State of Maryland
State Higher Education Labor Relations Board

IN THE MATTER OF:	)	
	)	
American Federation of State, County and Municipal Employees,	)	
	)	
Petitioner	)	
	)	
v.	)	**SHELRB Case No. 2002-15**
	)	
Bowie State University,	)	
	)	**Opinion No. 18**
Respondent.	)	
	)	

DECISION AND ORDER

Statement of the Case

On July 12, 2002, an Unfair Labor Practice Petition (Petition) was filed in the above-captioned case by the American Federation of State, County and Municipal Employees (AFSCME/Petitioner). AFSCME alleged that Bowie State University (Respondent/BSU) had engaged in an unfair labor practice when it included bargaining unit employee Calvin Juan Glover (Mr. Glover) in an initial round of layoffs in June 2002. AFSCME charged that Respondent BSU violated Mr. Glover's rights under Title 3 of the State Personnel and Pensions Article (Collective Bargaining Statute), §3-301, and committed unfair labor practices as defined under the State Higher Education Labor Relations Board (Board) Regulations at COMAR §14.30.07.01A and D.

Following the investigation of the allegations by the Board's Staff, the Board adopted the recommended finding of probable cause made by its Executive Director. The Board issued a notice of hearing delegating the case to the Office of Administrative Hearings (OAH) for assignment to an administrative law judge to make proposed findings of fact and conclusions of law. [1]/ On July 28, 2003, the Administrative Law Judge (ALJ) issued his report of Proposed Findings of Fact and Proposed Conclusions of Law (Report).[2]/

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[1]/ AFSCME's Petition had also included an unfair labor practice charge of failing to bargain in good faith as proscribed under the Board's Regulations at 14.30.07.01I. However, AFSCME did not seek reconsideration of the finding of no probable cause on this allegation made during the investigative stage of processing the Petition.

Background

Mr. Glover was hired by BSU as a full-time photographer on October 2, 2000. The position was assigned to BSU's University Relations and Marketing Department, a department that works closely with the Office of the President. Prior to October 2, 2000, BSU employed no full time photographer, but various departments at BSU contracted for photographic services from their budgets on an ad hoc basis.

In the fall of 2001, two unions, the Petitioner AFSCME and the Maryland Classified Employees Association (MCEA), launched organizing campaigns in BSU's non-exempt bargaining unit, which included Mr. Glover's position. Mr. Glover was among employees who actively participated in the organizing campaign on behalf of the Petitioner. AFSCME ultimately prevailed in the December 5, 2001 election and was certified on December 12, 2001 as the exclusive bargaining representative of BSU's non-exempt unit of employees. Mr. Glover continued to be actively involved in collective bargaining activities on behalf of AFSCME following the election. When the local AFSCME presidency became vacant, Mr. Glover ran for the office in mid-April 2002 and was elected. The following June, Mr. Glover was also elected as a member of AFSCME's bargaining team.

During this same period, BSU learned of major funding losses that necessitated that it incur severe budget cuts commencing in the Spring of 2002 through fiscal year (FY) 2003.[3]/ BSU looked to its various departments to find areas where funding could be cut and included the President's Office in this search. In January 2002, BSU's President requested that the University Relations Department determine whether it could absorb cuts. In February 2002, a survey conducted by the University Relations Department of area universities found that only two other universities employed full-time photographers while other universities handled their photography need through other means. Based on this survey, Mr. Glover's full-time photographer position was identified as an expendable one.

In mid-March 2002, BSU's President decided that he would develop his own plan to reorganize the University Relations Department as well as his office to handle the initial impact of the funding losses. On or about this same time, BSU's President issued a notice to the BSU staff that no layoffs were planned for the current fiscal year (FY 02), ending June 30, 2002, to address the university's budget crisis. In April, however, the Secretary of the Maryland Department of Budget and Management issued a notice to all State agencies, including BSU, that approximately 3,400 authorized and 338 contractual positions throughout the State would have to be eliminated no later than June 30, 2002. On June 7, 2002, the BSU President issued his reorganization plan. Phase One of the plan called for the elimination of the full-time photographer position and the website

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[2] / The ALJ's report of Proposed Findings and Proposed Conclusions of Law is attached as an appendix to this Opinion.

[3] / The fiscal year (FY) starts on July 1.

developer position in the University Relations Department and the general counsel position in the President's Office. On June 11, 2002, Mr. Glover's supervisor met with him to inform him that his position was being eliminated as of June 30, 2002 and that he was to cease working at that time.

Under the policy that governs BSU's layoff procedures, employees are: (1) afforded a qualified right to displace employees in comparable positions where the employee has seniority over the incumbent; and, (2) afforded 90 days notice before the effective date of the layoff. BSU had only one photographer position and no positions comparable to the photographer position. Therefore, there was no position where Mr. Glover could displace an incumbent. BSU continued to pay Mr. Glover for the 90-day period following his notice of layoff; however, BSU required Mr. Glover to cease working less than 90 days prior to his notice. Following his layoff, Mr. Glover continued to be active with the union and participated in a rally protesting his layoff on or about July 10, 2002; he also continued to provide photographic services to BSU as a contract freelancer.

ALJ's Findings and Conclusions

The ALJ found that AFSCME had established a *prima facie* case of the alleged unfair labor practices, proving, by a preponderance of the evidence, that the Respondent's layoff of Mr. Glover was caused in part by his protected union activities. The ALJ also found that BSU had proven that its layoff was motivated by a legitimate business reason to conserve funds due to fiscal constraints confronting the University. (ALJ Report at p. 36) However, the ALJ further found that BSU failed to prove that it would have included Mr. Glover in its layoff absent his protected union activities because BSU did not show that: (1) it actually realized any significant savings from the layoff; or, (2) any funds saved were used for purposes consistent with BSU's mission. (Report at pp. 36-37) Therefore, the ALJ concluded that BSU had committed an unfair labor practice when it laid off Mr. Glover, violating rights secured under Section 3-301(a) of the Collective Bargaining Statute.[4]/

Exceptions

On August 13, 2003, BSU filed Exceptions to the ALJ's proposed findings of fact and conclusions of law. AFSCME filed an Opposition to Exceptions and, in a separate filing, requested leave to submit additional evidence. BSU filed a Reply to AFSCME's Opposition and an opposition to AFSCME's request to submit additional evidence. The Board granted BSU's request for oral argument and heard arguments on September 24, 2003.

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[4] / We note that the ALJ erroneously cites §3-306(a) of the Collective Bargaining Statute as the source of the Board's authority to define unfair labor practices. (Report at p. 23) The statutory provision cited is actually administered by another agency, the State Labor Relations Board, in conjunction with the Secretary of the Department of Budget and Management, and does not pertain to the SHELRB. The SHELRB's authority for defining unfair labor practices is provided under §3-2A-06.

Prior to the commencement of oral arguments, the Board issued its ruling denying AFSCME's request for leave to submit additional evidence. AFSCME's request to submit additional evidence was in response to a BSU exception challenging the veracity of one of AFSCME's witnesses at hearing. BSU's credibility exception was first raised by BSU before the ALJ at the hearing. In his findings, the ALJ credited the witness' testimony despite BSU's attempt to impeach the witness. The Board found no basis for disturbing the ALJ's credibility determination in this regard, and found the circumstances proffered by AFSCME not to warrant the re-opening of the record to receive additional evidence on this issue.[5]/

Turning to the Exceptions, BSU objects to varied aspects of nearly half of the ALJ's 71 findings of fact.[6]/ BSU's exceptions to the findings of fact can be reduced to two general claims:

(1) most of BSU's objections to the findings of fact are based on its disagreement with the probative value, and resulting significance, of the ALJ-accorded evidence to support the alleged violation over competing evidence BSU had presented;

(2) the remaining exceptions are based on the ALJ's credibility determinations to assess the significance of one witness's testimony over that of another or other evidence on the same material issue of fact.

Based on these numerous challenges to the ALJ's findings of fact, BSU argues that the evidence actually supports alternate findings of fact and inferences that, as a matter of law, should have been made to support the conclusion that BSU had not committed the alleged unfair labor practices.

BSU's exceptions to the ALJ's findings of fact merely disagree with the ALJ's assessment of the record evidence. The contentions BSU makes concerning the significance that should have been accorded evidence presented at hearing were advanced before and rejected by the ALJ. We do not find that challenges to the ALJ's findings of fact based on competing evidence give rise to a proper exception where, as here, the ALJ based his findings on substantial evidence contained in the record. [7]/

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[5]/ A motion filed by AFSCME to strike BSU's Reply to AFSCME's Opposition to Exceptions was withdrawn prior to the oral argument.

[6]/ Specifically, BSU exceptions to the ALJ's findings of fact included the following: proposed finding nos. 7, 11, 12, 13, 16, 18, 19, 20, 21, 22, 23, 25, 26, 30 35, 37, 38, 44, 45, 46, 47, 49, 50, 51, 53, 57, 58, 59, 61, 63, 68, 69, 70 and 71.

[7]/ There is no omni-standard for review governing Maryland agencies reviewing exceptions to proposed findings of fact made by their ALJs or hearing examiners. *See, e.g.*, Berkshire Life Insurance Co. v. Md. Ins. Admin., 142 Md. App. 628, 791 A.2d 942 (2002).

As BSU correctly observes, the Board reserved the authority in our delegation to OAH to review the ALJ's proposed findings of fact. However, we do reserve to the ALJ those issues concerning the probative value and veracity accorded to the testimony and other evidence presented at hearing.[8]/ BSU's exceptions do not identify findings made by the ALJ, necessary to establishing a *prima facie* showing of the unfair labor practice, where the ALJ did not cite competent substantial evidence in the record supporting it.

After reviewing the entire record, the Board finds BSU's exceptions do not identify grounds for finding that the ALJ exceeded the authority accorded him in reaching his findings of fact based on the evidence presented. Based on these findings, we find no basis for disturbing the ALJ's conclusions that AFSCME had met its burden of establishing a *prima facie* showing of the required elements of the alleged unfair labor practice[9]/ and the Board hereby adopts the ALJ's proposed findings and conclusions in this regard.[10]/

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[8]/ The question of credibility and believability of a witness' testimony is within the fact-finder function of the administrative law judge. Gigeous v. Eastern Correct'l Institution, 132 Md. App. 487, 752 A2d 1238 (2000). Moreover, the credibility determinations and findings of an agency's representative, here the ALJ, because he sees and hears the witnesses during the administrative proceeding, are entitled to great deference. *See,* Finucan v. Md. St. Bd. Of Physician Quality Assurance, 827 A.2d 176 (2003). *See also,* Anderson v. Dep't of Pub. Safety and Correct'l Serv., *et al.,* 330 Md. 187, 623 A.2d 198 (1992) (in assessing the credibility of witnesses, the agency should give appropriate deference to the opportunity of the examiner, e.g., ALJ, to observe the demeanor of witnesses. *Cf,* Travers v. Balt. Police Dep't, 115 Md. App. 395, 693 A.2d 378 (1997) (even hearsay statements, admissible in administrative proceedings, if found credible and probative, may form the sole basis for an agency's decision/factual finding).

[9]/ The prima facie elements of an unfair labor practice as defined under Board Regulation 14.30.07.01D are as follows: (1) an adverse action against the employee/alleged discriminatee; (2) the employee's engagement in protected activity; (3) employer knowledge of the employee's protected activity; and (4) a nexus between the adverse action and the employee's protected activity. There is no dispute that BSU took adverse action against the alleged discriminatee, Mr. Glover, when BSU decided to include him in the layoff. The record is replete with evidence of Mr. Glover's protected union activity.

