She notes that the pay increase was significantly greater than the 1-percent increase proposed by the Union in its last counterproposal.
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The General Counsel argues, referring to pertinent trial Exhibits and the aforementioned Brief Exh. 1, that when one examines the "huge difference" between the wage rates insisted on by the Respondent during bargaining and the amount it paid ultimately to unit employees in October 2005, a more blatant act of bad-faith bargaining is unimaginable. She submits that Sargeant's testimony that in so many words things fell into place to allow the increases and continuation of most benefits is simply incredible.
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As to the areas where the Respondent claimed savings were realized to support the wage increase, the General Counsel asserts all of these were available to the Respondent before September 20 when the Respondent, irrespective of the withdrawal of recognition, still had a bargaining obligation with the Union. More importantly, she notes that the seemingly major obstacle to agreement—the unemployment issue—was not resolved. The Respondent presumably was still facing the \$100,000 "hit," but nonetheless found a way to grant a wage increase and continue benefits. On balance, the General Counsel contends that the Respondent's stated economic impediments to an agreement—the 3-year contract, legal fees, unemployment costs, paid leave, and reduced funding—were in essence a sham; that the Respondent was, in advocating its very lean economic offer, merely playing games with the Union, a game whose objective was to avoid reaching an agreement.
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Consistent with my prior findings, I would find and conclude that the Respondent's granting the unit employees a pay raise and retaining the bulk of the employees' benefits it sought to eliminate during bargaining are indicative of bad-faith bargaining.

35 *D. Were the Respondent's Issuance of Its Final Offer and Declaration of Impasse Indicia of Bad-Faith Bargaining*

The General Counsel argues essentially that the Respondent's final offer on July 12 was the same extreme economic offer it had offered for the first time in March 2005. Additionally, the final offer, she submits, was offered in bad faith because it was bottomed on false cost information on the one hand and it never provided information on the other, specifically relative to the unemployment costs.
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The General Counsel contends that the Respondent presented its best-we-can-do final offer, fully aware that there were many unanswered questions exposed in the negotiations regarding the agency's true financial condition. The General Counsel suggests that the final offer changed the entire tenor of the negotiations as attested by Mueller and forced the Union to hold a vote on the matter and to raise the unwelcome specter of a strike to get the Respondent to alter its unreasonably stubborn position. She implied that these actions were calculated to weaken support for the Union and ultimately influenced the employees to disaffiliate with the Union.
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5 The General Counsel also contends that the Respondent's declaration of impasse under the extant circumstances was inappropriate and unwarranted. She notes that the Union presented an economic proposal on July 12, which tended to move close to the Respondent's position regarding wages and also expressed its flexibility in vital areas such as health care, union security, and unemployment. The Union and the Respondent, she notes, reached tentative agreement as late as June 22 on education assistance and in-service training. On balance, she contends that the Union did not believe to a reasonable certainty the parties were at impasse, as evidenced by Mueller's August 5 letter to Ayers expressing the Union's flexibility on the several outstanding issues.

10 Finally, the General Counsel contends that the Respondent had not provided much of the information the Union sought on July 27 and none it sought on August 5. More importantly, the Respondent had not provided requested information regarding the agency's \$100,000 projected unemployment cost increase at the time of the impasse declaration.

15 The General Counsel submits that even by Ayers' own definition that impasse meant the parties' positions were "unalterable," the Respondent's declaration of impasse was premature. She contends that the Union was obviously willing to continue bargaining and made compromises in its position toward that end. She argues that the Respondent's declaration of impasse under these circumstances, along with its unwarranted take-it-or-leave-it final offer, demonstrate that the agency was merely attempting to derail the negotiations and indicates its continued bad-faith bargaining.

20 The Respondent contends that the Union rejected what it described as its final offer. This rejection prompted the agency to make an assessment of the negotiations to date to include the parties' respective positions, the length of time the parties had been bargaining, and the issues still outstanding. The agency's declaration of impasse followed, significant issues remained unsettled and, in the agency's view, the parties were at loggerheads.

25 The Respondent asserts that irrespective of its declaration of impasse, it still offered to meet with the Union, scheduled additional sessions, and provided much information as requested by the Union. Moreover, the Respondent asserts it never implemented any portion of its final offer while the Union represented the Head Start workers.

30 Accordingly, the Respondent submits that its final offer and declaration of impasse in no way was indicative of bad-faith bargaining.

35 In agreement with the General Counsel, I would find and conclude that the Respondent's final offer and its declaration of impasse were improper and indicative of bad-faith bargaining.

40 I have previously concluded that the Respondent's insistence throughout the negotiations on drastic cuts in wages and benefits was indicative of bad-faith bargaining on its part as I see things. The final offer was merely the final nail securing an intransigent position.

45 The declaration of impasse to me was merely a logical next step to derail the negotiations. It is clear that the Union strongly disagreed with the declaration of impasse and sought to keep the negotiations open through expressions of flexibility and possible compromise. The Union took this position in spite of the fact that information it considered vital had not been provided. Under the circumstances, I cannot envision how the Respondent legitimately and honestly came to conclude that both parties were of the view that further bargaining would be futile. At the risk of some speculation on my part, it seems to me that the final offer and the subsequent declaration of impasse emanated from the Respondent's

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frustration with the Union's insistence on receiving information, making a counter-economic proposal, and the mounting legal costs associated with the negotiations. In short, in agreement with the General Counsel, it seems that the Respondent's position was motivated more by the Union's refusal to capitulate to the agency's obdurate economic stances than any notion that further bargaining would be futile.

I would find and conclude that the Respondent violated Section 8(a)(5) by making its final offer on July 12, and prematurely and unwarrantedly declaring impasse in the negotiations on July 27, 2005. Moreover, such actions are indicative of bad-faith bargaining on the Respondent's part.

E. Did the Respondent's Attitude Toward the Union Indicate Bad-Faith Bargaining

The General Counsel argues that during the organizing campaign the Respondent strongly discouraged its employees against unionizing and warned employees that collective bargaining is potentially hazardous for them.¹⁸⁴ She also points out that the February 23, 2004 minutes of a Respondent's board of trustees meeting reflects Ayers' involvement with management training on union avoidance.¹⁸⁵ The General Counsel contends that these documents demonstrate the Respondent's historical and ongoing animus against the Union, which she submits was later operative in the negotiations that took place in 2005.

