

State of Maryland
State Higher Education Labor Relations Board

In the matter of:)	
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)	
American Federation of State,)	
County and Municipal Employees,)	
)	
&)	
)	
Donald R. Pryor,)	
)	
Co-Complainants/Petitioners,)	
)	
)	SHELRB ULP Case Nos. 2001-03
v.)	and 2002-01
)	
)	Opinion No. 7
Salisbury University)	
)	
Respondent.)	
)	
)	

DECISION AND ORDER

I. Procedural History

On December 18, 2001, counsel, on behalf of the American Federation of State, County and Municipal Employees ("AFSCME") and Donald R. Pryor, filed with the State Higher Education Labor Relations Board ("SHELRB" or "the Board") an Unfair Labor Practice ("ULP") petition alleging violations of various SHELRB regulations relating to Salisbury University's alleged disparate

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treatment of Mr. Pryor, a nonexempt bargaining unit employee, because of his activities on behalf of AFSCME.^{1/}

The Board also received additional filings on this matter from AFSCME noting further incidents where Salisbury University allegedly committed similar ULPs in its treatment of Mr. Pryor. The dates for these filings were January 31, 2002, and March 8, 2002. On the latter date, AFSCME alleged that Salisbury University additionally violated §14.30.06.01(E) of then-proposed SHELRB regulations.^{2/}

In a letter sent to parties on April 4, 2002, the Board delegated to the Office of Administrative Hearings the authority to issue conclusions of fact and proposed conclusions of law in this case. On May 31, 2002, ALJ Douglas E. Koteen issued a "Proposed Decision on Motion to Dismiss." Judge Koteen found that AFSCME's complaint should be dismissed because the Board's ULP regulations were not yet in effect in accordance with statutory requirements when the alleged events and violations took place. Specifically, Judge Koteen noted that "[a]s the Board has not adopted any regulations defining unfair labor practices, and certainly none existed at the time the

^{1/} AFSCME alleges violations of 14.30.06.01(A) & (D) of SHELRB proposed regulations, which read:

- "The following acts by an employer, or its agents, or representative, are unfair labor practices:
- (A) Interfering with, restraining, or coercing employees in the exercise of rights under the Collective Bargaining Law; ...
 - (D) Discriminating in hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization.

Please note that the numerical delineation of the regulations has changed as they have been adopted in their final format. The current numbers for these regulations are: 14.30.07.01(A) & (D). The language of the regulations themselves did not change between the proposed version and the final adopted version.

^{2/} 14.30.06.01(E) reads as follows:

- The following acts by an employer, or its agents or representatives, are unfair labor practices:
- (E) Discharging or discriminating against an employee because of the signing or filing of an affidavit, petition, or complaint, or giving any information or testimony in connection with matters under this subtitle.

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University is alleged to have engaged in ULP activity, there is no existing ULP definition upon which to regulate the University's conduct, and no violations for which the University can be legally sanctioned at this time." (ALJ opinion, p. 11). Further, Judge Koteen stated that "[t]o date, the Board has not defined ULP's through available means. Until that critical conduct is clearly defined, I conclude that the Board is without authority to regulate the University's conduct that is alleged in this proceeding to constitute ULPs, or to sanction the University." (ALJ opinion, p. 23).^{3/} After receiving Judge Koteen's proposed decision, the Board issued notice of a deadline for receiving exceptions to ALJ Koteen's ruling from all parties.

As of its August 29, 2002 meeting the Board was in receipt of exceptions to ALJ Koteen's ruling, as well as responses to those exceptions. At this time, the Board modifies, in part, and overrules, in part, ALJ Koteen's proposed decision. Based on this modification, the Board reverses the proposed disposition granting Salisbury University's Motion to Dismiss the ULP Petition and remands the case to the Office of Administrative Hearings for further proceedings consistent with this Opinion.