With respect to knowledge, BSU argued that the type of general knowledge that the ALJ found BSU had of Mr. Glover's union activities was insufficient and that a more specific degree of knowledge was required to prove this element of the unfair labor practice where, as here, the claim is that Mr. Glover was unlawfully selected for layoff. BSU cites *NLRB v. Vemco, Inc.*, 989 F.2d 1468 (6th Cir. 1993) (hereinafter *Vemco)* in support for its contention. As the ALJ observed, an employer's knowledge of protected union activity can be inferred from such factors as the extent of union activity in the work place, the notoriety of a particular targeted employee's activity, demonstrated hostility toward union activity, the failure to establish a legitimate reason for the adverse action among other related factors. (Report at 26) The establishment of BSU's knowledge of Mr. Glover's union activity is based largely on the notoriety of Mr.Glover's activities. As noted, the record is replete with evidence of the extent of Mr. Glover's *overt* union activities at the workplace, including his solicitation of employees during AFSCME's campaign, open display of union paraphernalia, distribution of union literature, and successful bid to become the local union president and a member of the bargaining team. While *Vemco* may preclude imputing employer specific knowledge of an individual employee's union activities based solely upon evidence of the employer's general knowledge of its employees' union activities, we do not read *Vemco* as precluding the imputation of employer specific knowledge of an individual employee's union activity where, as we find here, there is evidence (albeit mostly circumstantial) that the individual employee's activities were open and notorious. *See,* Medeco Sec. Locks v. NLRB, 142 F.3d 733 (4th Cir. 1998) *citing* NLRB v. Instrument Corp. of America, 714 F.2d 324 (4th Cir. 1983). Notwithstanding *Vemco,* the record contains d*irect*

We turn now to the ALJ's findings and conclusions with respect to BSU's affirmative defense, that Mr. Glover's inclusion in its layoff would have taken place for legitimate business or non-prohibited reasons notwithstanding his protected union activities. While we adopt the ALJ's factual findings, we conclude for the reasons discussed below, that notwithstanding Petitioner's *prima facie* showing of the alleged unfair fair labor practice, BSU established that its actions depended on legitimate budgetary and fiscal reasons without reference to Mr. Glover's protected activity. Therefore, we reject the ALJ's conclusions of law to the contrary.

Discussion

The ALJ employed the legal analysis first articulated by the National Labor Relations Board in *Wrightline, Inc.*, 250 NLRB 1083 (1980), *enf'd* 662 F.2d 899 (1st Cir. 1981, *cert. denied,* 445 U.S. 989 (1982) (hereinafter, *Wrightline*) to determine whether an unfair labor practice has been established. [11]/ *Wrightline* established the parties' shifting burdens of proof in a case of alleged anti-union discrimination. In both pretext and dual motive cases, the employee/petitioner must first establish a *prima facie* case of the alleged discriminatory action by the employer. The employer/respondent must then present any affirmative defense for its action, and, finally, the employee may offer any rebuttal to the employer's affirmative defense.

Based on the entire record, one of three determinations is made: whether (a) the employee's *prima facie* case was successfully rebutted by a showing that protected

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evidence of BSU's *specific* knowledge of Mr. Glover's activities. (See, Report at pp. 8-9; Prop. Findings of Fact 16, 23 and 25).

Finally, we find the ALJ's grounds for finding nexus well supported by the record evidence. Included among the factors supporting the finding of nexus was the timing of Mr. Glover's layoff, occurring in BSU's first round of lay offs two months after Mr. Glover was elected the local president of the bargaining unit and no more than eight days after AFSCME notified BSU's Human Resources Department that Mr. Glover was elected to the collective bargaining team. The ALJ also drew reasonable inferences of BSU anti-union animus from a pattern of adverse action against union officials and activists, and BSU's surveillance of employee union activities and the manner in which BSU handled Glover's layoff. Supporting this latter inference of anti-union animus, the ALJ found that notwithstanding the 90-day notice afforded laid-off employees, Mr. Glover was ordered *immediately* to return all of his equipment and remove all of his personal belongings. (Report at 12) Although he was paid for the full 90-days notice period, he was placed on administrative leave nineteen days from the date of the lay-off notice.

[10]/ The ALJ made several findings with respect to instances of unlawful surveillance attributed to BSU of bargaining unit employees engaged in protected activity as well as references to BSU's adverse action with respect to other employee union supporters. We consider these findings by the ALJ as evidentiary findings only insofar as they relate to the alleged unfair labor practices that were actually referred for hearing after a finding of probable cause. We note that the record does not reflect any attempt to amend the Petition to include this alleged conduct as an additional violation at any time during these proceedings.

[11]/ The Maryland courts have employed such burdens of proof analysis in personnel action cases. *See, e.g.,* Western Correctional Institution v. Geiger, 130 Md. App. 562, 747 A.2d 697 (2000).

activity played no role in the employer's action, or that unprotected activities (e.g., legitimate business or disciplinary reasons), standing alone, would have caused the employer's action (i.e., were substantially relied upon); (b) the employer's alleged reason for the action was not, in fact, the one relied upon (i.e., a pretext case); or (c) the employer's asserted reason was relied upon in part, but the employer cannot show that such a reason alone would have caused the employer's action (i.e., a so-called "mix- or dual-motive" case). Thus, a "pretext case" is one where the employer's case is wholly without merit, whereas in a "dual motive" case, the affirmative defense has some degree of merit. In dual motive cases, the employer's ability to prove that non-discriminatory reasons would have caused its action notwithstanding the employee's protected activity will determine the existence of a violation or not.

As we discuss in further detail below, the ALJ muddled his analysis of the instant case by confusing a dual motive analysis with a pretext analysis. He determines that while BSU may have relied upon legitimate business reasons for abolishing positions during its fiscal crisis, its reason for abolishing Mr. Glover's position was "largely pretextual." (Report at p. 34-35) Based upon our review of the ALJ's findings of fact and the record as a whole, we must reject the ALJ's conclusion in this regard.

The ALJ's findings that BSU had legitimate budgetary and fiscal reasons for conducting the round of lay-offs that included Mr. Glover's position clearly establishes this as, at most, a dual motive case. The ALJ correctly concluded that AFSCME met its burden of proof of establishing a *prima facie* case that BSU's layoff of Mr. Glover constituted an unfair labor practice as prescribed under 14.30.07.01D. Once a *prima facie* case of the alleged violation is established, consistent with *Wrightline*, the employer, BSU, must then meet its affirmative defense burden of proof by establishing that its action (here, Mr. Glover's layoff) would have occurred based on legitimate business considerations absent his protected activity.

Under the *Wrightline* analysis, AFSCME's "*prima facie* showing creates a kind of presumption that the unfair labor practice has been committed." *Wrightline*, *supra*, 662 F.2d at 905. Once this showing is made, the burden shifts to the employer, BSU, to produce evidence of an actually legitimate reason for its action, Mr. Glover's layoff. This burden, however, does not place on the employer the onus of affirmatively proving that the unfair labor practice did not occur. Rather, the employer's burden is limited to a rebuttal of the presumption created by the Petitioner's (AFSCME's) *prima facie* case showing. The First Circuit in *Wrightline* articulated this burden as "producing evidence to balance, not to outweigh, the evidence produced..." establishing the *prima facie* showing. Id. As an affirmative defense, the employer is charged further with a burden of persuasion as well as production.[12]/ The burden of persuasion is met by establishing its affirmative defense by a preponderance of the evidence.

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[12] / NLRB v. Transportation Management Corp., 462 U.S. 393 (1983).

The ALJ indeed found that BSU had produced evidence establishing legitimate business reasons for the layoff that included Mr. Glover. As such, there is no question that BSU had met the production element of its burden of proof. However, the ALJ based his conclusion that Respondent BSU "failed to prove by a preponderance of the evidence that it would have laid off Mr. Glover notwithstanding his protected union activity, on his finding that BSU had not shown that it actually realized any significant savings from the layoff or that funds were used consistently with BSU [sic] mission... ." (Report at p. 36) On that basis, the ALJ concluded as a matter of law that BSU did not satisfy the burden of persuasion element and thereby failed to meet its burden of proof establishing its affirmative defense.

We disagree.

In reaching this conclusion, the ALJ observed that "if they [BSU's President and the Chief Financial Officer] had eliminated [Glover's] position and accounted for the savings with corresponding increases within the educational program, the respondent probably would have convinced me that it would have taken this action even if Mr. Glover had not engaged in union activities." (Report at p. 31) The ALJ further observed that "BSU had a legitimate motive in reorganizing the President's office ... [h]owever, as the motive was allegedly implemented with regard to Mr. Glover, I conclude that the motive was largely pre-textual, since it is very unclear if any cost savings were realized from the elimination of Mr. Glover's job or how the funds saved were used." (Report at p. 34-35) Additionally, the ALJ observed, "Even if BSU did not need a full-time Photographer, the elimination of this position did not give any clear benefit to its overall budget." *Id.*

These speculations belie the ultimate conclusions of fact the ALJ made on this issue. Specifically, he made the following conclusions:

> BSU also had legitimate budgetary reasons for eliminating the Photographer [Mr. Glover's position]. The position was created recently and only filled by one employee. BSU faced a severe budgetary crisis for FY 2003 and was required to reduce the workforce by 35 positions, four of which were eliminated. The BSU President intended in part to channel scarce funds into academic areas. The elimination of the Photographer position resulted in some net savings to BSU's budget; for FY 2003, the savings equaled the net salary reduction of $32,211.96 minus the cost of hiring additional freelance photographic serves. The funds that were conserved were used to fund other priorities within the budget. (Report at p. 15; Finding No. 70)
> [Emphasis added.]

As we noted earlier, BSU's burden is limited to a rebuttal of the presumption created by AFSCME's *prima facie* case showing. The ALJ's own findings, as set forth above, demonstrate that BSU had legitimate business reasons for eliminating Glover's photographer position and establish that BSU met its burden of producing evidence that,

at a minimum, balances the evidence produced establishing the *prima facie* showing. We conclude from these findings that BSU met its further burden of persuasion by establishing its affirmative defense by a preponderance of the evidence. The ALJ's ultimate conclusions of fact establish that BSU realized net savings from the elimination of the full-time photographer position. Furthermore, the funds "conserved" were used "to fund other priorities within its [BSU's] budget."

Notwithstanding these facts, the ALJ observed that "even if BSU did not need a full-time Photographer, the elimination of this position did not give any clear benefit to its overall budget." (Rprt at p. 35) It is not our role to assign, through hindsight or second-guessing, the level of ultimate success required of an employer's business decision in order to determine its legitimacy if there is no other evidence that the decision is a pretextual one. Here, we find BSU's legitimate business objectives and mandates—the mandatory elimination of positions it could afford to expend to save money to fund other legitimate priorities in its budget—were in fact substantially achieved and did not become "pretextual" simply because other legitimate priorities were identified when the net savings became available. We will not second-guess the validity of legitimate business and mission-related decisions and objectives that are established as legitimate and non-pretextual when made.[13]/

Once BSU had established its affirmative defense, as was found here, of a legitimate and non-pretextual basis for eliminating Mr. Glover's position, the burden of proof or persuasion shifted back to AFSCME to adduce further evidence that would establish by a preponderance that anti-union motives substantially or predominantly motivated BSU's actions or that BSU's legitimate business reasons would not have caused it to abolish the photographer position in the absence of Mr. Glover's protected activity. We find the facts of this case do not support that the Petitioner met this burden.

The facts establish that months before Mr. Glover was elected president of the local union and a member of the collective bargaining team (the union activity that distinguished Mr. Glover from most other employee union activists), BSU's President had identified his office and the closely aligned University Relations Department (where Glover's position was assigned) as areas where he would start to implement the first phase of BSU's efforts to address the fiscal crisis. BSU's president asked the University Relations Department and his office to look into areas where funding could be cut. Pursuant to this directive, the University Relations Department conducted a comparative study on how photography functions were handled by other area universities. Based on that study, the University Relations Department learned that only two other universities employed full-time photographers and the University Relations Department determined

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[13] / As the National Labor Relations Board observed in *Wrightline*, "[i]n 'situations present[ing] a complex of motives that the decisional body be able to accomplish the 'delicate task' of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a particular manner and the balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." Wrightline, 252 NLRB 1083, 1089. We find that "balance" struck in our assessment of the competing interests.

that its full-time photographer position was expendable. (Report at p. 10; Findings Nos. 29-34)

We further observe that the photographer position was newly created less than two years prior to its elimination. The nature and duration of its existence did not make it an unlikely selection during a serious fiscal crisis compelling layoffs. At the time BSU first identified the photographer position as suitable for elimination in its effort to weather its fiscal crisis, Mr. Glover's union activities, while clearly evident, were not notably distinguishable from other employees in the bargaining unit that were active with the union.