The General Counsel also contends that the Respondent's site supervisors exhibited animus to certain employees during the negotiations. She cites the testimony of employee Joyce Hornsby, Sheila Rooks, and Ruth Griffey as cases in point.

Hornsby testified that her supervisor, Judy Butler, blamed the Union for the employees' reduction in hours, and their reduction in pay because of the legal fees the negotiations were costing the agency. Hornsby, the General Counsel states, also testified that Butler expressed her disappointment with Hornsby's failed effort to secure enough signatures to oust the union in March 2005.

Employee Rooks testified that in February 2005, her supervisor, Paula Pons, threw away a message to her from the "union lady," and admonished Rooks not to do union business at work.

Griffey testified that in November 2005, her site supervisor, also Butler, told her in a private conversation at the Lebanon Center that she hoped that everyone would now get along (with the Union ousted), that she hoped things would be better. According to Griffey, Butler then broke out in a kind of victory dance and said, "You lose, you lose," and walked away from her. The General Counsel argues that Griffey was not only an open union supporter but also a member of the Union's negotiating team.

In a similar vein, the General Counsel notes that Cayard and Sargeant met with the employees around October 7, 2005, and Cayard said, "Now we can talk openly and honestly to each other, something we could not do for 2 years, and that the employees could get the same

¹⁸⁴ The General Counsel points to GC Exhs. 117-119 in support of this contention. These documents essentially are antiunion materials that the Respondent evidently distributed to its employees during the organizing campaign of 2003. Neither these documents nor any matters associated with them or the organizing campaign are alleged as violations in the complaint.

¹⁸⁵ See GC Exh. 132.

(benefits) without paying legal fees and union dues and having to give up Fridays nights” (due to negotiations).

5 In sum, the General Counsel contends these statements and actions, by the Respondent’s line supervisors and even to highest level of management, shed light on its conduct at the bargaining table—conduct she submits was designated to thwart the bargaining process, and even get rid of the Union, all of which is clearly indicative of the agency’s failure to bargain in good faith.

10 First, there is no reason not to credit the testimony of the three current employee witnesses. Each witness appeared to me to be matter-of-fact and sincere in her testimony, irrespective of her particular leaning for or against the Union. The campaign documents speak for themselves. Clearly, the Respondent’s management did not want the Union, and it seems clear its antipathy to the Union was shared by at least two of its line supervisors.

15 However, the Respondent has not been charged with any specific violations of Section 8(a)(3) or even any coercive behavior under Section 8(a)(1) of the Act. Thus, to me, there being no discriminatory conduct alleged as well as no threats or intimidation associated with the supervisors’ statements, the Respondent’s site managers, and even including Cayard and perhaps Sargeant, were merely expressing their views as permitted by Section 8(c) of the Act. In my view, neither the Act nor the Board decisions require an employer engaged in negotiations to have a sanguine view of a union in order to avoid a finding of bad-faith bargaining.

25 I recognize that the Board, in judging good and bad faith, looks at the parties’ behavior at and away from the bargaining table. Here, as argued by the General Counsel, the bad-faith conduct manifested by the Respondent took place away from the table. More important to me, however, is that the conduct in question was not associated with the Respondent’s negotiating team members during the negotiations. While it is reasonable to assume that Cayard may have known about her supervisors’ general feelings about the Union,¹⁸⁶ there is no direct proof that she condoned or encouraged whatever antiunion opinions the supervisors harbored about the Union during the time she was directly involved in the negotiations. In my view, it would be highly speculative to attribute an antiunion animus to the Respondent’s negotiators based on the statements of the agency’s line supervisors, and to conclude therefrom that the negotiators engaged in bad-faith bargaining with the Union.

Irrespective of the Respondent’s evident dislike for the Union, I would not find or conclude that this was an indicium of the agency’s bad-faith bargaining.

40 *F. Did the Respondent Unlawfully Fail to Timely Provide Information and Was This Failure Indicative of Bad Faith*

45 The General Counsel contends that by failing to provide to the Union the number of nonbargaining unit employees who filed for unemployment in the summer of 2005,¹⁸⁷ the Respondent engaged in bad-faith bargaining. She argues that while this requested information was unrelated to the unit employees and it, nonetheless, was highly relevant to a central issue of the negotiations—unemployment costs.

50 ¹⁸⁶ Cayard testified that Butler told her of the employees’ effort to oust the Union in March 2005. Hornsby testified that she and Butler talked about the effort at the time.

¹⁸⁷ Muller, it may be recalled, made this request in her July 27, 2005 letter.

5 She notes that Mueller credibly testified that this information was important to the Union because the Respondent claimed in the negotiations that an increase in unemployment filings would increase its contribution tax rate to the State. Furthermore, the Respondent had included nonunit employees in documents provided to the Union covering the unemployment issue. Mueller, she notes, never received the requested information and Ayers admitted in the Respondent's December 27 position statement that this information was not provided.

10 The Respondent counters, noting first that the Union throughout bargaining made repeated and sometimes duplicative requests for information requiring voluminous responses and production of documents. Nonetheless, the Respondent contends that it responded to these requests fully and promptly.

15 Regarding the Union's July 27 request by letter for information, including specifically the number of bargaining unit and nonbargaining unit who had filed for unemployment compensation in the summer of 2005, the Respondent submits that the information was provided ultimately in its response to the Union on September 19 by virtue of a provided document entitled "Notice of Benefits Paid and Charged to Employer"—a State-issued document relating to unemployment benefits paid to agency employees during the summer of 2005. The Respondent contends that this document indicated the total amount of money paid to filing employees on its behalf of and charged to it. The document, the Respondent asserts, indicated that 28 bargaining unit employees had applied for unemployment but also contained a total number of employees who had so applied. The Respondent argues that by simple subtraction, the number of nonbargaining employees could have been determined by the Union.

25 The Respondent submits that the Union and agency management discussed the issue of unemployment insurance repeatedly and how and why there was an anticipated increase to nearly \$100,000 for the coming year. The Respondent also submits that from at least July 27 (including July 29, August 2, and September 6) until September 19 when it provided the requested information, the agency was responsive to the Union's requests, acknowledging receipt thereof and informing the Union that the agency was reviewing the requests and gathering the information. By August 15, the Respondent submits it provided a response (147 pages of documents) which included the number of bargaining unit employees who had applied for unemployment during the summer of 2005, as well as the historical costs of unemployment at the agency.

