

State of Maryland
State Higher Education Labor Relations Board

In the matter of:)
)
)
University of Maryland)
University College,)
)
Complainant/Petitioner,)
)
v.) SHELRB ULP Case No. 2002-04
) Opinion No. 6
American Federation of State)
County and Municipal Employees,)
)
Respondent.)
)
)

DECISION AND ORDER

On May 21, 2002, the University of Maryland University College (UMUC) filed with the State Higher Education Labor Relations Board (Board) an Unfair Labor Practice (ULP) petition against the American Federation of State, County, and Municipal Employees (AFSCME).^{1/} In its charging documents, UMUC asserts that by certain violative acts and conduct, bargaining unit employees represented by AFSCME are, "in a thinly veiled attempt," trying "to engage the employer (UMUC) in an Unfair Labor Practice."^{2/} UMUC alleges that these employees are attempting to change a disputed management performance evaluation process which UMUC states is a proper subject of collective bargaining.^{3/}

^{1/} At the time the ULP was filed, the petition was deficient, for want of correct charging statements as required under Board Regulation 14.30.07.04. UMUC was notified of the deficiency and filed a correct amended petition on June 2, 2002.

^{2/} See UMUC amended ULP Petition, at p. 2.

^{3/} Specifically, UMUC asserts that AFSCME bargaining unit members have disrupted administrative offices by taking photographs of the passing out of the above-mentioned management evaluation information. UMUC further asserts that employees posted copies of these pictures on flyers, and then advertised AFSCME's activities on behalf of the bargaining unit employees around the campus.

UMUC asserts that by such actions, AFSCME is attempting to address this bargainable subject outside the collective bargaining process. UMUC contends that AFSCME's acts and conduct are ULPs based on Board Regulations §14.30.07.02(A), 14.30.07.02C(6), 14.30.07.02(E), and 14.30.07.03D(4).

On June 24, 2002, AFSCME filed a response styled "Memorandum of Points and Authorities and Motion to Dismiss." In its Motion, AFSCME denies that it has committed a ULP. On July 9, 2002, UMUC filed a response to AFSCME's Motion.

Based on the pleadings of the parties, we find that the disposition of this case turns on issues of law. We have reviewed the pleadings and considered the arguments made by the parties. For the reasons that follow, we grant AFSCME's Motion to Dismiss.

To begin with, the Statute does not make it a ULP to "attempt to engage" a university in committing a ULP. Of course if this is something that is happening it is foolish and we would surely condemn it. Such conduct, however, would only constitute a ULP only if it independently violated another statutory or regulatory provision.

Board Regulation 14.30.07.02A and C provide as follows:

The following acts by an employee, employee organization, or their agents or representatives, are unfair labor practices:

A. Interfering with, restraining, or coercing employees in the exercise of rights under the Collective Bargaining Law;

UMUC states that the posting violated University policy on posting notices. In addition, UMUC alleges that the photographs were published and posted without permission of some of the employees in the photographs. Finally, UMUC alleges that the flyers and photographs included an intentional misrepresentation of a comment by Human Resources Vice President Erythia Lambert-Jones. The flyers included a quote that UMUC alleges was taken from a separate document and context, and did not reflect Ms. Lambert-Jones's reaction to the management evaluation the union circulated. UMUC alleges that this is a misrepresentation of fact.

* * * *

C. Engaging in, inducing, or encouraging any person to engage in a strike, which includes the following types of activities by employees when intended to induce, influence, coerce, or enforce demands for a change in wages, hours, terms, or other conditions of employment:

(6) Other Concerted Job Action

* * * *

E. If an exclusive representative:

- (1) Refusing to bargain collectively in good faith; or
- (2) Not fairly representing employees in collective bargaining or any other matter for which the employee organization has the duty of fair representation.

Board Regulation 14.30.07.02A prohibits unfair labor practices by employees and employee organizations that interfere with, restrain, or coerce such employees in exercising their rights under the Collective Bargaining Statute.^{4/} However, UMUC is an employer and thereby lacks standing to bring such an action on behalf of employees. Moreover, the ULP contains no allegation of acts and conduct by AFSCME itself that interfere with, restrain, or coerce employees in exercising their rights under the Collective Bargaining Statute.

The "activities" listed under Board Regulation 14.30.07.02C are prohibited as unfair labor practices when combined with the intent or objective to induce or encourage any person "to engage in a strike." Whether or not the alleged employee conduct constituted "concerted job action" under the strike provisions of Board Regulation 14.30.07.02C, the ULP petition contains no allegation supporting this violation. On the contrary, UMUC itself asserts that the employees engaged in the alleged conduct in an attempt to bargain over changes they sought to a disputed management evaluation process.

^{4/} Title 3 of the State Personnel and Pensions Article

UMUC also asserts that AFSCME has committed an unfair labor practice based upon Board Regulation 14.30.07.02E. Subsection E(2) concerns prohibited conduct by exclusive bargaining representatives towards their employees. Thus, the bargaining representative's duty to fairly represent employees in collective bargaining is owed to the employees it represents, not the employer. UMUC therefore lacks standing to make such a claim against its employees' chosen bargaining representative, AFSCME.