We are mindful that a finding was made that shortly after the University Relations Department identified the photographer position as expendable, BSU's President issued an e-mail to BSU staff that he would issue his own plan for handling the fiscal crisis that would not include layoffs for that year. (Report at p. 11; Finding No. 37) However, notwithstanding this notice, BSU's President subsequently came to the conclusion that a course of action that included layoffs was necessary. The ALJ found that this conclusion was made for legitimate business reasons.[14]/

Despite BSU President's initial decision not to resort to layoffs, the fact remains that identification of the photographer position as suitable to include in any layoff was made, as noted above, prior to Mr. Glover's participation in union activities that significantly distinguished him from his fellow union activists. We further note that the first phase of BSU's layoffs, which included Glover's full-time photographer position, also included a website developer position in the University Relations Department and BSU's general counsel position in the president's office. Unlike the photographer position, the website developer position was identified as a position the University Relations Department wanted to maintain in the event of a layoff. (Report at p. 10; Finding No. 33) There is no evidence that the employee occupying the website developer position was an active union supporter. This adds further support to our conclusion that BSU's determinations of which positions to eliminate in the wake of its budget crisis turned on legitimate factors regarding the positions themselves, not the employees occupying them.

If Mr. Glover were being unlawfully targeted from the time his union activities and pro-union sentiments first became evident (as early as the Fall of 2001 when the AFSCME began its organizing campaign), we find the BSU President's late February/early March 2002 notice that there would be no layoffs to address its fiscal crisis would be inconsistent with any unlawfully motivated effort by BSU to lay off Mr.

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[14] / The ALJ observed that "BSU's rationale for not having the Photographer made sense when one considers BSU's mission but the rationale was not consistent with BSU's actual practice." (Rprt at p. 35) However, the ALJ's observation that "BSU's rationale for not having the Photographer [position] was not consistent with BSU's actual practice" ignores earlier findings that BSU was confronted with a severe budget crisis that required it to take measures that, heretofore, had not been BSU's practice, including the reduction of its workforce by 35 positions.

Glover. (Report at p. 26 and 29) In any event, a finding was made that a DBM notice to all State agencies and universities calling for the mandatory elimination of 3,400 authorized positions was issued subsequent to BSU President's initial decision not to layoff. (Report at p. 11.) The DBM directive would clearly have an impact on BSU's available options as well as the viability of maintaining the BSU President's earlier notice of no layoffs.[15]/

In concluding that BSU failed to meet its affirmative defense burden of proof, the ALJ further observed that BSU failed to overcome competing evidence establishing that BSU "departed from its usual personnel practices in effectuating the layoff, the Respondent conducted surveillance of union activity and took adverse employment action against other union officers; and other related factors." (Report at p. 37.) However, in the face of competing evidence, while findings of BSU's departure from its usual personnel practice in effecting Mr. Glover's layoff were sufficient to establish the animus element necessary to a *prima facie* showing of the alleged unfair labor practices, it is not sufficient to rebut findings that BSU's decision to eliminate Mr. Glover's position was caused by legitimate budgetary reasons and would have been made absent Mr. Glover's protected activity. The remainder of the Petitioner's evidence cited by the ALJ does little to diminish BSU's affirmative defense but rather, again, is limited to evidence supporting the Petitioner's initial burden establishing the *prima facie* elements of the unfair labor practices.[16]/

Conclusion

These facts taken together sufficiently establish that BSU not only met its burden of production but its burden of persuasion that legitimate business reasons served as the substantial basis for identifying Mr. Glover's full-time photographer position as among those it could afford to eliminate to address the undisputed budgetary constraints confronting it. As noted above, the ALJ found that BSU realized net savings from the elimination of the full-time photographer position. Although the ALJ further found that

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[15] / We further note that BSU President stated that there were no layoffs planned for that year which ended June 30th. The first phase of layoffs, which included Mr. Glover, did not take effect until the next fiscal year which began July 1st.

[16] / Personnel actions involving other union supporters were not related to the instant fiscal crisis that precipitated the instant elimination of positions and resulting lay-offs. The referenced "surveillance" of union activity consisted of BSU security guards videotaping employees and AFSCME representatives at an open outside campus rally held in support of Mr. Glover about a month after BSU notified Mr. Glover of its decision to lay him off. While such findings can serve as supporting evidence of an alleged unfair labor practice violation, these actions or incidents, themselves, were not made the subject of Petitioner's alleged unfair labor practice violations. However, we do not find the probative value of these incidents sufficient to overcome evidence of BSU's legitimate fiscal motives.

We further note that the ALJ made findings that there appeared to be a pattern of BSU's taking adverse and disciplinary action since early 2001 against other employees active with the union. Notwithstanding these findings, there were no findings or evidence of any prior personnel actions or warnings against Mr. Glover or any allegation by AFSCME of same prior to Mr. Glover's lay off. (Report at p. 15, 30, and 37)

BSU could not establish that the savings were channeled into academic areas, he did find that the savings were used to fund other legitimate business and mission-related priorities in BSU's budget.

The ultimate burden of persuasion that an unlawful motive actually or substantially served as the motivating basis for Mr. Glover's layoff always remained with the Petitioner AFSCME. We find nothing persuasive in the record or in the ALJ's findings to rebut the legitimacy of BSU's decision to conduct layoffs in general or to identify its relatively new full-time photographer position, then-occupied by Mr. Glover, for elimination and replacement by contract photography. In view of these and related findings, we find that BSU met its burden of establishing its affirmative defense by a preponderance of the evidence that its decision identifying the photographer position for elimination and, consequently, laying off Mr. Glover, was made substantially for legitimate business reasons and would have occurred absent Mr. Glover's union activities.

Based on the foregoing, we find that the Petitioner AFSCME has not met its burden of proof establishing that by its layoff of Mr. Glover, BSU committed unfair labor practice violations as prescribed under Board Regulations 14.30.07.01D and A.

ORDER

IT IS HEREBY ORDERED THAT:

The Unfair Labor Practice Petition is dismissed.

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD
Annapolis, MD

December 17, 2003

Karl K. Pence, Executive Director
SHELRB, on behalf of Jamin B. Raskin, Chair

Appeal Rights

Any party aggrieved by this action of the State Higher Education Labor Relations Board may seek review in accordance with Board Regulation 14.30.11.26 and as prescribed under Title 10 of the State Government Article, Annotated Code of Maryland, § 10-222.

STATEMENT OF DISSENT FROM MAJORITY

I respectfully disagree with the conclusions drawn by the majority in this case, ULP 2002-15, AFSCME v. Bowie State University, as reflected in Decision and Order/Opinion 17. I am not persuaded that the Administrative Law Judge (ALJ) erred in his proposed findings of fact and proposed conclusions of law. I am not persuaded that the evidence of the savings and other intended fiscal goals BSU realized from this particular reduction-in-force was sufficient to overcome the quantum of evidence establishing a nexus between BSU's decision to abolish a position whose occupant was the elected local union president. Given the nature of the organizing campaign and its duration, I am further not persuaded that knowledge of Mr. Glover's comparatively more energetic level of union activity was unknown to the employer at the time the original decision to target positions was made, especially since the position was located directly under the President's office and, as AFSCME clearly established as part of the prima facie case, Mr. Glover did not get elected president of the local without having played a visible role in the organizing campaign. I am further not persuaded by the employer's argument that Glover's being the only unit position eliminated thereby establishes that no discriminatory action was involved. I therefore must vote to uphold the ALJ's proposed findings of fact and conclusions of law supporting the alleged unfair labor practice in this case.

Respectfully submitted,

SUSAN J. SCHURMAN
SHELRB MEMBER

AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES,	*	BEFORE PAUL B. HANDY
	*	AN ADMINISTRATIVE LAW JUDGE
On behalf of:	*	OF THE MARYLAND OFFICE
CALVIN JUAN GLOVER,	*	OF ADMINISTRATIVE HEARINGS
Petitioner	*	OAH No.: HELRB-LRB-01-200200010
v.	*	HELRB No.: ULP 02-15
BOWIE STATE UNIVERSITY,	*	
Respondent	*	

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PROPOSED FINDINGS OF FACT AND PROPOSED CONCLUSIONS OF LAW

STATEMENT OF THE CASE
ISSUE
SUMMARY OF THE EVIDENCE
PROPOSED FINDINGS OF FACT
DISCUSSION
PROPOSED CONCLUSIONS OF LAW

STATEMENT OF THE CASE

On July 12, 2002, the American Federation of State, County and Municipal Employees ("AFSCME" or "Petitioner"), on behalf of Calvin Juan Glover, filed an Unfair Labor Practice claim ("ULP") against Bowie State University ("BSU" or "Respondent") with the State Higher Education Labor Relations Board ("HELRB"). In essence, the Petitioner claimed that the Respondent had discriminated against Mr. Glover in hiring, tenure or term or condition of employment to discourage membership in an employee organization, when it laid off Mr. Glover shortly after he had been elected the union local president and a member of the collective bargaining team.

On August 2, 2002, the Respondent, through Rocquelle A. Jeri, Labor Relations Manager and Chief Negotiator, filed its response to the ULP. In essence, the Respondent asserted that it had eliminated Mr. Glover's position of Photographer pursuant to the BSU President's Office Reorganization Plan. It contended that a primary purpose for the reorganization plan was to conserve funds due to fiscal constraints. Further, the Respondent stated that since it had not yet entered into collective bargaining with the Petitioner, Mr. Glover's position with the union played no role in his lay-off.

The Petitioner filed with the HELRB a rebuttal letter, dated August 8, 2002. It alleged that the Respondent's "fiscal defense" was pre-textual, that the layoff was motivated by anti-union animus, and that the Respondent was obligated to bargain over the layoff of Mr. Glover.[1]

On December 16, 2002, the HELRB delegated authority to the Office of Administrative Hearings ("OAH") to conduct a hearing regarding this ULP.[2] The delegation is limited to the issuance of final findings of fact and proposed conclusions of law. However, since the HELRB hearing regulations only permit delegation to OAH of *proposed* findings of fact, Code of Maryland Regulations ("COMAR") 14.30.11.03B, this decision will include proposed findings of fact and proposed conclusions of law.

A pre-hearing conference was held on March 25, 2003, at OAH, 11101 Gilroy Road, Hunt Valley, MD 21031, before Paul B. Handy, Administrative Law Judge ("ALJ"). Linda D. McKeegan, Esquire, Kahn, Smith & Collins, P.A., appeared on behalf of the Petitioner. Sara Slaff, Assistant Attorney General, appeared on behalf of the Respondent. The hearing was scheduled for June 30 through July 3, 2003, at BSU. On March 25, 2003, the ALJ issued a Pre-hearing Conference Report and Order.

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[1] The Petitioner did not advance the last argument during the hearing, and it is deemed to be waived.

On June 18, 2003, the Respondent filed a Motion in Limine and Request for Hearing. The Respondent stated that the Petitioner had given notice that it intended to call Michelle D. Rhett as a witness. Ms. Rhett was formerly employed as General Counsel to BSU. The Respondent contended that Ms. Rhett's testimony would be based on confidential communications between Ms. Rhett and officials and employees of her client, BSU. The Respondent asserted its attorney-client privilege and sought to exclude Ms. Rhett from testifying.

The Petitioner filed its Memorandum in Opposition to Respondent's Motion in Limine, on June 23, 2003. The Petitioner proffered that Ms. Rhett would testify to matters contained in a memorandum she wrote to the Board of Regents of the University of Maryland System on June 14, 2002 [Pet. No. 1 for the Motion; Pet. No. 8 for the Hearing]. The Petitioner contended that none of the matters contained in that memorandum involved disclosure of confidential attorney-client communications. Therefore, the Petitioner requested that the Motion in Limine be denied.

A motions hearing on the Respondent's Motion in Limine was held on June 30, 2003, before the beginning of the hearing on the merits. After hearing oral arguments, this ALJ issued an oral decision denying the Motion in Limine to exclude the testimony of Ms. Rhett but placing restrictions on the subject areas of her testimony. The reasons for the decision were stated on the record and are also summarized in the Discussion section of the Proposed Findings of Fact and Conclusions of Law.