30 The Respondent argues that there is no evidence to support the charge that it failed to provide information and certainly the information provided was not false.

40 It should be clear beyond cavil that the unemployment issue and the associated costs were central to the economic issues the parties faced in their negotiations. The Respondent claimed throughout that it anticipated a very substantial increase—nearly \$100,000 in these costs—primarily because the Head Start employees, by mutual agreement with the Union, would be free to apply for unemployment benefits when they were not employed.

45 This was an important development because central to the Respondent's economic proposal was the elimination of the winter and spring breaks for which the employees were paid prior to the Union's advent. Thus, it was reasonable to assume that for these periods, about 2 weeks in the winter and 1 week in the spring, unit employees would apply for unemployment benefits. Whether this would actually result in the anticipated increase was unknown, but the Respondent's historical data did support the proposition that an increase could occur.

The Respondent asserts that the mere fact that the Union and the agency calculated the unemployment costs differently is meaningless and does not support the charge that it intentionally miscalculated the unemployment costs to justify its economic proposal.

5 However, regarding the information request allegation, in my view this argument misses
the point. The parties indeed had calculated the unemployment costs differently with the
Union's calculations indicating a difference in tens of thousands of dollars. The Union's
calculations were certainly nowhere near the \$100,000 figure cited by the Respondent. The
10 Union, through Mueller, repeatedly sought an explanation from the Respondent because of the
substantial discrepancy between her calculations and that of the Respondent. So, in my view,
her request for information about the nonunit employees' unemployment experience was
especially relevant to possibly resolving the unemployment cost issue. Notably, by July 27, the
Respondent had declared the parties to be at impasse, a position not accepted by the Union,
but a fact nonetheless. Accordingly, the requested information was vital, as Mueller made
15 abundantly clear at the hearing.

I would note that the duty to provide information includes the obligation to timely provide
the information if deemed relevant and necessary. The importance of the obligation clearly
manifested itself because (as the Respondent acknowledges) if the Union did not understand
20 how to extrapolate the requested nonunit information from the notice of benefits document it
provided to the Union on September 19, it could not get an explanation because before the next
scheduled negotiating session the Respondent had withdrawn recognition of the Union. The
point of a timely disclosure cannot be better demonstrated.

25 Moreover, the duty to provide information in my view does not permit the party so
disclosing to take a needle-in-the-haystack approach, especially where the information is
important. Here, it cannot be said too often that the unemployment costs issue was central to
the parties' economic proposals, but especially that of the Respondent. The Union should not
have been forced to comb through the provided documents and make extrapolations when the
30 underlying request was simple and straightforward.

As Mueller testified and informed the agency during negotiations, if the parties could
resolve this issue along the lines of her calculations, they were not very far apart and agreement
could be reached. By not providing the unemployment information regarding the nonunit
35 employees in a clear and readily identifiable and timely manner, I would find and conclude that
the Respondent violated Section 8(a)(5) of the Act.¹⁸⁸ I would also find and conclude that this
failure to provide the subject information in the context of the parties' negotiations is indicative of
bad-faith bargaining on the Respondent's part.¹⁸⁹

40 *G. Did the Respondent Make Changes in the Working Conditions of Its Employees
Without Bargaining with the Union; If So, Did these Changes Indicate Bad Faith*

The General Counsel contends that the Respondent changed its employees' working
conditions by unilaterally requiring them to be paid over 9 months when they had the option of
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¹⁸⁸ I have determined that Mueller clearly established in my view the relevance of the
sought-after unemployment information and the necessary nature of the information to the
Union's duty to represent the membership in the contract negotiations.

50 ¹⁸⁹ I would note, as pointed out by the General Counsel, Mueller credibly testified that she
did not know the nonbargaining information she requested could be gleaned from the
documents until the hearing.

being paid over a 12-month period; eliminating the use of employment contracts; eliminating their health care and disability coverage during the summer months; and closing the Hampton Bennett Center and transferring employees to other locations. She argues further that in making these changes, the Respondent did so without adequate notice to the Union or giving it
5 an opportunity to bargain over the changes or their effects; accordingly, the Respondent violated Section 8(a)(5) and such action is further indicative of the agency's bad-faith bargaining.

10 The General Counsel submits that the change in the payment system along with the elimination of the employment agreements in effect caused or was instrumental to the elimination of part-year employees' health and disability insurance coverage during the summer months, and that these changes occurred in July and August 2005 while the Respondent and the Union were still in a bargaining relationship. She notes that Mueller testified credibly that in
15 spite of these significant effects on the employees' working environment and terms of their employment, she was not informed of the changes until after the fact; she and the Respondent never bargained over, let alone reached agreement over, the elimination of the employees' long-held choice to be paid over 9 or 12 months.

20 Turning to the employment agreements, the General Counsel asserts that the decision to eliminate them was made unilaterally by the Respondent without giving the Union an opportunity to bargain over the decision or its effects, one of which was to deem part-year unit employees' laid off or unemployed during the summer and thus rendering them ineligible for insurance coverage under the Respondent's plans, a harmful effect for the employees and an economic (cost savings) benefit for the agency.

25 The General Counsel points to Sargeant's admission that as far as he knew, no agreement was reached with the Union over the elimination of the employment contracts. Moreover, she notes that Sheila Rooks, a current Head Start employee and a member of the Union's bargaining team during all phases of the negotiations, testified credibly that the Union was not afforded an opportunity to bargain over the elimination and no agreement (even when Jones was the lead negotiator) was reached except for the elimination in 2004 of the contract
30 clause prohibiting employees from filing for unemployment. The General Counsel notes that Sargeant testified that the decision to eliminate the contracts occurred in 2005 after Jones, who was the main adherent of the elimination of the unemployment clause, had departed.

35 The General Counsel argues that the Respondent, in unilaterally changing the part-year unit employees' pay option and eliminating the unemployment contracts entirely, both of which she asserts are mandatory subjects of bargaining, the Respondent violated Section 8(a)(5) of the Act. Furthermore, she asserted that these unilateral changes in effect caused or were
40 instrumental in eliminating the part-year unit employees' health and disability insurance coverage (also mandatory subjects of bargaining) and also constitute a violation of Section 8(a)(5). She submits that these actions are also indicative of the Respondent's bad-faith bargaining in violation of the Act because, in these instances, the Union was given no notice of the changes before they were implemented and no opportunity to bargain over them or their
45 effects.

