STATE OF MARYLAND
MARYLAND HIGHER EDUCATION LABOR RELATIONS BOARD

IN THE MATTER OF: *

AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, MARYLAND (Local 1885), * * *

Complainant/Petitioner, *

v. * SHELRB Case No. ULP 2012-01

MORGAN STATE UNIVERSITY, * *

Respondent.

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DECISION OF THE BOARD DENYING
COMPLAINANT/PETITIONER'S REQUEST TO FIND PROBABLE
CAUSE THAT RESPONDENT COMMITTED AN UNFAIR LABOR PRACTICE

I. BACKGROUND AND POSITION OF THE PARTIES

This matter is before the State Higher Education Labor Relations Board (hereafter "SHELRB" or "Board") as a result of an unfair labor practice complaint (hereafter "ULP") filed by Complainant/Petitioner American Federation of State, County, and Municipal Employees (AFSCME Local 1885) (hereinafter "AFSCME" or the "Union") against Respondent, Morgan State University (hereinafter "MSU") on August 15, 2012.

It is the position of AFSCME that MSU committed an unfair labor practice in violation of State Personnel and Pensions Article, Title 3, Collective Bargaining, Sec. 3-101(c), which, among other things requires bargaining over "wages, hours, and other terms and conditions of employment." Sec. 3-501(b) obligates the state and the

collective bargaining representative for its employees to "meet at reasonable times and engage in collective bargaining in good faith…" Section 3-502, states, that "collective bargaining shall include all matters relating to wages, hours, and other terms and conditions of employment." Finally, Section 3-306(8) makes it an unfair labor practice to "refuse[ing] to bargain in good faith."

On September 6, 2011, MSU filed a Motion to Dismiss the ULP Complaint, together with a "Memorandum in Support" thereof. On September 30, 2011, the Union filed an Answer in Opposition to Motion to Dismiss, requesting that MSU's Motion be dismissed and that the SHELRB investigate the matter.

On January 17, 2012, Counsel for the parties appeared before the Board and presented oral argument in support of their respective positions, subject to questions from Board members.

Upon review and consideration of the ULP Complaint, together with the filings, cited authority and oral argument of the parties, it was the decision of the Board that the ULP Complaint states a claim under the SHELRB statute sufficient to warrant DENIAL of MSU's Motion to Dismiss. MSU was ordered to file an Answer to the ULP complaint and the matter to proceed in accordance with the applicable regulations.

On March 2, 2012, MSU filed its Answer to the ULP Complaint, denying and admitting certain allegations, and raising the following affirmative defenses:

1. The use of University office space for Union purposes is not the subject of mandatory bargaining.
2. The union's ULP was untimely filed.

Upon receipt of Respondent's Answer, and pursuant to the Decision and Order of the Board issued on January 26, 2012, the Executive Director, pursuant to SHELRB Regulations COMAR 14.30.07.04F *et seq.* (Investigations) is authorized by the Board to investigate and determine whether probable cause exists to believe that the alleged ULP has occurred, and to present such findings and recommendations to the Board for final decision.

After having reviewed the pleadings, exhibits, documents, and relevant case law presented by both parties, conducting her own investigation, which included reviewing numerous affidavits and documentation submitted by the Union, as well as affidavits and documentation from MSU, the Executive Director, on June 8, 2012, recommended that there was no probable cause for the ULP and that it be dismissed.

On June 25, 2012, MSU filed a <u>Request for Reconsideration</u>, requesting that the Board reject the Executive Director's "No Probable Cause" finding.

The thrust of the Union's request is as follows:

(1) The Executive Director ignored instructive precedent.

(2) The Union was denied the opportunity to put on evidence in answer to claims made by MSU.

(3) MSU's administration was aware and accepting of the Union's use of room G-69 since 2001, and this open and apparent use ripened into a condition of employment.

(4) MSU's ejection of the Union from room G-69 was an illegal unilateral change in a term and condition of employment and MSU's failure to give notice and

an opportunity to bargain concerning the ejection was an unfair labor practice.

On November 9, 2012, the Board issued its Decision and Order Granting AFSCME's Request for Reconsideration and Setting a Date for Hearing before the State Higher Education Labor Relations Board. In its Decision, the Board stated:

> "….the SHELRB members, in rejecting the IRRD's recommendation, have determined that a genuine dispute of fact does exist warranting the holding of both an evidentiary hearing and an oral argument. The Board finds that there are factual disputes as to the following issues: (1) Did MSU have knowledge of the union's use of the room and if so, did the union's use of the room ripen into a condition of employment? (2) Did MSU provide the union with an opportunity to bargain over the issue?"