The hearing on the merits was held on June 30 and July 1, 2003, at BSU, Human Resources Conference Room, 14000 Jericho Road, Bowie, MD, before this ALJ. Ms. McKeegan represented the Petitioner. Ms. Slaff represented the Respondent.

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[2] The parties have made reference to a preliminary investigation conducted by the HELRB. The results of such investigation have not been provided to OAH.

Procedure in this case is governed by the contested case provisions of the Administrative Procedure Act, the Rules of Procedure of the Office of Administrative Hearings and the Procedures for Administrative Hearings concerning matters before the HELRB. Md. Code Ann., State Gov't §§ 10-201 through 10-226 (1999 & Supp. 2002); COMAR 28.02.01; and COMAR 14.30.11.

ISSUES

The issues are: (1) whether the Respondent engaged in unfair labor practices, pursuant to Md. Code Ann., State Pers. & Pen. § 3-306 (Supp. 2002), by laying off Mr. Glover because he engaged in protected union activities; and if so, (2) the appropriate remedy.

SUMMARY OF THE EVIDENCE

Exhibits

The Petitioner submitted the following documents in its evidence binder [parenthetical information in brackets denotes whether the document was offered and/or admitted into evidence[3]]:

Pet. No. 1 - BSU Operating Budget for Fiscal Year ("FY") 2003 [admitted].

Pet. No. 2 - BSU Operating Budget for FY 2004 [admitted].

Pet. No. 3 - Layoff notice from Deborrah M. Banks to Mr. Glover, dated June 11, 2002 [offered by the Respondent and admitted as Resp. No. 7].

Pet. No. 4 - Handwritten note by Dr. William P. Marable, dated July 3, 2002 [admitted].

Pet. No. 5 - Mr. Glover's grievance, dated July 9, 2002 [admitted].

Pet. No. 6 - Memorandum from T. Eloise Foster, Secretary of the Department of Budget and Management ("DBM") to all Agency Heads, CFOs ("Chief Financial Officers") and Personnel Directors, dated April 8, 2002 [admitted].

[3] Many of the documents which were not offered into evidence were commented upon by witnesses.

Pet. No. 7 - Blank AFSCME Contract Survey [admitted].

Pet. No. 8 - Letter from Ms. Rhett to Nathan A. Chapman, Jr., Chairman, University System of Maryland ("USM") Board of Regents, dated June 14, 2002 [identical to Pet. No. 1 for the Motion; not offered].

Pet. No. 9 - BSU Reorganization Plan, dated June 7, 2002 (partially redacted) [offered by the Respondent and admitted as Resp. No. 1].

Pet. No. 10 - USM Policies and Procedures VII-1.32 – Policy on Layoff and Recall of Regular Exempt Employees [not offered].

Pet. No. 11 - *The Daily Record* article: "Glendening 'budget constraints' take first human toll," dated September 7, 2002 [not offered].

Pet. No. 12 - AFSCME Contract Action Team announcement, undated [admitted].

Pet. No. 13 - BSU Audit Report by Office of Legislative Audits, dated September 2001 [not offered].

The Respondent submitted the following documents in its evidence packet [parenthetical information in brackets denotes whether the document was offered and/or admitted into evidence]:

Resp. No. 1 - BSU Reorganization Plan, dated June 7, 2002 (partially redacted, identical to Pet. No. 9) [admitted].

Resp. No. 2 - USM Policies and Procedures VII-1.30 and VII-1.32 [admitted].

Resp. No. 3 - BSU University Relations Comparison Analysis by Ms. Banks, dated February 2002 [admitted].

Resp. No. 4 - Memorandum from Sheila Hobson, Senior Director of Human Resources, and Ms. Rhett, General Counsel, to Ms. Banks, dated March 13, 2002 [admitted].

Resp. No. 5 - BSU University Relations Photography Expenses for the period, 1999-2002 [admitted].

Resp. No. 6 - BSU Position Description for Photographer, undated [not offered].

Resp. No. 7 - Layoff notice from Ms. Banks to Mr. Glover, dated June 11, 2002 (identical to Pet. No. 3) [admitted].

Resp. No. 8 - Letter from Ms. Banks to Mr. Glover, dated September 9, 2002 [admitted].

Resp. No. 9 - Termination notice from George E. Miller, III, Provost, to Theresa Butler, dated October 1, 2002 [not offered].

Resp. No. 10 - Performance Management Process ("PMP") Evaluation of Donald Myers, dated May 15, 2002 [not offered].

Resp. No. 11 - Memorandum from Marisa Greenlee, Director of Business Systems, to Mr. Myers, dated June 4, 2002 [not offered].

Resp. No. 12 - Maryland Rules of Professional Conduct – Rule 1.6 (2003) [not offered].

Resp. No. 13 - Letter from Ms. Rhett to Ms. Slaff, dated July 1, 2002 [not offered].

Resp. No. 14 - BSU University Relations Film and Photo CD Processing Expense Report, with entries dated April 8, 2001 through February 27, 2002 [not offered].

Resp. No. 15 - PMP Evaluation of Mr. Glover, dated May 9, 2002 [not offered].

Witnesses

The Petitioner presented the testimony of the following witnesses:

Josif Kahraman, Lead Organizer, AFSCME.
Jeff Bigelow, Representative, AFSCME.
Theresa M. Butler, formerly Office Secretary and Administrative Assistant, BSU.
Donald Myers, Data Processing Operations Manager, BSU.
Michelle D. Rhett, formerly General Counsel, BSU.
Mr. Glover.

The Respondent presented the testimony of the following witnesses:

Calvin Wayne Lowe, Ph.D., President of BSU.
Willie Hughey, Vice President for Finance and Administration, BSU.
Deborrah M. Banks, Director of University Relations and Marketing, BSU.
Sheila Hobson, Senior Director of Human Resources, BSU.
William P. Marable, Ph.D., Chief of Staff, BSU.

PROPOSED FINDINGS OF FACT

Based on the evidence presented, I propose that the HELRB find the following facts by a preponderance of the evidence:

The Parties and the Employment Relationshp

1. BSU is a post-secondary institution within the University System of Maryland ("USM"). BSU receives funds from both the State of Maryland and from private and federal grants and endowments.

2. Prior to December 5, 2001, none of the BSU employees were represented by any union or employee organization in collective bargaining with BSU. However, there was a local organization, Local No. 1297, affiliated with AFSCME, at BSU.[4]

3. Prior to October 2, 2000, BSU did not employ a full-time photographer. Photographic services were provided by the various departments of BSU from their budgets on a piecemeal basis. Departments often hired freelance photographers, particularly for special events such as commencement ceremonies and sporting events.

4. Vice President for Institutional Advancement Arthur Brooks created the position of Photographer because he believed it would be beneficial to BSU to retain a full-time photographer to supply all photographic needs. Dr. Brooks assigned this position to the University Relations and Marketing Department, under Ms. Banks' supervision.

5. Mr. Glover was hired as the Photographer on October 2, 2000. He is the only person to ever hold that position.

6. Originally, Ms. Banks and Mr. Glover agreed that the Photographer would not only take photographs but also develop film. However, the budget allocated to University Relations did not include funds for setting up a darkroom. Therefore, Mr. Glover's duties required him to take photographs only. Mr. Glover suggested that the department purchase a digital camera in order to eliminate development costs; Ms. Banks replied that the department could not afford this purchase. Mr. Glover acted both as a photojournalist, creating a pool of photographs that could be used for various purposes, and as the official photographer for various events both on and off campus.

7. Mr. Glover reported directly to Ms. Banks, then to Dr. Brooks, and then to the BSU President.

Mr. Glover's Union Activity

8. During the first 12 to 18 months they worked together, Mr. Glover and Ms. Banks were friendly.

[4] The evidence as to the role AFSCME played at BSU was vague. Mr. Kahraman testified that the local "existed before" December 2001. Mr. Bigelow testified that as an AFSCME Representative he has represented grievants in third step grievance hearings at OAH.

9. In the fall of 2001, a union certification campaign began at BSU. Both AFSCME and the Maryland Classified Employees Association ("MCEA") sought to be elected the bargaining agent for BSU employees.

10. During that time, organizers for AFSCME looked for potential union recruits among the BSU employees. Mr. Glover declared his support for AFSCME and agreed to help promote AFSCME among his fellow BSU employees.

11. At that time many employees were fearful of expressing their support for AFSCME because a key union supporter, Vanessa Rawlings, had been terminated earlier in 2001.

12. As the Photographer for BSU, Mr. Glover frequently traveled around the campus and he was well known to employees and students.

13. In September 2001, AFSCME distributed a contract survey to BSU employees. AFSCME was seeking information about their needs and experiences as employees [Pet. No. 7]. Mr. Glover's name was listed as a contact person for AFSCME on the survey. He was active in handing out the survey.

14. During the fall of 2001 and the spring of 2002, Mr. Glover frequently wore his AFSCME union shirt, which had bright green, red, blue and yellow colors and the image of a fist on the front. He also frequently wore hats or pins identifying support for AFSCME. Mr. Glover spoke to many employees to advocate voting for AFSCME as the BSU bargaining agent.

15. Mr. Glover's office area was in front of Ms. Banks' office, and she had to pass by it to get to her office. Mr. Glover kept union literature on his desk, and was open about his activities on behalf of AFSCME.

16. On December 5, 2001, a union certification election was held at BSU. The employees chose between AFSCME, MCEA and no representation. Mr. Glover attended the election as an observer and wore an AFSCME union button to the election. Sheila Hobson, the Senior Director of Personnel, and Dr. William Marable, the Chief of Staff, also attended portions of the election and saw Mr. Glover there.

17. The BSU employees elected AFSCME as their bargaining agent.

18. Beginning in late 2001 or early 2002, Mr. Glover's relationship with Ms. Banks deteriorated. Ms. Banks rarely spoke to Mr. Glover after that time. She did ask Mr. Glover on several occasions to attend continuing education to update his skills. Mr. Glover enrolled in several courses but did not advise Ms. Banks of this fact.

19. During the spring of 2002, Josif Kahraman, the new AFSCME lead organizer assigned to BSU, met with Mr. Glover and other employees active in AFSCME in the BSU library on at least a weekly basis during non-work hours. Mr. Kahraman often visited Mr. Glover's office to confer briefly with him. Mr. Kahraman is a Caucasian man who was visible on a campus where many of the students and staff were African-American. Mr. Kahraman was open about his role with AFSCME.

20. During the times that union members met in the library, several BSU supervisors questioned participants about their activities in the meetings.

21. In early 2002, the President position at AFSCME Local 1297 became vacant when the incumbent was determined to be ineligible because he held an improper job classification for union membership.

22. From April 11 through 18, 2002, an election for union officers was held at BSU. Mr. Glover was elected President of the local. Donald Myers was elected Vice President, and Theresa Butler was elected Treasurer.

23. Word-of-mouth spread throughout the BSU campus that Mr. Glover had been elected President. Two management members, who were Ms. Banks' superiors, congratulated Mr. Glover that day. Mr. Myers informed his supervisors of the election results shortly afterward.

24. On June 3, 2002, Mr. Glover was elected to be a member of the AFSCME collective bargaining team. Mr. Myers and Ms. Butler were also elected.

25. Shortly after that election, the lead AFSCME negotiator, Ron Barillas, notified the Human Resources Department of the names of the people elected so that they could be released from work to participate in negotiations.

26. On June 4, 2002, Mr. Myers was given a counseling memorandum for excessive absences. His grievance of this memorandum is pending as of the hearing date, and no action has been taken past step one of the grievance process.

BSU's Financial Problems

27. At some point during their employment relationship, Ms. Banks asked Mr. Glover to develop a budget transfer form so that the University Relations Department could bill other departments for photographic services. Mr. Glover developed such a form [Resp. No. 14], but it was never used because BSU financial policy required an additional step that neither Ms. Banks nor Mr. Glover followed through on.[5]

[5] Both Mr. Glover and Ms. Banks blamed the other for this problem. It is not necessary to resolve this conflict to determine the issues in this case.

28. Ms. Banks frequently criticized Mr. Glover for taking too many photographs and thereby wasting resources. On a typical occasion, Mr. Glover took six photographs but Ms. Banks argued that only one or two were necessary.