The General Counsel also asserts that the Respondent violated Section 8(a)(5) and demonstrated its bad faith during the negotiations by unilaterally deciding to close the Hampton Bennett facility and transfer the employees assigned there to other locations, without adequate
50 notice to the Union before implementation of the closing and transfer and without giving the Union an opportunity to bargain over the effects of these actions.

The General Counsel notes that the undisputed testimony is that the Respondent made the decision regarding Hampton Bennett on August 23, 2005, again while the parties were under a bargaining obligation. On August 24, the employees affected by the closure were notified of the change and their transfer to new work locations with new supervisors. The Union,
 5 the exclusive bargaining representative, was not notified until September 1. However, this was a done deal.

The General Counsel argues that the Respondent closed the center but still continued to operate its Head Start Program with no change in the nature of its program or the services it provided. Moreover, at the hearing, the Respondent's management—Cayard in particular—said
 10 that the closing was designed to bring the agency's operating expenses back in line with the budget, but not to save labor costs, since no employee lost her job or hours because of the facility closing and transfer of the employees. The General Counsel maintains that the Respondent in such circumstance must give proper notice to the Union and extend to it an
 15 opportunity to bargain over the decision and/or its effects since employees were transferred as a result. The General Counsel also submits that the Respondent's conduct evinces its bad-faith bargaining, especially since, as attested by Mueller, it reneged on its previous tentative agreement on transfers by amending its proposal covering management rights.

The Respondent counters, contending that the Union and the agency agreed first that the employment contracts would be modified to exclude the unemployment restriction for the
 20 2004–2005 academic year, and for future years they would be eliminated in their entirety.

The Respondent notes that Ayers credibly testified to these agreements and during negotiations informed the Union that there would be consequences to the elimination of the
 25 contracts, especially since the Union insisted that unit employees were entitled to file for unemployment. The Respondent argues that in order for the employees to claim unemployment, they had to be laid off in the summer months. Accordingly, employees could not receive payment over 12 months; but this was a consequence of the Union's choice.

The Respondent asserts that on the other hand, in order to be eligible under the agency's insurance plans, employees had to be "active"—defined as being employed—for more
 30 than 30 hours per week. Since the employees were going to have to be laid off during the summer months to be eligible for unemployment they, per force, became ineligible for these benefits.¹⁹⁰ For these reasons, the Respondent contends that it did not violate the Act in either
 35 the elimination of the employment contract or those provisions thereof that allowed for a payment option and health care coverage.

Regarding the closure of the Hampton Bennett facility, the Respondent contends that it
 40 did not violate the Act for essentially two reasons: (1) the Act did not require it to bargain over the decision; and (2) the Union waived the opportunity to bargain over the decision as well as the effects thereof.

The Respondent submits that under the Act, it is not required to bargain over decisions
 45 that constitute a fundamental change in the scope or direction of its unions; only those matters

¹⁹⁰ The Respondent notes that because the agency received a waiver from its carrier, Anthem, to allow part-year employees to continue their health coverage for the summer of 2005.
 50 The employees' health care coverage did not change until the summer of 2006, much after the Respondent withdrew recognition of the Union. In short, the Respondent asserts it did not actually eliminate health care coverage for the part-year employees for 2005.

relating to wages, hours, and other terms and conditions of employment require collective bargaining. The Respondent contends that its decision to close Hampton Bennett arose out of its need to save money and begin the 2005–2006 school year with a balanced budget. With the closure, the agency saved money in rent, while still serving the same number of children. The Respondent notes that labor costs were not a factor in its decision and, in fact, no employee lost her job, received less pay, or a different work assignment, other than a location change.

The Respondent further argues that its financial circumstances were such that immediate action was required and for this reason was excused from its obligation to bargain with the Union. In short, the Respondent maintains that faced as it was with a deficit at the end of the 2004–2005 term, the 2005 closure of Hampton Bennett offered a way to help bring the budget back into balance, but only if the agency acted quickly, for the Hampton Bennett landlord required a 60-day notice to terminate the lease and every day of continued rental (without a program in place) cost the agency money. The Respondent asserts that acting on the exigencies of the circumstances, it gave notice as soon as possible, knowing that if circumstances changed, this decision could be revoked.

In the alternative, the Respondent argues that even if there were a legal requirement to bargain over the decision to close Hampton Burnett and its effects, the Union waived the opportunity to bargain. The Respondent asserts that the Union here was given a meaningful opportunity to bargain over this matter and failed to protest the decision on September 1 when Ayers sent his letter to Mueller informing her of the agency’s decision which, according to Cayard, was not then irrevocable. The Respondent contends the Union could have, if it had acted, provided alternatives regarding the closure itself and/or staffing. However, the Union neither requested a bargaining session nor registered its protest in any way at any time.

The Respondent concedes, however, that even if the Union had requested bargaining, there was still little to bargain over. The employees, for instance, experienced no change to their job except for a location change—where they reported for work—and an attendant increase in travel distance. Accordingly, the Respondent argues that it did not violate the Act in any way by closing the Hampton Bennett Center and transferring the affected employees to another location.

It seems clear on this record that the employment contracts themselves and, inter alia, the unemployment clause along with the payment options, formed an integral part of the Head Start employees’ employment relationship with the agency. First, as Sargeant testified, long before the advent of the Union the unit employees viewed the contracts as emblems or symbols that put them on a somewhat equal professional footing with the public school employees; an important point with the Head Start employees. According to Sargeant, the agency shared that view. Together, the employees and management decided that these employment contracts were in their mutual best interests for purposes of their working relationship for a number of years. It is important to note that while the contracts dealt with matters clearly falling within the concept “wages, benefits, and other terms and conditions of employment,” there was also what I would call a psychic component associated with their use and implementation that cannot be strictly measured in monetary terms. The Respondent evidently recognized this throughout the time the contracts were employed. Accordingly, contrary to the Respondent’s argument, it cannot be gainsaid that the contracts themselves were meaningless without the unemployment restriction. Therefore, I would find and conclude that the contracts were mandatory subjects of bargaining.