As per the above noted Decision, on December 3, 2012, the parties appeared before the Board and presented their witnesses and oral arguments in favor of their respective positions.

Finally, pursuant to the Board's order, the parties, on December 13, 2012, filed, simultaneously, briefs in support of their positions.

II. ANALYSIS

A. Did MSU Have Knowledge of the Union's Use of Key Hall G-69 as a Union Office?

Our finding regarding this opening issue is "Yes."

The evidence presented by the Union is overwhelming to the effect that for a period of approximately ten years, the Union has openly and notoriously used what is known as Key Hall G-69 ("G-69") as an office. Testimony at the hearing, through several witnesses, indicated that G-69, while being an assigned reporting place for employees in MSU's physical plant to clock in, store tools, and use available lockers, it

was also used as a place from which Union members conducted Union business. According to Union shop steward, Geron Mackall, the Union, from the time of its recognition in 2001, until the time of its removal from G-69 in July, 2011, the Union not only conducted its organizing activities from G-69, but it made and stored pro-union signs and literature in the room, met with other pro-union employees in the room, and met with professional union organizers in the room. Additional record evidence reveals that when the student newspaper ran a story on collective bargaining rights and campus organizing activity, it met with employees in G-69 and as a result of this meeting, the newspaper published a photograph of the then Union president in G-69 (Union Ex. 1-A.). He and two other Union supporters sat in G-69 in AFSCME shirts, surrounded by pro-Union signs as confirmed by examination of Union Ex. 1-A.

Additional testimony supports the Union's position that G-69 was its home on MSU's campus. Geron Mackall testified that he and other Union leaders printed business cards listing G-69 as their office on campus (Union Ex. 1-B), and circulated the cards to employees and to others who had business with the Union.

The record is replete with additional testimony and numerous affidavits providing ample support for the Union's position that it openly and notoriously used G-69 as a Union office for approximately ten years and that not only MSU employees but MSU faculty, including a former MSU president, would come to G-69 when they wanted to discuss Union business and MSU issues.

As to the issue of whether or not MSU had knowledge of the Union's use of G-69, "It is settled…that proof of knowledge may be inferred from all the circumstances,"

Stewart-Warner Corp., 253 NLRB 136, 153 (1980). And in Flat Rate Movers, Ltd. & Local 116, RWDSU, UFCW, 357 NLRB No. 112 at 9 (Nov. 16, 2011), the NLRB held that it would impute knowledge of union activities to the employer when such "union activity was open and notorious."

MSU's witnesses' testimony that they had no knowledge that the Union was using G-69 as an office until bargaining started in August, 2010, is incredible. We do not credit Human Resources Director Armada Grant's denials that she had no knowledge of the use of G-69 even though she had been involved in union/management contract negotiations since 2001. Similarly, we find it difficult to accept the testimony of the Director of Physical Plant, Ken Ellis, to the effect that he had no knowledge of the existence of G-69 as a union office, when the evidence presented revealed that many of his subordinates reported to G-69 to clock in and out for years, and that G-69 housed important mechanical systems such as the fire alarm unit which Ellis, in his capacity as physical plant director would be called on to inspect.

In our opinion, Union witnesses Geron Mackall, Michael Stewart, and Ben Forstenzer testified credibly that the G-69 office was well known as the "Union office." The 14 affidavits submitted into the record, over MSU's objection, from employees who under oath, all stated that G-69 was, in effect, the Union's "office" on campus, and gave reasons for such conclusion, supported the testimony of witnesses Mackall, Stewart and Forstenzer.

We find that the Union has proven by a clear preponderance of the evidence that it had used G-69 as an office, open and notorious, for a period of at least 10 years. We find

that MSU had knowledge of such use, in spite of their witnesses' denials. In this regard, we note with approval the NLRB cases cited above, by the Union, holding that the National Labor Relations Board will impute knowledge of union activities to an employer where such "union activity was open and notorious."[1]

B. Having Found, for the Reasons Stated Above, that MSU had Knowledge of the Union's Use of Key Hall G-69 as a Union Office, Did Such Usage Ripen into a Term and Condition of Employment Requiring Bargaining before Any Change in the Room's Status Could Be Lawfully Made?

Our finding regarding this issue is "Yes."