29. In late 2001, President Lowe and other management officials at BSU became aware that BSU could lose funding for the spring of 2002, beginning in March 2002, and face even more severe budget cuts for FY 2003. President Lowe asked the departments to look at areas they could cut funding, and he began to consider cuts within his own office.

30. Student enrollment at BSU was projected to increase substantially during the 2002-2003 school year. Therefore, President Lowe anticipated a need to hire at least one additional adjunct professor and to increase funding in the educational programs.

31. In January 2002, President Lowe advised Ms. Banks to consider whether she could absorb cuts within her department.

32. By early 2002, Ms. Banks came to believe that the Photographer position should be eliminated.

33. In February 2002, Ms. Banks conducted her own survey of other institutions of higher education as to their methods of handling photography functions [Resp. No. 3]. Ms. Banks surveyed Howard University, University of Maryland – Baltimore County ("UMBC"), Towson University, American University, Southern University, and Prince George's County Community College. Ms. Banks learned that only two institutions, Towson and American, employed full-time photographers. Ms. Banks relied on this survey and her department's tight budget to advocate to the President that the Photographer position at BSU should be eliminated. Ms. Banks urged that she needed a graphics specialist in her department more than she needed a full-time photographer.

34. In February or March 2002, Ms. Banks requested information from the Human Resources Department as to how to handle layoffs within her department.

35. On March 13, 2002, Ms. Hobson and Ms. Rhett issued a memorandum to Ms. Banks with recommendations as to how to handle possible layoffs [Resp. No. 4]. The recommendations included: (1) develop an organizational chart that reflects the anticipated changes as of July 1, 2002; (2) meet with staff to advise them of the impending reorganization and anticipated structure; (3) meet with the BSU President to obtain his approval of the plan – any proposed letter to employees notifying of layoffs must be approved by Ms. Hobson and Ms. Rhett prior to distribution; and (4) conduct one-on-one meetings with staff to advise them of the impact on their positions. Ms. Hobson and Ms. Rhett met with Ms. Banks to discuss these recommendations.

36. Shortly after this meeting, Ms. Banks was advised that President Lowe wanted her to stop planning for reorganization because he intended to formulate his own plan for reorganizing his office, including the University Relations Department.

37. In February or March 2002, President Lowe issued an e-mail to the entire BSU staff, stating that no layoffs were planned for that year.

38. In the spring of 2002, President Lowe met secretly with Ms. Hughey, Dr. Marable, and a few other key persons to formulate a reorganization plan. Ms. Banks was not included in the discussions. Neither Ms. Hobson nor anyone else in the Human Resources Department was included.

39. President Lowe intended in part to reorganize BSU to channel funds into the core functions of the institution, consistent with BSU's mission to provide the students with a good education.

40. On April 8, 2002, the Secretary of DBM issued a memorandum to all state agencies, including BSU, advising them that approximately 3,400 authorized positions and 338 contractual positions throughout the State must be eliminated by June 30, 2002 [Pet. No. 6]. The agencies were directed to provide two positions reduction plans, one with a 3% reduction of authorized positions and one with an additional 5%. The Secretary stated, "Since we all want to avoid the need to abolish filled positions, we are asking you to determine which vacant positions can be abolished in your agency." President Lowe, Ms. Hobson and Ms. Hughey all received and reviewed this memorandum.

41. The costs for photographic supplies, film and developing incurred by the University Relations Department were as follows: (1) FY 1999 - $9,526.16 (including new camera); (2) FY 2000 - $4,300.67; (3) FY 2001 - $1,473.95; and (4) FY 2002 - $2,080.94.

42. On June 7, 2002, President Lowe issued his reorganization plan [Resp. No. 1; Pet. No. 9]. Phase one of the plan, to be implemented immediately, called for the elimination of both the Photographer and Website Developer positions within the University Relations Department. The General Counsel position was also eliminated.

43. In his plan, President Lowe stated that the impact of the layoff of Mr. Glover was as follows: Salary savings for FY 2002 - $30,682.00 plus benefits savings of 28% - $8,590.96, minus severance cost of $7,061.00, for a net savings of $32,211.96.

44. President Lowe relied on budgetary analysis provided by the Chief Financial Officer, Willie Hughey. Ms. Hughey did not calculate the additional costs to be incurred by BSU to hire additional freelance photographers to replace some of the Photographer's functions.

45. Ms. Banks had advocated the elimination of Photographer but not the elimination of the Website Developer.

46. The Human Resources Department received no advance notice of this reorganization plan. President Lowe did not review or consider the recommendations on how to handle layoffs prepared by Ms. Hobson and Ms. Rhett [Resp. No. 4].

The Layoff

47. On June 11, 2002, Ms. Banks met with Mr. Glover and advised him that his position was being eliminated as of June 30, 2002. She handed him her memorandum documenting this action [Resp. No. 7; Pet. No. 3]. The memorandum stated that Mr. Glover was ordered to cease working as of June 30, 2002. It further ordered Mr. Glover to return all equipment that day. Ms. Banks orally ordered him to remove his personal belongings within 30 minutes. He was paid through October 2002.

48. At Ms. Banks' suggestion, Mr. Glover met with Ms. Hobson to discuss the layoff. Ms. Hobson was unaware of the layoff when Mr. Glover arrived in her office.

49. The USM Policy on Layoff for Classified Personnel ("the Policy") VII –1.30 – III – C provides that a department head or chairperson "shall notify employees who are to be laid off at least 90 calendar days before the effective date of the layoff." Ms. Banks gave notice to Mr. Glover of his layoff less than 90 days before his duties ended but more than 90 days before his pay ended.

50. Under the Policy VII –1.30 – III – G, a laid-off employee has a qualified right to displace other employees. Neither Ms. Banks nor Ms. Hobson advised Mr. Glover of his right to exercise displacement rights. Since he was the only Photographer employed at BSU, there was no other comparable position as to which he could displace the incumbent.

51. Mr. Glover has not applied for any other position at BSU or any other institution within the USM system as of the hearing date. There are very few positions within the system that are comparable to the Photographer position.

Aftermath of Layoff

52. On June 11, 2002, the position of General Counsel was eliminated effective June 30, 2002, and Ms. Rhett was laid off. BSU also eliminated the Web Designer and Director of Institutional Research positions.

53. President Lowe maintained a practice of conducting Open House Thursdays; each Thursday, any employee, student or other person could meet with the President to discuss any matter. On Thursday, June 20, 2002, Mr. Glover, Mr. Myers, Mr.

Bigelow, Mr. Kahraman and Evelyn McCarter, Associate Director of AFSCME Council 92, requested to meet with President Lowe to discuss Mr. Glover's layoff. They were told that President Lowe was unavailable. After discussing the situation with legal counsel, Dr. Marable agreed to meet with these individuals.

54. The meeting occurred on July 3, 2002. Mr. Glover and his allies asked Dr. Marable to justify the abolition of the Photographer position. Dr. Marable conceded that photographic services would still be needed for the BSU web page, publications, commencement exercises, and other uses, but he stated that the services would be provided by the various departments. When asked what the savings would be, Dr. Marable stated that he had this figure in his office. He led the others to his office, where he wrote the following: "First year cost savings reorganization of Mr. Glover's position. $32,211.96 annually. William P. Marable 7-3-02" [Pet. No. 4].

55. On July 9, 2002, Mr. Glover through AFSCME filed a grievance protesting his layoff.

56. On or about July 10, 2002[6], the USM Board of Regents met at BSU. Mr. Glover, Ms. Butler, Mr. Myers, Mr. Bigelow and about fifty to sixty persons met to protest BSU's decision to lay off Mr. Glover. Some of the protesters were employees of BSU; others were affiliated with AFSCME, and some were employees of other universities. Dr. George Miller, the BSU Provost, watched the protesters and wrote notes on a paper. President Lowe also was present and observed the protesters. A BSU campus police officer filmed the protesters.

57. At the rally, Ms. Butler asked the officer who was videotaping why the protesters were being videotaped. The officer informed Ms. Butler that President Lowe and Provost Miller wanted it videotaped so they would "know what you were saying." She asked why. The officer then whispered, "Because you're going to go on a list to be terminated." Mr. Myers asked another officer to tell him who had told the officers to videotape the demonstration, and the officer replied, "The administration did."

58. Several officers had told other employees who intended to participate in the protest before the USM Board of Regents, that the session would be closed.

59. The officers videotaped the protesters on behalf of the BSU administration.

60. At the Board of Regents' open meeting that day, numerous employees who were sympathetic to AFSCME and to Mr. Glover's situation, sat apart from the protesters and did not wear union-referenced clothing. Some employees feared retaliation from BSU management if they were associated with the protest.

[6] The various witnesses gave different dates. Their accounts as to what occurred were consistent.

61. Since his layoff, Mr. Glover has provided freelance photographic services for several departments at BSU. Some departments have used other freelance photographers. Ms. Banks and her student interns have taken some photographs using a digital camera.

62. On September 9, 2002, Ms. Banks sent a letter to Mr. Glover advising him that she would not reconsider the decision to eliminate his position [Resp. No. 7].

63. In October 2002, Ms. Butler was terminated after twenty years of employment with BSU. The reason for the termination was that Ms. Butler allegedly gave false information to campus police. As of the hearing date, Ms. Butler's grievance of this action was pending at step three of the grievance process.

BSU's Operating Budget for FY 2003

64. Under the State Personnel Management System ("SPMS"), an agency can contract by eliminating or returning a position. When it eliminates a position, the agency retains the position identification number ("PIN") and the funding for that PIN but does not fill the position; the agency may redirect the funds elsewhere. When it returns the position to DBM, it loses the position and funding for that position permanently.

65. Under the SPMS accounting system, when a PIN is eliminated, it can still appear as an entry in the agency's budget. If so, the PIN must be funded. However, those funds can be used for other purposes.

66. A state agency can eliminate PINs without legislative approval, but the agency is generally expected to spend its budget in accordance with its mission and its budget request.

67. BSU's operating budget for FY 2003 included Mr. Glover's position and salary, since Mr. Glover's position had been eliminated but not returned. BSU included the position because it intended to use the money for cost containment, i.e., to cover turnovers among staff and to apply the money in other areas as needed.

68. BSU eliminated 35 positions during its FY 2003. It imposed hiring freezes and furlough days. BSU created a position of Deputy Provost and an additional Vice President slot, while eliminating the Vice President for Administration position[7]. Two vacant positions within the BSU President's Office were not filled. BSU also gave substantial raises to certain employees who were trained in a new software program, PeopleSoft. Senior management employees received a 1-1/2% cost of living increase, while other employees received a 2-1/2% cost of living

[7] Finance and Administration were combined into one position.

increase. BSU returned 10 PINs to DBM that year; the other positions remained vacant.[8]

Ultimate Conclusions of Fact

69. BSU's decision to eliminate Mr. Glover's position was motivated in part by anti-union animus. BSU management personnel conducted surveillance of employees engaged in union activity and targeted some active union members for adverse personnel actions. Management staff was aware of Mr. Glover's union activities, which were open and notorious. Management staff was aware that Mr. Glover was an AFSCME monitor for the collective bargaining agent election of December 2001, that he was elected President of AFSCME Local 1297 shortly after April 18, 2002, and that he was named to the AFSCME bargaining team in early June 2002. Management staff conducted surveillance of the union-led protest of July 2002, and supervisors questioned employees about their attendance at union meetings. Mr. Glover's relationship with his own supervisor, Ms. Banks, deteriorated shortly after he began advocating in favor of AFSCME.

70. BSU also had legitimate budgetary reasons for eliminating the Photographer position. The position was created recently and only filled by one employee. BSU faced a severe budgetary crisis for FY 2003 and was required to reduce the workforce by 35 positions, four of which were eliminated. The BSU President intended in part to channel scarce funds into academic areas. The elimination of the Photographer position resulted in some net savings to BSU's budget; for FY 2003, the savings equaled the net salary reduction of $32,211.96 minus the cost of hiring additional freelance photographic services. The funds that were conserved were used to fund other priorities within the budget.