Regarding the payment option, it is equally clear that this component of the contract was not only integral in terms of the effects on the unit employees’ wages and benefits but, again on

5 this record, also on the employees' professional self-esteem. Public school employees, according to Sargeant, had this option. It is, of course, not disputed that the payment option had an immediate and dramatic effect on employees' insurance (health and disability) coverage and unemployment eligibility because, under the pay option, employees were either active and employed or inactive and laid off. Accordingly, in my view the payment option was at least for these reasons¹⁹¹ a mandatory subject of bargaining.

10 The question remaining is whether the Union agreed at any time to either eliminate the contracts in their entirety or the payment option component thereof. I would conclude that on this record there was no such agreement and, to the extent the contracts were eliminated in whole or in part, the Union and the Respondent did not bargain over the decision or its effects.

15 I note that it seems abundantly clear on this record that where the parties reached agreement on any proposals, the agreements were reduced to a written form usually stated as tentative agreements or "TA's." The record does not disclose any such written agreement regarding the elimination of the entire contract. Moreover, Sheila Rooks, a current employee and former member of the Union's negotiating team when Jones was the lead negotiator, credibly testified that the Union raised no objections to the employment contracts and actually, in her view, an agreement was reached to retain them but without the unemployment restriction. 20 Current employee Ruth Griffey credibly testified that for the 2005-2006 school term she worked under no employment agreement, a first since she was hired in 2000.¹⁹² Accordingly, I would reject the Respondent's claim that the parties reached any agreement over the total elimination of the employment contracts. Furthermore, I would find and conclude that the elimination of these contracts, done unilaterally and without notice to the Union or opportunity to bargain over the decision or its effects, violated the Act. 25

A fortiori, the elimination of the contracts resulted in the elimination of the payment option previously accorded employees under the contracts which, in effect, affected their coverage under the Respondent's insurance plans. Here, too, there was no agreement by the 30 parties to eliminate the payment option which was tied to the hotly negotiated cost issues surrounding employee benefits. In my view, the Respondent ultimately eliminated the employees' payment choices, specifically the 12-month option, so that it would no longer have to provide insurance coverage for the employees. At least according to employee Griffey, the Respondent did not inform the employees until August 2005 that she would not be covered 35 effective May 31, 2006, by the agency's benefit plans. While Griffey was a negotiating team member, this information was not, as far as I can determine, provided at the bargaining table so that the Union could be afforded an opportunity to bargain over the change or its effects.¹⁹³ In my view, the Respondent's unilateral change in the payment option, a mandatory subject of bargaining, affecting vital employee benefits in particular, was violative of the Act. 40

45 ¹⁹¹ I have adopted in part in this respect the General Counsel's position on the mandatory nature of the payment option for purposes of bargaining.

¹⁹² In testifying about the employment contracts, Griffey gave me the impression by her demeanor that the elimination of the contracts was not something she felt was a positive development regarding her job.

50 ¹⁹³ Griffey testified that she really needed her insurance. What the record will not reflect is her tone and the emphasis she placed on her "need" for insurance for which she credibly testified she merely was told by Hird to start saving. Griffey stated she was surprised and shocked over Hird's "out of the blue" call regarding her insurance.

Turning to the Respondent's closure of Hampton Bennett, in agreement with the General Counsel, I would find and conclude that the agency violated Section 8(a)(5) of the Act. First, the closure resulted in the need to transfer employees from Hampton Bennett to another location and, hence, affected the involved employees' terms and conditions of their employment.

5 Accordingly, in my view the transfer covered a mandatory subject of bargaining obliging the Respondent to bargain over the move. Moreover, in agreement with the General Counsel, even if the Respondent could be entitled to make its decision, it should have bargained over the effects thereof. While the Respondent attempts to minimize the hardship testified to by employee Fitzpatrick,¹⁹⁴ the issue should have been broached and discussed by the
10 Respondent with the Union. In any case, the Respondent merely presented the Union with a done deal, a fait accompli, and employees like Fitzpatrick had no recourse. In this regard, I have not credited Cayard's claim that the Respondent's decision was not irrevocable if only the Union had offered an alternative. Clearly, any alternatives would have fallen on deaf ears. The Respondent had already acted, including giving its landlord notice and transferring the children
15 or the slots involved by August 25. The Respondent's notice to the Union came on September 1. In my view, any protest from the Union at that time would have been an act of futility. Accordingly, I would find and conclude that the closure of Hampton Bennett was unilaterally effectuated by the Respondent, without notice to the Union and without giving it an opportunity to bargain over the decision and/or its effects, all in violation of Section 8(a)(5) of the Act.

20 I would also find and conclude that in unilaterally so eliminating the contracts in their entirety, which in turn eliminated employee payment options that in effect affected the employees' health and disability insurance coverage, and in unilaterally closing the Hampton Bennett location either without adequate notice or timely notice to the Union during the
25 negotiations, these actions by the Respondent indicate bad-faith bargaining.

H. Did the Respondent Unlawfully Withdraw Recognition of the Union

30 The General Counsel in the main argues that considering the totality of the circumstances associated with and surrounding the Respondent's conduct during bargaining, the agency violated the Act as alleged and, in turn, bargained in bad faith. She contends the Respondent's withdrawal of recognition of the Union on September 20, though based on the petitions of 50 percent of the unit employees, was nonetheless unlawful because the agency's own unlawful actions and bad faith contributed substantially to the employees' disaffection with their chosen representative.
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40 The Respondent asserts that its withdrawal of recognition was appropriate because the Union here actually lost the support of a majority of the bargaining unit employees, citing *Levitz Furniture Co. of the Pacific*, 333 NLRB 717 (2001). The Respondent submits that here the petitions received by Cayard were sufficient evidence of the requisite number of employees' disaffection for the Union. The Respondent also asserts that both Cayard and Sargeant were at

45 ¹⁹⁴ Fitzpatrick credibly testified that the closure of Hampton Bennett was particularly hard on her because the new location, Louisa Wright, required additional travel time and distance in the context of her need to care for her ailing spouse. She testified that the Franklin Center would have been a better location, and she told Cayard as much; however, Cayard refused to assign her there. I should note that I do not regard notice to an employee, even one on the Union's bargaining team, sufficient notice to the Union where the Employer plans to make a change, or has in fact made a change in a mandatory term. Thus, I would conclude the Union did not
50 waive the closure of Hampton Bennett because Fitzpatrick was informed in late August of the closure of Hampton Bennett.

pains to verify the signatures for authenticity; they determined that of the 35 unit employees 18, and later 19, submitted withdrawal petitions. Thus, the Respondent had specific evidence that the Union had lost its majority support. The Respondent notes that it had no part in the employees' actions. Verily, the Respondent submits no evidence was presented that the agency coerced the employees or aided them in the effort to leave the Union.