The Maryland Collective Bargaining Statute sets out the rights of certain employees of the State of Maryland to enter into collective bargaining with the State concerning wages, hours and other terms and conditions of employment. Section 3-501, State Personnel and Pensions Article, Subtitle 5 provides at (b) – "The parties shall meet at reasonable times and engage in collective bargaining in good faith, to conclude a written memorandum of understanding or other written understanding…" Section 3-502 "(a) provides: Permissible matters"… all matters relating to wages, hours, and other terms and conditions of employment."

That a past practice, not a part of a collective bargaining agreement, can ripen into a term or condition of employment prohibiting unilateral action and requiring negotiations, is an accepted principal of labor law.[2]

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[1] We recognize that, as an independent agency of the State of Maryland, we are not bound by the precedent of the National Labor Relations Board ("NLRB"). However, the NLRB is the federal agency responsible for interpreting the National Labor Relations Act (NLRA), the premier federal labor statute governing collective bargaining in the private sector. See 29 U.S.C. § 151 et seq. Moreover, this state's collective bargaining law was modeled on the NLRA. Accordingly, that law is an instructive analytical framework in this case.

[2] See NLRB v. BASF Wyandotte Corp., 798 F.2d 849 (1986), where the Court stated: "Where a collective bargaining agreement embodies a particular working condition and past practice demonstrates that an employer had

C. Did MSU Bargain with the Union Over the Status of G-69?

Having found, for the reasons stated above, that the Union's use of G-69 became a term and condition of employment which requires negotiations before unilateral action can be taken, did MSU bargain over the status of G-69 prior to evicting the Union.

Our finding regarding to this issue is "Yes."

We are convinced by a preponderance of the record evidence presented at the hearing, that the parties did engage in collective bargaining negotiations regarding the issue of union office space, i.e., the future status of G-69.

The Union first proposed that "[t]he University shall provide a designated Union office space with a secure locking door." MSU responded by indicating that the provision was not accepted. *See* MSU Exhibit A, MSU to AFSCME – 9/09/10, Article 6 (see crossed-out language). The Union then submitted a proposal requesting room G-69 be used for office space – "The University shall provide *G69* as a Union office space." MSU responded: "The University reserves the right to respond to this issue at a later date." *See* Exhibit B, MSU to AFSCME – 9/15/10, Article 6.

On 10/15/10, MSU further responded to the Union's request to use room G-69 for

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administered that working condition in a particular manner, the employer is forbidden from changing that condition unilaterally.

In conclusion, the Court stated:

"We reject the company's argument that the perquisites the company has denied the local chairman, Gremillion, are shown to be illegal under § 302 or § 8(a)(2). <u>We hold that the Board was justified in finding that the company had violated</u> § 8(a)(5) by making unilateral changes in the perquisites provided union representatives. We stress that the issue before the Board was whether the company had the obligation to bargain with the union about removal of the perquisites it had in the past furnished to the local union chairman._ (emphasis added). See also <u>American Ship Building Co.</u>, 226 NLRB 788 (1976), holding that an employer's granting of paid time to stewards to attend to grievances and the employer's providing of an office to the union for use by employees were both <u>mandatory</u> subjects of collective bargaining (emphasis added).

union office space as follows: "The University is not in a position to offer space and G69 is not conducive for an office." *See* MSU Exhibit C, page 2, MSU to AFSCME – 10/15/10, Article 6. Section 1 (New Paragraph 2). The Union's next proposal to MSU deleted any reference to Room G-69 and provided the following language: "If a space is identified on campus where the Union can keep a filing cabinet and have desk space then the Union shall indicate that a space has been found and there shall be a meeting between the Union and MSU to discuss whether that space would be appropriate for use as Union office space. Such meeting shall be held within 2 weeks of the Union indicating that they have found space. Office space shall be determined to be appropriate if the Union's use of the space will not interfere with the regular functioning of the University." MSU responded to this proposal on 10/20/10 – 1 P.M.) with a package proposal to settle all outstanding issues between the parties, including alternative language for Article 6, Section 2: "If appropriate shared space is identified on campus where the Union can keep a filing cabinet and have desk space, the Union shall submit a written request to Management requesting the use of the space. Within thirty 30 days from receipt of the written request, Management will make a determination if the space is acceptable for Union use." *See* MSU Exhibit D (dated 10/20/10), Article 6, Section 2, page 2.

Both the Union representative, Ben Forstenzer, and MSU's representative Randy Schultz signed the package proposal in settlement of all outstanding issues between the parties, which included the Article 6, Section 2 language above. *See* MSU Exhibit D at page 8 (signature page) dated 10/20/10. After the preliminary agreement of the parties, MSU withdrew the above language. *See* Draft Memorandum of Understanding dated

August 2, 2011, showing that Article 6, Section 1, paragraph 2 was deleted. *See* MSU Exhibit E, Draft MOU, Article 6, Section 1, at pages 7 – 8.