II. Analysis

The Collective Bargaining Statute ("the Statute") contained in Title 3 of the State Personnel and Pension Article (SPP) became law on July 1, 2001. It established upon passage the right of certain employees of the State and institutions of the University System of Maryland to elect and be represented by employee organizations and engage in collective bargaining with the State over wages, hours, and other terms and conditions of employment. Section 3-301(a) of the Statute granted employees certain collective bargaining rights as follows:

^{3/} Additionally, Judge Koteen opined on due process issues, noting that "[t]o provide the University with the appropriate safeguards of due process of law, the University must have been afforded proper notice, *in advance of its actions*, as to the definition and standard for 'unfair labor practices' that are applicable to employers and employees at State higher education institutions in Maryland." (ALJ opinion p. 8, emphasis in original).

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- (a) Employees subject to this title have the right to:
- (1) Take part or refrain from taking part in forming, joining, supporting, or participating in any employee organization or its lawful activities;
 - (2) Be fairly represented by their exclusive representative, if any, in collective bargaining; and
 - (3) Except as provided in §§3-303 and 3-305 of this subtitle, engage in other concerted activities for the purpose of collective bargaining.

Subtitle 2A of the Collective Bargaining Statute created the State Higher Education Labor Relations Board ("SHELRB" or "the Board") to enforce all the provisions and guarantees of the Statute. SPP Section 3-2A-05(a) states that the Board "is responsible for administering and enforcing provisions of this Title relating to employees...." Further, Section 3-2A-05(b)(2) specifically authorizes the Board to "investigate and take appropriate action in response to complaints of unfair labor practices and lockouts."

These provisions make clear that unfair labor practice complaints are fundamentally statutory in nature and that the Board, acting solely on its statutory powers, has power to act on them. Thus, without any further exercise of its regulatory authority,^{4/} the Board has not only the power but the duty to enforce the right of covered employees to choose whether or not to be organized into a union-represented bargaining unit. The Board has the

^{4/} SPP § 3-2A-06 permits the Board to "adopt and enforce regulations, guidelines, and policies" to carry out various methods of enforcement of the Collective Bargaining Statute. Under this provision of the Statute, the SHELRB is permitted to "(1) define unfair labor practices; and (2) establish permissible labor-related activities on the work site." At its meeting on April 25, 2002, the Board acted to adopt such Regulations, which were made final by publication in the Maryland Register on May 28, 2002. Thus, these Regulations were not in force at the time of the alleged unfair labor practices in this case.

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explicit authority to take appropriate action "in response to complaints of unfair labor practices."

It goes without saying that the Board cannot enforce Regulations that have not yet been promulgated. Thus, when AFSCME filed this case with the SHELRB as a ULP based on then proposed SHELRB regulations §14.30.06.01(A), §14.30.06.01(D), and §14.30.06.01(E), it is axiomatic that the Board cannot find a violation of those regulations since they were not effective at the time of the alleged violations. In his proposed ruling, ALJ Koteen accordingly concluded that the motion to dismiss filed by Salisbury University should be granted.

Judge Koteen's determination that the Board cannot enforce regulations that do not exist is an acceptable premise within this limited context. However, SHELRB's enforcement authority extends beyond adjudicating complaints of unfair labor practices as defined in its regulations. Rather, the Board has the explicit responsibility to administer and enforce *all of the provisions of the statute*, not just matters set forth in the Board's regulations. Indeed, Section 3-2A-07(a) specifically empowers the Board to "investigate (1) a possible violation of this title or any regulation adopted under it; and (2) any other relevant matter." (emphasis added). Section 3-2A-07(b), moreover, authorizes the Board to hold a hearing whenever necessary for a fair determination of "*any issue or complaint arising under this title or a regulation adopted under it.*" (emphasis added).

Mr. Pryor has the *statutory right* to support and participate in a union and to engage in other protected concerted activity in an effort to obtain collective bargaining rights for his chosen union. If Mr. Pryor's employer takes retaliatory disciplinary action against him because he has exercised his statutory rights and/or in an effort to stifle the protected union activity of Mr. Pryor and other employees, there can be no dispute that a violation of the Statute has occurred. While it is not yet known whether Mr. Pryor's rights were violated by the actions of the Salisbury University, it cannot be disputed that these rights exist. There also can be no dispute

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that the Statute clearly empowers the Board to investigate and hold hearings to determine whether any statutory violation has occurred, and if a violation is found, to fashion an appropriate remedy to ensure the fair and proper enforcement of the statute's provisions.