The Respondent further argues that the Union's loss of majority status was not "tainted" by any unfair labor practices on its part, and further that the General Counsel failed to show any specific proof of causal relationship between any arguable unfair labor practices on its part and the Union's loss of the support of the unit employees.¹⁹⁵

The Respondent notes that as early as March 2005, long before the agency's final offer and declaration of impasse and (arguendo) any refusal to provide information on the closure of the Hampton-Bennett Center, there were a number of unit employees who did not want the Union, who wanted to leave the Union for no reason or cause associated with or attributable to agency management.

The Respondent further submits that employees (specifically Howard) did not want the Union to represent them any longer because the Union informed them that there was a possibility of a strike. The Respondent notes in passing that its supervisors did nothing more than listen to employees, and at most provided general information regarding employee rights. The supervisors, it argues, did not solicit the petitions nor in any other way assist the employees in disavowing the Union.

As the parties point out in their respective briefs, the Board employs the factor analysis of *Vincent Industrial Plastics*¹⁹⁶ and *Master Slack Corp.*¹⁹⁷ to determine whether a causal connection exists between unlawful actions of the employer and employee disaffection with the union. To reiterate those factors are: (1) the length of time between the unlawful actions and the withdrawal of recognition; (2) the nature of the illegal acts, including the possibility of their detrimental or lasting effect on employees; (3) any possible tendency to cause disaffection with the union; and (4) the effect of the unlawful conduct on employee morale, organizational activities, and membership in the union.

Regarding the timing factor, I have determined the Respondent violated Section 8(a)(5) and did not bargain in good faith relative to matters I find were integral to the bargaining efforts, and these violations continued through the time the employees petitioned not to be represented by the Union until the Respondent's withdrawal on September 20. Significantly, as noted by the General Counsel, the final offer, the declaration of impasse, the unilateral changes—elimination of the employment contracts, the closing of the Hampton Bennett Center—all occurred in July and August; the petitions were signed in mid-August and in early to mid-September.

Turning to factors (2) and (3), it is important to be mindful that the negotiations here were designed to reach an initial contract, and it would be reasonable to assume that the employees were carefully watching the proceedings between management and the Union.

¹⁹⁵ The Respondent submits that since the General Counsel did not establish there was a general refusal to bargain with the Union, she must provide this specific proof.

¹⁹⁶ 328 NLRB 300, 301 (1999).

¹⁹⁷ 271 NLRB 78, 84 (1984).

Notably, not all of the employees wanted the Union in the first place but they were obviously in the minority. However, it seems clear that these employees, even during the middle of the negotiations—in March 2005—still harbored antiunion feelings and unsuccessfully attempted then to dislodge the Union. Clear also is the Respondent's dislike for the Union and the evident collective feeling among management, even at the top, that a union was not in the best interests of the agency, its program, and mission. Thus, while the Union had been effective, or so it seems, in negotiating the noneconomic issues, its real test would come in negotiating economic matters, pay and benefits, the real bread and butter issues. I believe that in this regard the unit employees were especially attentive, especially considering that the agency had never in the history of the Head Start Program cut pay and/or benefits. In fact, as Sargeant testified, essentially the agency wanted to keep pay and benefits at least comparable to the nonprofits, but surely not below that which other organizations provided.

In concurrence with the General Counsel, I think the employees clearly were aware of the Respondent's initial and, as it turns out, their final (and practically identical) offer. They were informed by the Union and later asked to vote on the final offer. The final offer was in mild terms very drastic and, as I have noted earlier, unprecedented. Some employees were to be sure taken aback and as employees Hornsby—an inveterate opponent of the Union—and Creech—a later convert to the Union's opposition—both testified, these proposed cuts in pay influenced them greatly to withdraw support for the Union. Thus, to my eyes, the Respondent's unlawful insistence on the drastic pay and benefits cut and its presenting these in its final offer, followed by its (premature) declaration of impasse, which in turn forced the Union into informing the membership that a strike might ensue, were instrumental in causing the employees to lose confidence in the Union and to conclude that it was ineffectual.

I would find and conclude that the Respondent's action on pay and benefits was detrimental and of lasting effect on the employees and had a more than possible tendency to cause disaffection with the Union. I would also find and conclude that the Respondent's unlawful elimination of the employment contracts and its unilateral closing of the Hampton Bennett Center, in likewise, were highly detrimental and of lasting effect on the employees and tended to cause disaffection with the Union.

As to the final factor, the Respondent's violations in my view certainly would have a negative effect on employee morale. Employee Barbara Howard credibly testified that the Respondent's final offer included not only pay cuts but cuts in holiday, sick and accumulated leave; she had never received in all her years with the agency any such cuts. Howard said without hesitation she wanted to get rid of the Union, thinking that if the Union were gone, then everything would go back to the way things were. (Tr. 453.) In these sentiments, there can be no clearer proof that the Respondent's unfair labor practices, as I have determined herein, had a negative effect on employee morale and membership in the Union.

I would find and conclude that the Respondent's withdrawal of the recognition of the Union was unlawful.

CONCLUSIONS OF LAW

1. The Respondent, Warren County Community Services Head Start, LLC, is an employer engaged in commerce within the meaning of Section 2(6) and (7) of the Act.

2. The Union, Service Employees International Union (SEIU), District 1199, affiliated with Services Employees International Union (SEIU), is a labor organization within the meaning of Section 2(5) the Act.