71. BSU's reliance on fiscal restraint as a reason for the layoff of Mr. Glover was largely pre-textual, because: (1) little actual financial savings were realized; (2) the BSU President bypassed normal protocol in formulating his reorganization plan by failing to consult with Human Resources regarding the protocol for such plans[9]; (3) personnel actions have been taken against other two union officers during the same time period[10]; (4) surveillance of union activists occurred on BSU campus during this time, and this surveillance tended to chill union activity; (5) while the directive was discretionary, BSU failed to follow the DBM Secretary's recommendation to eliminate vacant positions first; (6) although BSU policy provided for 90 days notice of layoff, Ms. Banks only gave Mr. Glover 30 minutes to clear out his belongings, leading to an inference that this was not a

[8] This finding of fact reconciles the testimony of President Lowe and Ms. Hughey, which were not entirely consistent.

[9] I am not concluding that the President's plan was illegal, only that he departed from normal practices. This is a factor that, when combined with other factors, casts some doubt on his professed motives in reorganizing his office.

[10] I am not ruling on the merits of these personnel actions. However, the fact that three union officers have received adverse employment actions during the period, June through October 2002, is a factor in determining whether BSU management is acting based on anti-union animus.

traditional layoff but an action to remove Mr. Glover's influence from the campus; and (7) the facts set forth in Finding of Fact No. 69.

DISCUSSION

Motion in Limine

In this case, the Petitioner sought to introduce testimony and a letter from Ms. Rhett, who was the General Counsel to BSU prior to June 11, 2002 when her position was eliminated. Ms. Rhett had been employed by BSU for five years, first as an Equal Employment Opportunity ("EEO") Officer and then as the General Counsel. There was a short period when Ms. Rhett held both titles, but she had been exclusively employed as the General Counsel for approximately three years.[11]

Md. Code Ann., Courts & Jud. Proc. § 9-108 provides that a "person may not be compelled to testify in violation of the attorney-client privilege." This statute memorializes the common-law attorney-client privilege. *See Trupp v. Wolff*, 24 Md. App. 588, 335 A.2d 171 (1975). It is "a rule of evidence that forever bars disclosure, without consent of the client, of all communications that pass in confidence between the client and his attorney during the course of professional employment or as an incident of professional intercourse between them." *Pratt v. State*, 284 Md. 516, 519, 398 A.2d 421 (1979).

The ethical duty of Maryland attorneys to preserve confidential communications with their clients is set forth in Md. Rules of Prof. Conduct, Rule 1.6, which provides in pertinent part:

> (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraph (b).
>
> (b) A lawyer may reveal such information to the extent the lawyer reasonably believes necessary:

[11] Ms. Slaff proffered this information without objection.

(1) to prevent the client from committing a criminal or fraudulent act that the lawyer believes is likely to result in ... substantial injury to the financial interests or property of another;

(2) to rectify the consequences of a client's criminal or fraudulent act in the furtherance of which the lawyer's services were used[.]

The Comment to Rule 1.6 includes the following: "The observance of the ethical obligation of a lawyer to hold inviolate confidential information of the client not only facilitates the full development of facts essential to proper representation of the client but also encourages people to seek early legal assistance ... A fundamental principle in the client-lawyer relationship is that the lawyer maintain confidentiality of information relating to the representation. The client is thereby encouraged to communicate fully and frankly with the lawyer even as to embarrassing or legally damaging subject matter ... The confidentiality rule applies not merely to matters communicated in confidence by the client but also to all information relating to the representation, whatever its source ...The requirement of maintaining confidentiality of information relating to representation applies to government lawyers who may disagree with the policy goals that their representation is designed to advance."

The Petitioner proffered that Ms. Rhett would testify consistently with the letter she wrote to Nathan A. Chapman, Jr., Chairman of the University System of Maryland ("USM") Board of Regents, dated June 14, 2002 [Pet. No. 1 for the Motion; Pet. No. 8 for the Hearing, not admitted]. In that letter, Ms. Rhett detailed her complaints regarding personnel actions by the BSU President, including her own layoff and that of Mr. Glover. Ms. Rhett offered factual information and opinions regarding the legality of the actions.

The Respondent moved to exclude all testimony by Ms. Rhett, as well as her letter. The Respondent asserted its attorney-client privilege and contended that Ms. Rhett's proffered testimony and the content of the letter are based on levels of confidential communications with

BSU officials. The Respondent suggested that Ms. Rhett may have violated her ethical duties under Rule 1.6 by writing the letter to the Board of Regents; in any event, the privilege could not be waived by Ms. Rhett. The Respondent further maintained that Ms. Rhett's legal opinions were not admissible.

The Petitioner responded that Ms. Rhett was careful not to divulge confidential communications in crafting her letter and that the Petitioner would introduce only non-privileged evidence at the hearing. The Petitioner argued that the attorney-client privilege is narrowly construed, that it is limited to "confidential communications," and that it does not extend to facts gathered by an attorney, either in that attorney's role as advocate or as an institutional employee. According to the Petitioner, Ms. Rhett could offer important evidence as to BSU's intent to discriminate against union activists on campus, and that the Petitioner should not be denied access to or use of such probative evidence. The Petitioner noted in its written response that the Respondent did not assert attorney work product, which is a broader privilege than that of attorney-client communications.

I denied the Respondent's motion to exclude Ms. Rhett as a witness, but I placed restrictions as to the subject areas of her testimony. The subject areas would have to be in the public domain and clearly not related to her functions as General Counsel. For example, she could testify as to the content of policies that were issued or communications made by BSU officials to the employees generally. However, she was not allowed to testify as to most subjects contained in her letter, since Ms. Rhett clearly learned many of those matters partly as a result of her role as attorney for the institution[12]. I so ruled for the following reasons:

[12] Ms. Rhett testified in the hearing that although she tried to limit her letter to matters that were not confidential, she later realized that some of the lines she drew were "rather thin." I am not deciding or charging that Ms. Rhett engaged in unethical behavior, as she exercised her judgment. My concern is that evidence that is *actually* privileged and not waived should not be aired at the hearing.

During most of the critical time pertinent to this case, Ms. Rhett has been employed exclusively as an in-house counsel to BSU. She had no duties other than those of attorney. Thus, whenever she communicated with employees or officials of BSU, she did so in her role as attorney for the institution. When she gathered information or conferred with others, these functions related to her role to advise and advocate for the institution. Thus, an attorney-client relationship existed, and most of the activities conducted by Ms. Rhett at BSU related to her role as attorney. The attorney-client relationship here is so complex that even seemingly innocent encounters may have been influenced by confidential information learned by the attorney.

I construe the attorney-client privilege more broadly than the Petitioner does. The Petitioner relies on *Blair v. State,* 130 Md. App. 571, 747 A.2d 702 (2000) to support its narrow construction of the privilege. However, that reliance is misplaced. In *Blair*, a criminal defendant was convicted of second-degree murder and use of a handgun, based in part on testimony by an alleged accomplice and his attorney. The alleged accomplice waived his attorney-client privilege so that his attorney could testify about statements the witness/accomplice gave to the attorney. On cross-examination, the defense attorney sought to discover and use notes made by the attorney, but the trial judge refused to allow this. The Court of Special Appeals reversed, in part because both the attorney-client privilege and the broader attorney work product privilege had been waived. Although the Court discussed the general differences between the two doctrines, the case was not decided on the basis of the scope of the attorney-client privilege.

In another criminal case, *Pratt v. State*, *supra*, the Court of Appeals held that the attorney-client privilege extends not only to communications between the attorney and client, but also to communications between the attorney or the client and a psychiatric expert hired privately by the client. The Court noted:

> Initially we observe that, given the complexities of modern existence, few if any lawyers could, as a practical matter, represent the interest of their clients without a variety of nonlegal assistance. Recognizing this limitation, it is now almost universally accepted in this country that the scope of the attorney-client privilege, at least in criminal causes, embraces those agents whose services are required by the attorney in order that he may properly prepare his client's case.

Id., 284 Md. at 520, 398 A.2d 421 (1979).

In *Stitz v. Bethlehem Steel Corp.*, 650 F.Supp 914 (D. Md., 1987), the U.S. District Court for the District of Maryland excluded an attorney from representing an adverse party to a corporation for which he had served as in-house counsel. In reaching this result, the Court stated: " In determining whether to disqualify counsel for conflict of interest, the trial court is not to weigh the circumstances with 'hair-splitting nicety,' but, in the proper exercise of its supervisory power over the members of the bar and with a view of preventing 'the appearance of impropriety,' it is to resolve all doubts in favor of disqualification." *Id.* at 916 [citations omitted].

The case of *Harris v. Baltimore Sun*, 330 Md. 595, 625 A.2d 941 (1993), presented multiple issues as to when the Office of the Public Defender ("OPD") was obligated to provide information about its expenses incurred in defending a highly publicized, capital murder prosecution. The Court of Appeals determined that the OPD could refuse to provide such information if disclosure would violate attorneys' ethical obligation to preserve confidential communications with their clients. The Court noted that the language of Rule 1.6 is broader in scope (of the privilege) than that of the former rule, Disciplinary Rule ("DR") 4-101(C). However, the Court stated that an attorney could only assert this privilege successfully in situations where disclosure "would be likely to be detrimental to the client." *Id.*, 330 Md. at 605, 608, 625 A.2d 941.

The Office of the Attorney General has issued an opinion that under proper circumstances, St. Mary's County Government can assert its attorney-client privilege and

prevent a former county attorney from disclosing confidential communications. 82 Op. Att'y Gen. – (December 16, 1997).

None of these cases, statutes, rules or opinions addresses the exact scenario presented here. However, a number of guiding principles can be gleaned: First, the attorney-client privilege protects not only direct communications between attorney and client but also knowledge and information that flow from such communications. Second, the privilege belongs to the client and cannot be waived by the attorney. Third, an attorney who works exclusively for an institution or governmental entity has the same ethical responsibilities as does an attorney for an individual, and it can often be a thorny question whether particular communications between the attorney and institutional employees are privileged. Fourth, important public policies are advanced by the privilege, for example, to encourage clients to seek early legal advice and to freely discuss embarrassing or damaging matters. Based on these principles, I concluded that the scope of Ms. Rhett's testimony should be limited in order to avoid the likelihood that she could inadvertently disclose confidential matters.

I did not exclude Ms. Rhett's testimony outright because she might be able to testify as to matters that were not disclosed in the course of attorney-client communications. However, I did not allow testimony as to discussions Ms. Rhett conducted with employees about incidents on campus.

For a different reason, I excluded any testimony Ms. Rhett would offer regarding the legality of BSU's actions. Such testimony would not be useful to me (or the HELRB) as trier of fact to understand the evidence or to determine a fact in issue. *See* Md. Rule 5-702.

The Substantive Matters

1. The Legal Standard

In this case, Mr. Glover's position was eliminated as the result of a layoff, and the reasons given for the layoff were economic in nature. Although there was some evidence that Mr. Glover's supervisor disapproved of or criticized some aspects of his performance, it is undisputed that he was not laid off because of his performance. Instead, the Respondent cited severe budgetary problems at BSU and argued that the purposes for the layoff were: (1) to conserve funds in a tight budget; and/or (2) to channel funds into the core functions of BSU, i.e., the educational programs. The Petitioner maintains that the Respondent laid Mr. Glover off because of anti-union animus, based on several factors.

The HELRB was established in 2001 to enforce the collective bargaining laws, under Md. Code Ann., State Pers. & Pen. tit. 3 (Supp. 2002), as applied to state employees of higher education institutions, including the USM and more specifically BSU. Md. Code Ann., State Pers. & Pen. §§ 3-102(a)(5), 3-2A-05(a) (Supp. 2002).[13]

Under § 3-301(a)(1), a qualified employee has the right to take part in forming, joining, supporting or participating in an employee organization or its lawful activities. However, § 3-302 provides in pertinent part:

> The State, through its appropriate officers and employees, has the right to:
> (1)(i) determine the mission, budget, organization, numbers, types and grades of employees assigned, the work projects, tours of duty, methods, means, and personnel by which its operations are to be conducted ...; and
> (ii) maintain and improve the efficiency and effectiveness of governmental operations;
> (2) determine the:
> (i) services to be rendered, operations to be performed, and technology to be utilized; and

[13] Unless otherwise indicated, all statutory references will be to the 2002 Supplement of the State Personnel and Pensions Article of the Annotated Code of Maryland.