The parties eventually signed the final MOU which did not include any reference to union office space. The date of execution was 3/30/2012, with an effective date of 11/1/11 to 6/30/13. See MSU Exh. F.

Record evidence reveals that the Union submitted the final draft agreement, without any provision as to union office space, nor any reference to G-69, to its membership for ratification. The membership ratified the MOU and the Union signed the ratified agreement. A few months thereafter, MSU evicted the Union from G-69.

By way of summary, we conclude that MSU satisfied its bargaining obligation and, specifically, did not commit an unfair labor practice in evicting the Union from G-69. While the union initially proposed in negotiations that MSU provide it with lockable space, the issue in negotiations clearly expanded to the union's use of G-69 and the union being provided with any space for union business (other than just meeting space, which is covered by another provision) by MSU. Clearly, the negotiators discussed the inappropriateness of G-69 for use by the union, and whether there was any space on the campus that was available for use by the union and that MSU would allow the union to use. The union raised the issue in negotiations which led to expanded discussions that satisfy MSU's obligation to bargain a status in which G-69 is no longer permissible union space. The undisputed evidence at the hearing clearly established that the use of G-69 was addressed in the negotiations, and MSU made it clear that G-69 was inappropriate for use as a union office. The Union didn't protest MSU's position on this, but shifted

the discussion to let's find a place that is appropriate. When MSU subsequently notified the Union that it was unwilling to provide the Union with any space, the Union chose not to pursue the issue in negotiations. It could have. The Union objects to MSU's withdrawal of its prior proposal that the Union would look for a place and, were a suitable place found, the Union would present it to management. The Union asserts that MSU unilaterally excluded that provision from the draft MOU and alleges that MSU's negotiator told the Union negotiator that, relying on advice of counsel, MSU did not have to provide space to the Union. However, at this point the record indicates that the Union did not push the issue further. In fact, the Union did present the draft MOU, absent the provision, to its membership for ratification. The members ratified the MOU and the Union executed the agreement.

Therefore, we conclude that the Union, by its actions in not insisting on further negotiations, and in submitting the draft agreement for ratification, and then signing the MOU, waived its right to bargain further over the issue. The execution of the new MOU, without the office language, resolved the issue. Simply stated, the Union accepted MSU's final position that it would not provide the Union with office space.

We reject the Union's position that MSU's withdrawal of a tentatively agreed on proposal at the "last minute" is indicates bad faith bargaining. In Olin Corporation, 248 NLRB 1137, 1141 (1980) the employer, near the conclusion of negotiations, notified the Union that it was withdrawing a previously agreed to union-security provision. The employer indicated to the Union its willingness to continue bargaining. According to the NLRB:

> "Successful collective bargaining requires flexibility. Accordingly, we find that the employer did not violate Section 8(a)(5) of the Act by refusing to bargain concerning its withdrawal of the union-security clause, and shall dismiss the [ulp] complaint."

In Merrell M. Williams, 279 NLRB 82, 83 (1986) the Board held:

> "…the Respondents withdrawal of these provisions [having been previously agreed to] does not constitute bad faith in the circumstances of this case."
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> * * * *
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> "…the withdrawal of tentative agreements reached prior to the formation of a legally enforceable contract represents only one factor to be considered in determining good or bad-faith bargaining….it is well established that we look to the totality of circumstances reflecting the party's bargaining frame of mind." (Emphasis added).

In accordance with the holdings in the above two cases, we find that MSU's change of position, in the "totality of circumstances" of this case, did not constitute an attempt "to frustrate the bargaining process or avoid reaching a contract" (Merrill M. Williams, infra., p. 83).

CONCLUSION

For the reasons stated above, we affirm the recommendation of the Executive Director, issued on June 8, 2012, that probable cause in this matter does NOT exist. As a result it is ordered:

ORDER

The complaint is hereby DISMISSED.

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD

Karl K. Pence, Chairman

Glen Burnie, MD
March 1, 2013

APPEAL RIGHTS

Any party aggrieved by this action of the SHELRB may seek judicial review in accordance with Title 10, Subtitle 2 of the State Government Article, Annotated Code of Maryland, Sec. 10-222 (Administrative Procedure Act—Contested Cases), and Maryland Rules CIR CT Rule 7-201 *et seq.* (Judicial Review of Administrative Agency Decisions).