3. At all times material, SEIU District 1199 has been the exclusive collective-bargaining representative of the Respondent's employees in the following unit appropriate for the purposes of collective bargaining:

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All full-time and regular part-time Head Start employees, including teachers, family advocates, teacher assistants, cooks/custodians, drivers, bus aides, maintenance specialists, family advocates/drivers, and teacher assistant/bus aides employed by the Respondent in Warren County, Ohio at the sites designated at 852 Franklin Road, Lebanon, Ohio; 10 North High Street, South Lebanon, Ohio; 150 East Sixth Street, Franklin Ohio; and 101 Walnut Street, Franklin, Ohio; but excluding all site supervisors, site supervisor/teachers, administrative assistants, office assistants, education managers, family services managers, disabilities managers, nutrition managers, parent training managers/acting health managers, substitute employees, confidential employees, office clerical employees, professional employees, all other employees and all guards and supervisors as defined by the Act.

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4. By refusing to provide relevant information to the Union in a timely fashion, the Respondent has violated Section 8(a)(1) and (5) of the Act.

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5. By unilaterally making changes in the working conditions of its employees without giving adequate notice to the Union or giving it an opportunity bargain over the decisions or their effects, the Respondent has violated Section 8(a)(1) and (5) of the Act.

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6. By proposing and insisting on severe across-the-board wages and benefits cuts for unit employees in negotiations with the Union, while contemporaneously planning for and seeking approval from the board of trustees for wage increases for the unit employees and continuing benefits in whole or in part it sought to eliminate during negotiations with the Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.

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7. By presenting its final offer and prematurely declaring impasse in the negotiations with the Union, the Respondent violated Section 8(a)(1) and (5) of the Act.

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8. By unlawfully withdrawing recognition of the Union and granting unit employees across-the-board increases and continuing most benefits it sought to eliminate during bargaining with the Union, the Respondent has violated Section 8(a)(1) and (5) of the Act.

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9. By its overall unlawful conduct during the negotiations with the Union, the Respondent failed and refused to bargain with the Union in good faith in violation of Section 8(a)(1) and (5) of the Act.

10. The Respondent has not violated the Act in any other manner and respect.

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11. The aforesaid unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

THE REMEDY

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Having found that the Respondent has engaged in certain unfair labor practices I shall recommend that it cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

In view of my finding that the Respondent, on September 20, 2005, unlawfully withdrew recognition of the Union, I shall recommend that it be ordered to recognize the Union forthwith, and cease and desist in such conduct and bargain with the Union in the bargaining unit described hereinbefore with respect to wages, hours, and other terms and condition of employment and, if an agreement is reached, embody it in a signed document.¹⁹⁸

In view of my having found that the Respondent unlawfully unilaterally made changes in wages, benefits, and conditions of employment before and since the withdrawal of recognition, the Respondent shall, if requested by the Union, rescind any unilateral changes implemented before and after the withdrawal of recognition on September 20, 2005. Nothing in this Order to follow, however, shall be construed to require the Respondent to withdraw any benefit previously granted unless requested by the Union.

I shall also recommend that the Respondent be ordered to make bargaining unit employees whole for all losses suffered during the period beginning July 1, 2005, up to and

¹⁹⁸ I have concluded under the circumstances of this case that an affirmative bargaining order is recommended for the unlawful withdrawal of recognition. Here, an affirmative bargaining order in this case vindicates the Sec. 7 rights of the unit employees who were denied the benefits of collective bargaining by the Respondent's unlawful withdrawal of recognition and its refusal to bargain with the Union for the employees' very important initial contract. An affirmative bargaining order here, while acting as a bar to any question concerning the Union's majority status for a reasonable time, will not unduly prejudice the Sec. 7 rights of employees who may oppose continued union representation, since the duration of the order is no longer than is reasonably necessary to remedy any ill effects of the violations. In my view, the Union, at least during 2005, was not given a fair opportunity to reach an agreement with the Respondent. By restoring the status quo ante and requiring the Respondent to bargain with the Union for a reasonable period of time, the employees will be able to fairly assess for themselves the Union's effectiveness.

2. An affirmative bargaining order in this case will also serve the policies of the Act by fostering meaningful collective bargaining and industrial peace. Here, the Respondent and even the Union will have no incentive to delay bargaining. The Union will want to prove effectiveness, and the Respondent will have no incentive to discourage support for the Union by delay. Notably with the resolution of the unfair labor practices and an order to cease and desist in this regard, the Union will not be pressured to achieve immediate results, with the withdrawal issue resolved. A temporary period of insulated bargaining will afford employees a fair opportunity in an atmosphere free of unlawful conduct to assess the Union's performance.

3. A cease-and-desist order alone in my view would be inadequate to remedy the Respondent's unlawful withdrawal of recognition and refusal to bargain with the Union because as was clear on this record, another challenge to the Union's majority status would ensue due to the taint of the Respondent's successful but unlawful attempt to oust the Union. An affirmative bargaining order here would allow sufficient time allowing such taint to dissipate. At this juncture, the instant litigation has taken over a year and in my view the Union needs a fair opportunity to reestablish its representative status with the unit employees. The Respondent should not be allowed to profit by its unlawful conduct, a result certainly possible if it is allowed to petition for decertification of the Union immediately. I would for these reasons and reasons stated in this opinion recommend that an affirmative bargaining order with its temporary decertification can be imposed as necessary to remedy full the violation in this case. See *Parkwood Development Center*, 347 NLRB No. 95 (2006).

including the date of this decision, where such losses are attributable to the unlawful conduct as determined by me.¹⁹⁹

5 On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²⁰⁰

ORDER

10 The Respondent, Warren County Community Services Head Start, LLC, Lebanon, Ohio, its officers, agents, successors, and assigns, shall

1. Cease and desist from

15 (a) Refusing and failing to provide relevant and necessary information to the Union in a timely fashion, including but not limited to such information requested by the Union in letters on July 27 and August 5, 2005.²⁰¹

20 (b) Unilaterally making changes in the working conditions of its employees without giving notice to the Union and/or giving it an opportunity bargain over any such changes or their effects.

25 (c) Proposing and insisting on severe across-the-board wages and benefits cuts for unit employees in negotiations with the Union, while at the same time planning for and seeking approval for wage increases and continuation of benefits in whole or in part for the unit employees without informing the Union of such plans and sought-after approval.

(d) Prematurely making its final offer and declaration of impasse in negotiations with the Union.

30 (e) Unilaterally changing terms and conditions of employment by implementing its last contract offer prior to reaching a good-faith impasse in bargaining.