The Board does not believe that the right of employees to organize unions free from improper interference and discrimination by their employer and its agents is mysterious or inscrutable in nature. In passing this statute, the Maryland legislature acted against the background of more than sixty five years of federal and state labor law.^{5/} The legislature clearly assumed, as we must also, that the Board would be able to recognize and define unfair labor practices, either on an adjudicatory case-by-case basis or prospectively as a matter of rulemaking. Indeed, this is not a complex task. There is nothing in labor law that has been more carefully developed than the question of what kinds of employer conduct violate the employees' right to organize. Had the Board decided never to promulgate regulations, it still would be not only empowered, but *required* by the Statute to proceed on a case-by-case basis to define the contours of what is permissible and impermissible employer conduct in response to an employee's exercise of his/her statutory rights to join, support, and participate in union and other concerted activities. The Board does not forfeit that power or escape this obligation simply because it had not defined any unfair labor practices at the time of the alleged unlawful activity that interfered with the employee's statutory rights, or because the Board has acted with quick dispatch to draft such regulations for the future.

^{5/} See, e.g. "Symposium Overview—Critical Issues in Labor and Employment Law, 1994", 24 Stet. L. Rev. 1, 2 (1994). (indicating a lengthy history behind the development of federal labor laws: "The statutory law governing the labor/management relationship remains rooted in the events of the Great Depression and the system of mass industrial production that predominated sixty years ago."). See also, e.g. Charles J. Morris, *The Developing Labor Law* (2d ed. 1983) (characterizing the legislative and common-law development of labor law jurisprudence as having "become deeply woven into the institutional fabric of our society in a relatively short period of time.")

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The Board additionally emphasizes that this obligation poses no "due process" problems to Salisbury University, or in fact to the other ULP respondents in unfair labor practice claims filed about conduct allegedly taking place before the Board's ULP regulations were promulgated.^{6/} The preeminent purpose of the Statute is to protect the organizing and collective bargaining rights of covered employees of which Mr. Pryor is undisputedly one. As previously noted, the Collective Bargaining Statute became law July 1, 2001. Unquestionably, the statutory rights and obligations prescribed therein, and the Board's authority to enforce them, predate the alleged occurrence of the instant ULPs. Clearly, the Statute puts all interested parties, including university-employers, on notice that employees have these statutory rights.

It would be possible to simply dismiss the complaint in this case and have the petitioner re-file it asserting a statutory unfair labor practice rather than a regulatory one. But this would be elevating form over substance.^{7/} The Board always has power and responsibility to investigate and take action against statutory violations, regardless of the means by which they are brought to the attention of the Board. Therefore, the claim filed on behalf of Mr. Pryor will be treated as asserting a violation of his statutory rights under the Collective Bargaining Statute to "take part or refrain from taking part in forming, joining, supporting, or participating in any employee organization or its lawful activities." (Collective Bargaining Statute § 3-301). The Board will

^{6/} Board regulation 14.30.07.01 and .02, the unfair labor practice regulations in question, became effective May 28, 2002.

^{7/} See, e.g., Frederick County Bd. of Com'rs v. Sautter, 718 A.2d 685, 691 (Md.App.,1998) (noting that if the court in this case were to determine the case holding based on the titling of a particular motion, it would be elevating form over substance in a manner not consistent with general principles governing pleading in Maryland). See also, e.g., Alitalia Linee Aeree Italiane v. Tornillo, 577 A.2d 34 (Md. App. 1990) (noting further that, ordinarily, "magic words" are not essential to successful pleading in Maryland, and that courts and administrative agencies are expected to look at the substance of the allegations before them, not merely at labels or conclusory averments. Thus, motion for rehearing was not defective for failure to use the words "error of law" or "newly discovered evidence.").

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remand this case to the Office of Administrative Hearings,^{8/} for proposed findings of fact about statutory violations that are consistent with this reasoning.