(ii) overall methods, processes, means, and classes of work or personnel by which governmental operations are to be conducted;

(3) hire, direct, supervise, and assign employees;

(4) (i) ... lay off employees; and

(ii) terminate employment because of lack of funds, lack of work, under conditions where the employer determines continued work would be inefficient or nonproductive, or for other legitimate reasons;

* * *

(8) take actions, not otherwise specified in this section to carry out the mission of the employer.

Pursuant to § 3-306(a), the State and its officers, employee, agents, or representatives are prohibited from engaging in any "unfair labor practice." The statute grants authority to the Secretary of DBM to define this term.

COMAR 14.30.07.01D defines an "unfair labor practice" by an employer in part: "Discriminating in hiring, tenure, or any term or condition of employment to encourage or discourage membership in any employee organization[.]"

This language in COMAR is virtually identical to the National Labor Relations Act ("NLRA") § 8(a), now codified at 29 U.S.C.A. § 158(a) (2002). The NLRA is a federal law that applies only to private employers and their employees. Since the term, "unfair labor practice(s)," is defined almost identically under the NLRA and COMAR 14.30.07.01D, the case law in this jurisdiction and others interpreting the NLRA provision is strongly persuasive.

Both federal and Maryland labor law permit an employer to lay off employees for purely economic reasons. In *Goldtex, Inc. v. NLRB*, 14 F.3d 1008 (4th Cir. 1994), the employer laid off four employees following a union campaign. The National Labor Relations Board ("NLRB") found that the employer had discriminated against the employees based on their union activity and ordered reinstatement and other relief. However, the U.S. Circuit Court for the Fourth Circuit refused to enforce three of the four orders on the basis that there was no evidence that the

employer was even aware that these employees participated in union activities and that there was a legitimate economic purpose for laying off employees generally. *Id.* at 1012.

In *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246 (4th Cir. 1997), the U.S. Court of Appeals for the Fourth Circuit determined the sufficiency of an ULP concerning the layoff of employees following a union campaign. In quoting *Goldtex,* at 1011, the Court established the test for determining ULP disputes involving allegations of anti-union discriminatory discharges:

> The Board ("National Labor Relations Board" or NLRB") has established a formula for determining when an allegedly discriminatory discharge violates the [Act]. First, the General Counsel must make out a prima facie case that the employer's decision to lay off an employee was motivated by anti-union animus. The burden then shifts to the employer to prove affirmatively that the same action would have been taken even in the absence of the employee's union activity. To make out a prima facie case, the General Counsel must show (1) that the employee was engaged in protected activity, (2) that the employer was aware of the activity, and (3) that the activity was a substantial or motivating reason for the employer's action. Motive may be demonstrated by circumstantial as well as direct evidence and is a factual issue which the expertise of the Board is peculiarly suited to determine.

Alpo, at 250 (parenthetical matters added).

In essence, this analysis applies the *Wright Line* framework set forth in *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied,* 445 U.S. 989 (1982). The *Wright Line* case discussed the history of decisions deciding "mixed motive" controversies; i.e., where the employer is motivated both by anti-union animus and legitimate business purposes in taking an adverse employment action. The NLRB noted that the shifting burden paradigm described above "represents a recognition of the practical reality that the employer is the party with the best access to proof of its own motivation." *Id.*, 251 NLRB at 1087-88.

The *Wright Line* analysis requires: "In 'situations present[ing] a complex of motives' that the decisional body be able to accomplish the 'delicate task' of weighing the interests of employees in concerted activity against the interest of the employer in operating his business in a

particular manner and of balancing in the light of the Act and its policy the intended consequences upon employee rights against the business ends to be served by the employer's conduct." *Id.* at 1089 [citations omitted]. The NLRB set forth the following test for determining whether an ULP was committed based on employer motive:

> First, we shall require that the General Counsel make a prima facie showing sufficient to support the inference that protected conduct was a "motivating factor" in the employer's decision. Once this is established, the burden will shift to the employer to demonstrate that the same action would have taken place even in the absence of the protected conduct.

Id. at 1089. This is the test I will apply in this case, as the issue here concerns the motive of the Respondent in laying off Mr. Glover.

In order to meet its prima facie burden, the employee must establish: (1) that the employee engaged in protected activity; (2) that the employer was aware of the activity; (3) that the employee suffered an adverse employment action; and (4) that there was a nexus between the protected activity and the adverse action. *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777 (6th Cir. 2002).

As the Court in *Alpo* stated, the NLRB's determination of motive will be upheld if it is reasonable, but "mere speculation as to the employer's real motives registers no weight on the substantial evidence scale." *Alpo*, at 250. Some factors that have been regarded as evidence of anti-union animus include: (1) implied or express threats of termination tied to union activity; *id.*, at 253; (2) surveillance of employees engaged in union activities or the creation of the impression of such surveillance; *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 683 (4th Cir. 1980); (3) notorious union activity just prior to the termination; *Alpo*, at 253; *Purolator Armored, Inc. v. NLRB*, 764 F.2d 1423 (11th Cir. 1985); (4) the employer's departure from usual personnel policy and practice in terminating the employee; *NLRB v. Transportation Management Corp.*, 462 U.S.

393, 404 (1983); (5) adverse employment actions against other union activists; *Medtech Security, Inc.*, 329 NLRB 926, 929-30 (1999); and other similar factors. *See FiveCAP, supra,* at 778.

The employer's knowledge can also be imputed by using such factors as the employer's general knowledge of union activity, expressed hostility to the union activity, timing of the discharge, and the pretext given. *Darbar Indian Restaurant*, 288 NLRB 545 (1988); *Montgomery Ward & Co.*, 316 NLRB 1248, 1253 (1995), *enfd.* 97 F.3d 1448 (4th Cir. 1996).

With these principles in mind, I will analyze the evidence in this case.

The Petitioner's Prima Facie Case

1. Protected Activity

The evidence was undisputed that Mr. Glover engaged in concerted activity on behalf of AFSCME prior to the layoff. Beginning in the fall of 2001, AFSCME Local 1297 was active at BSU recruiting members and leaders for its organizing drive. Mr. Glover joined the union and advocated in favor of AFSCME to other employees. He distributed contract surveys [Pet. No. 7] to employees requesting information about the employees' needs; this form listed Mr. Glover, among others, as a contact person for AFSCME. In December 2001, a bargaining agent certification election was held. Mr. Glover campaigned on behalf of AFSCME prior to this election, and he attended the election as an observer. I credit testimony from Mr. Glover, Mr. Myers and Ms. Butler that Mr. Glover regularly wore AFSCME buttons and/or hats in the workplace, and he often wore a brightly colored shirt depicting a fist and reference to AFSCME on its front. He also kept union literature on his desk.

After AFSCME won the certification election, Mr. Glover remained active in union activities. Mr. Kahraman became the lead organizer at BSU in February 2002, and he identified Mr. Glover as a leader among the employees. Mr. Kahraman testified credibly that he met

frequently with Mr. Glover and other union activists in the BSU library during lunchtime. He also visited Mr. Glover's office to pass messages.

In April 2002, Local 1297 held an election to elect new officers, as some of the former officers had been disqualified because they were ineligible for union membership because of their job classifications. Mr. Glover ran for President and was elected to this position.

On June 3, 2002, the local conducted an election for its Contract Action (collective bargaining) team. Mr. Glover was again elected to the team. An announcement of this election [Pet. No. 12] was distributed at BSU.

On June 7, 2002, President Lowe issued his reorganization plan [Pet. No. 9; Resp. No. 1]. The plan called for Mr. Glover's position of Photographer to be eliminated in phase one. On June 11, 2002, Mr. Glover's supervisor, Ms. Banks, gave him notice of the layoff [Pet. No. 3; Resp. No. 7]. Clearly, Mr. Glover participated in concerted union activity immediately prior to the layoff action.

2. Employer Knowledge

The Respondent argued that the Petitioner failed to prove this element. Indeed, all of the management witnesses testified that they did not know of Mr. Glover's union activity until after the layoff was implemented, except for Ms. Banks. She stated she learned this in late April 2002, but she had already made her decision to advocate for the elimination of Mr. Glover's position by then.

The Respondent maintained that the Petitioner presented no evidence that anyone in AFSCME ever notified management personnel that Mr. Glover was active in the union. This argument is incorrect. First, Mr. Myers testified credibly that he told his supervisor about the results of the union officer election immediately after the election was held. Second, Mr.

Kahraman testified credibly that Mr. Barilla, the lead negotiator for AFSCME, notified the Human Resources Department of the Contract Action team elections, so the members could be excused to participate in bargaining.[14] Mr. Bigelow testified that it was normal policy for AFSCME to notify management of election results for the same reasons cited by Mr. Kahraman.

Even assuming that no one expressly told management personnel at BSU about Mr. Glover's union activity, there was ample circumstantial evidence to show that they knew about such activity. First, Mr. Glover was open and overt about his union activity, he wore clothing items that identified him as a union supporter, and he kept union literature at his desk. Second, Mr. Glover's name appeared on the Contract Survey form and the Contract Action Team announcement distributed by AFSCME at BSU. Third, both Dr. Marable and Ms. Hobson observed Mr. Glover at the December 2001 election, and he was wearing an AFSCME button at the election. Fourth, there was credible evidence that management personnel conducted surveillance of union activities, in that supervisors questioned employees about their participation in meetings in the BSU library and that unknown persons were standing near the locations of those meetings. Fifth, in July 2002, when all of BSU management staff unquestionably knew that Mr. Glover had been elected union local President, there was credible evidence that management authorized campus police to videotape union protesters and that Provost Miller wrote notes on a pad of paper as he stared at the protesters; this behavior was consistent with the reports that surveillance had been conducted of the union meetings on campus earlier. This behavior is significant both because it shows management was actively gathering information on union activists, but also because it shows management intended the

[14] Ms. Hobson testified that no such notification occurred, but it is possible that the notification was delivered to one of her staff. I have found that this notification occurred, but even if it did not, the following discussion shows that management staff had knowledge of Mr. Glover's role in the union.

employees to see the surveillance and be chilled by it. Sixth, there was testimony that word-of-mouth spread quickly throughout the BSU campus when the election results were announced. Seventh, Mr. Glover's second-level supervisors congratulated him for his election as union local President on election day in April 2002.

In short, there was so much evidence that Mr. Glover was engaged in regular, open and notorious union activity from the fall of 2001 through June of 2002, that the denials of knowledge of such activity by the management witnesses defied credibility. The witnesses' assertions that they were completely indifferent to the union activity or too busy to notice it were inconsistent with the circumstantial evidence that management personnel monitored and even attempted to chill such activity. In the case of Ms. Banks, she had to pass by Mr. Glover's desk to get to her office. I was not convinced that she never noticed Mr. Glover had union literature on his desk or that he wore buttons, hats or t-shirts with AFSCME's name on them.

Therefore, I do not credit the testimony of President Lowe, Dr. Marable, Ms. Hobson, Ms. Hughey and Ms. Banks that they were completely unaware of Mr. Glover's union activity. I find that the BSU management staff was aware of such activity.

3. Adverse Action

The parties agreed that Mr. Glover was laid off on June 11, 2002.

4. Nexus

The Petitioner established in its prima facie case that there was a nexus between Mr. Glover's protected activity and his layoff. First, the layoff occurred only eight days after he was elected to the Contract Action team and two months after he was elected local President. Second, the Respondent took adverse personnel action against Mr. Myers, the local Vice President, in June 2002 and has not processed that action past the first step. Third, the

Respondent reprimanded Theresa Butler, the local Secretary, in June 2002 and terminated her in October 2002 for giving false statements to a police officer. Fourth, in early 2001, the Respondent terminated Vanessa Rawlings, who had been active in the union. While these actions are peripheral to this case, there appears to be a pattern of disciplinary actions against union officers.