Regarding Subsection E(1), UMUC has alleged no overt act by AFSCME supporting its allegation that AFSCME is refusing to bargain in good faith. Nor does UMUC make any allegation that, if proven, would establish that the bargaining unit employees in question were acting as agents or representatives of AFSCME when one employee made a request by e-mail to meet with a UMUC management representative concerning the results of a management evaluation. All of the alleged acts and conduct were committed by individual bargaining unit employees. The only conduct UMUC directly attributes to AFSCME is that AFSCME never contacted UMUC to request bargaining over the subject of the management performance evaluation process. Obviously, a bargaining representative's election to postpone raising a bargainable subject cannot, standing alone, constitute a violation of the duty to bargain in good faith.

The duty to bargain in good faith exists between the employer and the exclusive representative of the employer's bargaining unit employees. Section 3-101(c) of the Collective Bargaining Statute defines collective bargaining as "good faith negotiations by authorized representatives of employees and their employer with the intention of (a) reaching an agreement about wages, hours, and other terms and conditions of employment; and (b) incorporating the terms of the agreement in a written memorandum of understanding." The Statute and Board Regulations prescribe prerequisites for initiating the collective bargaining process with respect to negotiable matters. Section 3-501(a) requires that both employers and exclusive representatives "designate one or more representatives to participate in collective bargaining on behalf of a system institution" or "on behalf of the exclusive representative." These statutory provisions are

implemented under Section 14.30.09.01 of the Board's regulations.

As previously noted, UMUC acknowledges that AFSCME did not request bargaining over the management evaluation process, much less take the prescribed steps set forth above to initiate bargaining on the subject matter. To the extent that the employee requested bargaining over the evaluation form results (and it is not clear that this was even the case), the prerequisite for bargaining, as required under the Collective Bargaining Statute and Board Regulations, had not been met. A proper foundation simply does not exist to establish the necessary nexus tying the employee's actions to AFSCME. Under these circumstances, UMUC was under no obligation to recognize or bargain with the employee as a representative of AFSCME.

If, as AFSCME asserts, this was not a request to bargain but rather an attempt to exercise an employee right to discuss a matter directly with UMUC, the allegations fall outside the purview of the Board. Section 3-301(b) of the Collective Bargaining statute accords bargaining unit employees the right to discuss any matter with their employer without the intervention of their employee organization representative. AFSCME argues, among other things, that the alleged employee conduct does not form the basis of an unfair labor practice but rather constitutes an exercise of this basic statutory right.

Within the confines of the petition allegations, we are constrained to agree. This does not mean that we sanction or condone the alleged acts and conduct of the employees who are the subject of UMUC's ULP petition. We merely conclude that such employee actions, as alleged in the UMUC petition, do not constitute unfair labor practices or otherwise violate the Collective Bargaining Statute.

The Collective Bargaining Statute and the Board's Regulations are silent regarding the administration of an employee's right to discuss any matter with his or her employer. This reserved employee right is an exception to the rights the Collective Bargaining Statute grants to certified bargaining representatives as exclusive representatives of the employees' interests. To the extent that employees exercise this independent right to discuss a grievable matter with the employer, it follows that

allegations that employees failed to act properly would fall under the purview of separate statutory provisions and related rules and regulations governing the grievance process or proper employee conduct. In fact, UMUC asserts in its petition that the tactics used by employees in the alleged conduct violated UMUC policy. If that is correct, UMUC has all the authority it needs to sanction individual employees who are engaged in conduct that is unprotected by the Collective Bargaining Statute and other campus rules. Clearly, allegations limited to such conduct, as in the instant case, do not fall under the jurisdiction of the Collective Bargaining Statute and, thereby, the Board.

AFSCME's Motion to Dismiss is granted. The ULP is dismissed for failure to state a cause of action under the Collective Bargaining Statute or the Board's Regulations.^{5/}

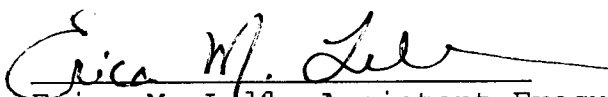
ORDER

IT IS HEREBY ORDERED THAT:

The Unfair Labor Practice Petition in Board Case No. 2002-04 is dismissed.

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD

Annapolis, MD
September 30, 2002



Erica M. Lehl, Assistant Executive Director
on behalf of Jamin B. Raskin, Esq., Board Chairman

^{5/} In view of our disposition, we do not reach UMUC's claim that the alleged employee conduct constitutes a violation of Board Regulation 14.30.07.03D(4). Facts or conduct that conform with the listed "Permissible Labor Practices," as defined, ensure that such conduct will not constitute an unfair labor practice. While the failure to conform to such conduct as defined will not necessarily establish an unfair labor practice, such nonconformity can serve to support an unfair labor practice if the other elements of the alleged unfair labor practice are present. The Board concluded that the other elements of the alleged unfair labor practices were not present in this case.

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.