35 (f) Unlawfully withdrawing recognition of the Union and granting unit employees across-the-board increases and continuing most benefits in whole or in part that the Respondent sought to eliminate during bargaining with the Union.

(g) Engaging in overall unlawful conduct during the negotiations indicative of bad-faith or surface bargaining with the Union.

40 ¹⁹⁹ I would leave the ascertainment of these losses, if any, to the compliance stage of these proceedings.

45 ²⁰⁰ If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

50 ²⁰¹ I will leave to the compliance stage of the proceedings a determination whether and to what extent the Respondent has provided the Union with the information in question. The Respondent has not raised any issue to the relevance of the requested information. I have examined the letters in question which are of record herein, and the requested information in my view is both relevant and necessary for the Union to carry out its representation obligations to the membership.

(h) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

5 2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) On request, bargain with the Union as the exclusive representative of the employees in the following appropriate unit concerning terms and conditions of employment and, if an understanding is reached, embody the understanding in a signed agreement:

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All full-time and regular part-time Head Start employees, including teachers, family advocates, teacher assistants, cooks/custodians, drivers, bus aides, maintenance specialists, family advocates/drivers, and teacher assistant/bus aides employed by the Respondent in Warren County, Ohio at the sites designated at 852 Franklin Road, Lebanon, Ohio; 10 North High Street, South Lebanon, Ohio; 150 East Sixth Street, Franklin Ohio; and 101 Walnut Street, Franklin, Ohio; but excluding all site supervisors, site supervisor/teachers, administrative assistants, office assistants, education managers, family services managers, disabilities managers, nutrition managers, parent training managers/acting health managers, substitute employees, confidential employees, office clerical employees, professional employees, all other employees and all guards and supervisors as defined by the Act.

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(b) On request of the Union, restore to unit employees the terms and conditions of employment that were applicable prior to July 1, 2005, and continue them in effect until the parties either reach an agreement or a good-faith impasse in bargaining and make them whole for any losses suffered by reason of the unilateral changes in terms and conditions of employment on and after July 1, 2005, plus interest.

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(c) Upon request, furnish the Union in a timely fashion with any information that is relevant for purposes of collective bargaining, including but not limited to that information requested by the Union by letters of July 27 and August 5, 2005.

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(d) Within 14 days after service by the Region, post at its Lebanon, South Lebanon, and Franklin, Ohio facilities, copies of the attached notice marked "Appendix."²⁰² Copies of the notice, on forms provided by the Regional Director for Region 9, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since May 3, 2006.

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²⁰² If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

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(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

5 It is further ordered that the complaint is dismissed insofar as it alleges violations of the Act not specifically found herein.

Dated, Washington, D.C. March 14, 2007

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Earl E. Shamwell Jr.
Administrative Law Judge

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APPENDIX

NOTICE TO EMPLOYEES

Posted by Order of the
National Labor Relations Board
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this Notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union
Choose representatives to bargain on your behalf with your employer
Act together with other employees for your benefit and protection
Choose not to engage in any of these protected activities

WE WILL NOT fail to recognize and bargain with Service Employees International Union (SEIU), District 1199, as the exclusive bargaining representative of our employees in the following appropriate bargaining unit:

All full-time and regular part-time Head Start employees, including teachers, family advocates, teacher assistants, cooks/custodians, drivers, bus aides, maintenance specialists, family advocates/drivers, and teacher assistant/bus aides employed by the Respondent in Warren County, Ohio at the sites designated at 852 Franklin Road, Lebanon, Ohio; 10 North High Street, South Lebanon, Ohio; 150 East Sixth Street, Franklin Ohio; and 101 Walnut Street, Franklin, Ohio; but excluding all site supervisors, site supervisor/teachers, administrative assistants, office assistants, education managers, family services managers, disabilities managers, nutrition managers, parent training managers/acting health managers, substitute employees, confidential employees, office clerical employees, professional employees, all other employees and all guards and supervisors as defined by the Act.

WE WILL NOT make any unilateral changes in contracts or wages and benefits and other terms and conditions of employment without affording the Union an opportunity to bargain.

WE WILL NOT implement our last offer before the parties have reached an agreement or a lawful impasse during negotiations, and WE WILL NOT implement other changes in your terms and conditions of employment before we have reached an agreement or we have reached an impasse in negotiations with the Union.

WE WILL NOT refuse provide SEIU District 1199 requested information necessary for the performance of its function as collective-bargaining representative of our employees in the bargaining unit stated in this notice.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL recognize the Union as the exclusive bargaining representative of our employees in the unit described above.

WE WILL meet with the Union at reasonable times, confer with it in good faith, and in all other respects bargain in good faith with it as the exclusive representative of our employees in the unit set forth above, concerning their wages, hours, and other terms and conditions of employment.

WE WILL rescind, upon the Union's request, any unilateral changes we have made in benefits and conditions of employment of bargaining unit employees without affording the Union an opportunity to bargain since our unlawful withdrawal of recognition of the Union on September 20, 2005.

WE WILL, to the extent that any employee was affected adversely because of the changes we made in wages and group health insurance, make each such employee whole, with interest, for all losses the employee suffered because of the unlawful changes.

WE WILL, on request, bargain with the Union and put in writing and sign any agreement reached on terms and conditions of employment for our employees in the bargaining unit.

WARREN COUNTY COMMUNITY SERVICES
HEAD START, LLC

(Employer)

Dated _____ By _____
(Representative) (Title)

The National Labor Relations Board is an independent Federal agency created in 1935 to enforce the National Labor Relations Act. It conducts secret-ballot elections to determine whether employees want union representation and it investigates and remedies unfair labor practices by employers and unions. To find out more about your rights under the Act and how to file a charge or election petition, you may speak confidentially to any agent with the Board's Regional Office set forth below. You may also obtain information from the Board's website: www.nlr.gov.

550 Main Street, Federal Office Building, Room 3003
Cincinnati, Ohio 45202-3271
Hours: 8:30 a.m. to 5 p.m.
513-684-3686.

THIS IS AN OFFICIAL NOTICE AND MUST NOT BE DEFACED BY ANYONE

THIS NOTICE MUST REMAIN POSTED FOR 60 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 ABOVE REGIONAL OFFICE'S

COMPLIANCE OFFICER, 513-684-3750.