Fifth, as I will discuss in more detail later, BSU officials departed from normal protocol for layoffs when they implemented this layoff, and there is little definitive evidence as to how much money was conserved through the layoff. The lack of definitive evidence dilutes the credibility of the Respondent's argument that Mr. Glover was laid off for financial reasons. Mr. Glover's position was preserved in the FY 2003 budget; Ms. Hughey could not state whether these funds actually went to fund vacancies/turnovers or whether the funds were used to create the Deputy Provost position or to pay for cost-of-living increases. In addition to the fact that President Lowe did not consult with Human Resources before issuing his reorganization plan, he did not follow DBM Secretary Foster's recommendation that all agencies attempt to eliminate vacant positions first. BSU was not obligated to follow this recommendation, but it could have. One inference is that BSU eliminated non-essential positions to channel funds into education; however, another inference that could be drawn is that Mr. Glover was targeted for removal. That inference is supported by the fact that he was ordered to remove his belongings immediately. I conclude that both motives were present.

For all these reasons, the Petitioner has met its prima facie burden in this case.

The Respondent's Financial Hardship

For the reasons that follow, I conclude that the Respondent had a legitimate business purpose for reorganizing the staff at BSU. However, it has not clearly shown how much money

it saved by laying off Mr. Glover, nor has it proven that it would have laid Mr. Glover off regardless of whether he participated in union activity.

The Petitioner argued that BSU did not face a financial crisis during FY 2002, but this argument is not correct. President Lowe, Ms. Hughey and Ms. Banks all testified that they were notified through USM contacts that budget cuts were coming. President Lowe stated that a funding freeze was implemented in March 2002.

In assessing the testimony of President Lowe and Ms. Banks, I should note that their respective interests did not completely coincide during this period. Ms. Banks was primarily concerned with maintaining the budget within her department. If she could save photographic expenses by billing other departments, this was fine by her. President Lowe had to look at the big picture, and his concern was to make sure that the funds that were available to the institution as a whole were used appropriately.

Although I did not believe President Lowe when he testified that he was unaware of Mr. Glover's union activity, I found his testimony about the budgetary problems to be convincing. Further, he cogently stated that the mission of BSU was to provide a good education for the students, and this was clearly an appropriate mission.

President Lowe and Ms. Hughey, the chief financial officer, testified that the Photographer position was a luxury that BSU could not afford. If they had eliminated the position and accounted for the savings with corresponding increases within the educational programs, the Respondent probably could have convinced me that it would have taken this action even if Mr. Glover had not been engaged in union activities. However, there is no convincing evidence that either: (a) the elimination of the Photographer position resulted in net savings to

the institution; or (b) the funds that were conserved were channeled into an appropriate use consistent with BSU's mission.

The first problem for the Respondent's position is that the reported savings amount for FY 2003 of $32,211.96 from this action is not the actual amount that BSU saved. The reported amount represents Mr. Glover's annual salary plus benefits minus his severance package, and this was the amount cut from the University Relations Department. However, both President Lowe and Dr. Marable testified that photographic services were still needed at BSU; the various departments became responsible for contracting the services. Some of the work Mr. Glover had done was performed by Ms. Banks and her student interns with a digital camera. Professional photographers were needed, however, for sports photographs, commencement[15], and other special uses. Mr. Glover testified credibly that he provided freelance services to three departments during the fall of 2002. To the extent that one could calculate photographic expenses campus-wide, there was probably some saving. It is possible there was no saving, since the record does not show the rate or amount paid for freelance services.

The second problem is that the Respondent did not account for what happened to the funds that may have been saved. Ms. Hughey testified that she did not know as of the hearing date exactly what happened to the savings. Generally, she said that Mr. Glover's PIN was "eliminated" but not "returned." When a PIN is eliminated, the institution tells the SPMS system that it will not use the funds for that purpose. However, a PIN must be associated with funds; it cannot have a zero dollar associated with it. Ms. Hughey stated that Mr. Glover's PIN remained in the budget for FY 2003 and FY 2004, but the position no longer existed. Those funds were used for other purposes.

[15] Even during Mr. Glover's tenure, additional photographers were hired for commencement due to the size of the event.

In FY 2003, the position of Deputy Provost was created. BSU staff generally received a 2-1/2% cost-of-living increase, while management staff received a 1-1/2% increase. A total of 35 positions were contracted, and ten PINs were returned. However, several employees received substantial pay increases, either because they were reclassified or because they were trained in a new software program. Some of the funding increases came from federal grants. Thus, the evidence presented does not allow me to trace the funds from the eliminated PIN to its actual use.

The third problem for the Respondent is that President Lowe (and later Ms. Banks) departed substantially from BSU's protocol for layoffs. President Lowe testified credibly that he never saw the memorandum on layoffs written by Ms. Hobson and Ms. Rhett [Resp. No. 4] that they had prepared for Ms. Banks. Ms. Hobson recommended among other things, that Ms. Banks prepare her staff for the possibility of a layoff by meeting with staff and advising them as to the impact the new structure will have on their jobs, and that Ms. Banks allow Human Resources to review the layoff letter. According to the memorandum, the layoff letter should contain the reason for the layoff. These suggestions were not mandated by law.

When he was asked why he did not consult with Human Resources on his reorganization plan, President Lowe stated that he wanted to be as low-key as possible until the plan was formalized. He was particularly concerned that information would leak out. He was then asked if he did not trust the Human Resources Department to maintain confidentiality, and he denied that he harbored such mistrust. President Lowe said he wanted to have the ability to think out loud without his expressions being construed as policy statements. This process struck me as unusual, since Ms. Hobson was experienced in personnel matters and could have given guidance on how to handle the matter smoothly and lawfully.

President Lowe also did not follow Secretary Foster's suggestion to reduce the budget using vacant positions. Again, as the Respondent argued, there was nothing illegal about this action. According to Ms. Hughey, one vacant position was eliminated. She did not testify whether this was the only vacant position available for budget cuts.

President Lowe issued his plan on June 7, 2002. He published it to Ms. Banks after it was formulated, but not to Ms. Hobson. At that point, there was no reason to exclude Human Resources from the process.

On June 11, 2002, Ms. Banks met with Mr. Glover to advise him of the layoff. She provided him with the notice of layoff [Pet. No.3; Resp. No. 7]. The notice stated that his position would "be discontinued effective June 30, 2002." It further stated that it "serves to initiate your 90-day layoff notification." Mr. Glover was ordered to remove his belongings that day, and he was asked not to return to work after that day.

Under the USM Policy on Layoff for Classified Personnel, § III.C, laid-off employees are entitled to written notice at least 90 calendar days before the effective date of the layoff. Here, Mr. Glover was ordered to vacate the campus the same day as the notice, and his position was discontinued in 19 days, but he was paid through October 2002. There was nothing unlawful about the handling of the layoff, but Ms. Banks' (or President Lowe's) decision to order him to vacate immediately suggests that she (or President Lowe) wanted his influence removed from the campus. No alternate rationale was offered for this decision.[16]

In short, BSU had a legitimate motive in reorganizing the President's Office. However, as that motive was allegedly implemented with regard to Mr. Glover, I conclude that the motive was largely pre-textual, since it is very unclear if any cost savings were realized from the

elimination of Mr. Glover's job or how the funds saved were used. Further, even if BSU did not need a full-time Photographer, the elimination of this position did not give any clear benefit to its overall budget. I cannot conclude from this record that BSU would have eliminated the position even if Mr. Glover had not participated in protected union activity. BSU's rationale for not having a Photographer made sense when one considers BSU's mission, but the rationale was not consistent with BSU's actual practice. Based on the record as a whole, I conclude that it is more likely that BSU management wished to remove Mr. Glover because of his role in union leadership.

Remedy

The Petitioner did not ask for a specific remedy in its ULP claim or at the hearing. The parties presented no argument as to the appropriate remedy. Perhaps they believed that the HELRB would exclusively determine this issue. As part of my recommended decision, I will address the matter briefly.

If the HELRB concludes that the Respondent committed an unfair labor practice, it may consider appropriate sanctions. COMAR 14.30.07.04G provides:

> G. If the Board finds an unfair labor practice has been or is being committed, the Board shall take the action that it deems necessary to remedy the unfair labor practice including:
>
> (1) Issuing a cease-and-desist order;
> (2) Requiring a party to make reports from time to time showing the extent of compliance with the Board's order or ruling;
> (3) Back pay;
> (4) Reinstatement;
> (5) Communicating directly with employees about their rights; and
> (6) Such further action as the Board may require.

[16] The fact that these actions were lawful is pertinent but not determinative. This is not a grievance matter. In an ULP proceeding, when management departs from normal practice, even if it acts lawfully, the departure can be considered in determining management's true motive.

In this case, it appears that a cease-and-desist order, back pay and reinstatement would be appropriate relief in this case. I recommend that, in the event the HELRB finds that the Respondent committed an unfair labor practice, it order these remedies. Mr. Glover should be reinstated to his position or to a comparable position within the institution (this issue is complicated by the fact that Mr. Glover's position has been eliminated), and awarded back pay retroactive to October 31, 2002, when his pay ended, minus any wages or freelance fees he earned since that time. The Respondent should be ordered to cease and desist from conducting surveillance of union activities, which the NLRB has viewed as a particularly egregious violation of the NLRA; *see J.P. Stevens, supra.*; and from taking further adverse employment actions based on protected activity conducted by its employees.

PROPOSED CONCLUSIONS OF LAW

Based upon the Proposed Findings of Fact and Discussion above, I recommend that the HELRB conclude, as a matter of law, that:

(1) The Petitioner has proven by a preponderance of the evidence that Mr. Glover engaged in protected union activity, that the Respondent was aware of such activity, that the Respondent laid off Mr. Glover on June 11, 2002, and that the layoff was caused in part because of Mr. Glover's protected union activities; Md. Code Ann., State Pers. & Pen. § 3-306 (Supp. 2002); COMAR 14.30.07.01D; *Alpo Petfoods, Inc. v. NLRB*, 126 F.3d 246 (4th Cir. 1997); *Wright Line*, 251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), *cert. denied* 445 U.S. 989 (1982);

(2) The Respondent has proven that its layoff of Mr. Glover was motivated in part by a legitimate business purpose to conserve funds due to fiscal constraints; however, it has failed to prove by a preponderance of the evidence that it would have laid off Mr. Glover notwithstanding

his protected union activity, because the Respondent has not shown that it actually realized any significant savings from the layoff or that the funds were used consistently with the BSU mission, the Respondent departed from its usual personnel practices in effectuating the layoff, the Respondent conducted surveillance of union activity and took adverse employment actions against other union officers; and other related factors; *J.P. Stevens & Co. v. NLRB*, 638 F.2d 676, 683 (4th Cir. 1980); *Goldtex, Inc. v. NLRB*, 14 F.3d 1008 (4th Cir. 1994); *FiveCAP, Inc. v. NLRB*, 294 F.3d 768, 777 (6th Cir. 2002) ; *NLRB v. Transportation Management Corp.*, 462 U.S. 393, 404 (1983); *Medtech Security, Inc.*, 329 NLRB 926, 929-30 (1999);

(3) The Respondent laid off Mr. Glover primarily because of his protected union activity and thereby committed an unfair labor practice; and

(4) The appropriate remedies for the Respondent's unfair labor practice include: reinstatement of Mr. Glover to the same or a similar position; back pay retroactive to October 31, 2002, less any wages and freelance fees earned by Mr. Glover since then; and an order to the Respondent to cease and desist from conducting surveillance of union activities and from taking adverse employment actions against employees for protected union activities.

July 25, 2003
Date

Paul B. Handy
Administrative Law Judge

PBH/
54299

REVIEW RIGHTS

Any party aggrieved by the proposed decision may file written exceptions thereto and request an opportunity to present oral argument. Such exceptions and any request for argument must be made within twenty (20) days from the date of receipt of the proposed decision. A response to the exceptions may be filed within fifteen (15) days from the filing of the exceptions. The written exceptions must contain the legal and factual basis for the exceptions or response, and be accompanied by copies of any portions of the record referred to in the exceptions. COMAR 14.30.11.23. The written exceptions and request for argument, if any, should be directed to Karl K. Pence, Executive Director, Maryland State Higher Education Labor Relations Board, 839 Bestgate Road, Suite 400, Annapolis, MD 21401. The Office of Administrative Hearings is not a party to any exceptions or appeal process.

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