We turn now to ULP Case No. 2002-01 (Unlawful Assistance to MCEA). On June 3, 2002, the Board issued an Order granting, in part, AFSCME's Motion to revoke our delegation to OAH as to ULP 2001-02 (Shared Governance) and ULP 2002-01 (Unlawful Assistance to MCEA).^{9/} Pursuant to the Order, SU filed a Motion to Dismiss ULP 2001-02 (Shared Governance)^{10/} and ULP 2002-01 (Unlawful Assistance to MCEA). The Board finds that the allegations in ULP Case No. 2002-01, if proven, would constitute statutory violations.^{11/} As such, we conclude that our rationale in ULP Case No. 2001-03 (Pryor 1), is applicable to ULP 2002-01 (Unlawful Assistance to MCEA). We also find that the disposition of ULP 2002-01, like ULP 2001-03, requires the resolution of disputed issues of fact. Based on our Decision in ULP 2001-03, we also remand ULP Case 2002-03 to the Office of Administrative Hearings for proposed findings of fact consistent with this Opinion.

^{8/} We remand pursuant to Board Regulation in COMAR 14.30.11.24(A)(4), which provides as follows:

- (A) In any matter that has been delegated to the Office of Administrative Hearings or to the Executive Director, the Board, after considering the record and any exceptions, by majority vote, shall:
 - ...(4) Remand the matter for further proceedings.

^{9/} The Board found that Judge Koteen's granting of SU's Motion to Dismiss in ULP 2001-03 raised significant and fundamental issues concerning the Board's authority under the Collective Bargaining statute. Consequently, the Board concluded that OAH's disposition of ULP 2001-03 evoked one or more of the criteria prescribed under Board Regulation 14.30.11.03C for revoking OAH's delegation over the then still-pending and related ULP 2001-02 and ULP 2002-03. The Board denied the Motion with respect to Case No. 2002-04 (Election Objections).

^{10/} The Board found the disposition of ULP 2001-02 turned on threshold issues of law in our dismissal of that case in Opinion No. 9.

^{11/} In the main, AFSCME alleges that Salisbury University has interfered with employee rights and its right to seek to become the exclusive representative of the non-exempt bargaining unit by denying AFSCME bargaining unit employee supporters the same access and opportunities to campaign for AFSCME as it accords bargaining unit employees who supported MCEA. As discussed, the Statute accords employees the right to support any employee organization. Allegations that the rights of employees who support a particular employee organization were being infringed or compromised by employer action clearly gives rise to a violation of a right prescribed by the Statute.

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We are certain that the findings of fact in both of these unfair labor practice cases will generate clear legal conclusions. In any event, the Board, exercising its statutory expertise in labor law will review the forthcoming OAH report on these cases and render a final decision concerning the recommended findings.

ORDER

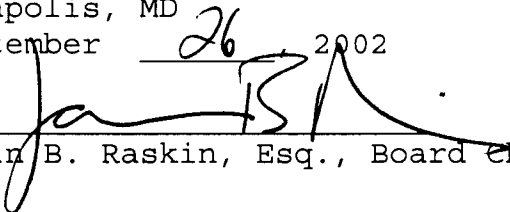
IT IS HEREBY ORDERED THAT:

1. AFSCME's exceptions to the administrative law judge's proposed decision in ULP 2001-03 are sustained to the extent consistent with this Opinion. The proposed disposition of the administrative law judge in ULP 2001-03 granting Salisbury University's Motion to Dismiss is reversed. ULP Case No. 2001-03 is hereby remanded to the Office of Administrative Hearings for additional proposed factual findings regarding alleged violations of the Collective Bargaining Statute.
2. Salisbury University's Motion to Dismiss ULP Case No. 2002-01 is denied. ULP Case No. 2002-01 is hereby remanded to the Office of Administrative Hearings for proposed factual findings regarding alleged violations of the Collective Bargaining Statute.

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD

Annapolis, MD

September 26, 2002


Jamin B. Raskin, Esq., Board Chairman

Appeal Rights

Any party aggrieved by this action of the Board may seek review in accordance with Board Regulation 14.30.11.24C and as prescribed under Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222.