

State of Maryland
State Higher Education Labor Relations Board

In the matter of:)	
)	
)	
American Federation of State,)	
County and Municipal Employees,)	
)	
Complainant/Petitioner,)	
)	
v.)	SHELRB ULP Case Nos. 2001-02
)	and 2002-03
)	
Salisbury University,)	Opinion No. 8
)	
Respondent/Employer,)	
)	
and)	
)	
Maryland Classified Employees)	
Association,)	
)	
Intervenor.)	

DECISION AND ORDER

On April 4 and May 10, 2002, the Board delegated to the Office of Administrative Hearings (OAH) four related cases filed by the American Federation of State, County and Municipal Employees (AFSCME) against Salisbury University, i.e., SHELRB ULP Case No. 2001-03 (Donald Pryor I), SHELRB ULP Case No. 2001-02 (Shared Governance), ULP Case No. 2002-01 (Unlawful Assistance), and Case No. 2002-04 (Objections to Election). The Board determined that a sufficient record had been established by the parties in a fifth case between these parties, ULP 2002-03 (Progressive

Discipline).^{1/} Because of the related issues in the cases, the Board deferred its decision in ULP 2002-03 pending disposition of the ULP cases delegated to OAH.

On May 31, 2002, OAH Administrative Law Judge Douglas Koteen issued a Proposed Decision, granting SU's Motion to Dismiss ULP 2001-03 (Pryor I). On June 3, 2002, the Board issued an Order granting, in part, AFSCME's Motion to revoke our delegation to OAH as to ULP 2001-02 (Shared Governance) and ULP 2002-01 (Unlawful Assistance to MCEA).^{2/} Pursuant to the Order, AFSCME filed Exceptions to Judge Koteen's Proposed Decision in ULP 2001-03 (Pryor I) and SU filed a Motion to Dismiss ULP 2001-02 (Shared Governance) and ULP 2002-01 (Unlawful Assistance to MCEA). SU also moved that ULP 2002-03 (Progressive Discipline) be dismissed.

We have reviewed the record, AFSCME's Exceptions, and SU's Motion to Dismiss. Because Judge Koteen's Proposed Decision in ULP 2001-03 raises fundamental and significant issues concerning the Board's authority under Title 3 of the State Personnel and Pensions Article, Annotated Code of Maryland (Collective Bargaining Statute) to enforce unfair labor practices, we have addressed AFSCME's Exceptions in that case in a separate companion Opinion (Opinion No. 7). Similarly, we find the fundamental issues raised by Judge Koteen's Proposed Decision are controlling in our disposition of ULP 2002-01 (Unlawful Assistance to MCEA) and have therefore addressed its disposition in Opinion No. 7 as well.

Regarding the claims made in ULP 2001-02 (Shared Governance) and ULP 2002-03 (Progressive Discipline), we rule that their disposition does not turn on disputed issues of material fact but rather on threshold issues of law. In view of the basis of our disposition of these cases, we have no occasion to reach the parties'

^{1/} The background and history of these cases are set forth in the Board's Decision and Order (Opinion Nos. 1, 2 and 3).

^{2/} The Board found that Judge Koteen's granting of SU's Motion to Dismiss in ULP 2001-03 raised significant and fundamental issues concerning the Board's authority under the Collective Bargaining statute. Consequently, the Board concluded that OAH's disposition of ULP 2001-03 triggered one or more of the criteria prescribed under Board Regulation 14.30.11.03C for revoking OAH's delegation over the then still-pending and related ULP 2001-02 and ULP 2002-03. The Board denied the Motion with respect to Case No. 2002-04 (Election Objections).

arguments (arising from Judge Koteen's Proposed Decision in ULP 2001-03) concerning the Board's authority to enforce unfair labor practices at the time these alleged unfair labor practices occurred. For the reasons discussed below, we dismiss the petitions filed in ULP 2001-02 and 2002-03.

ULP 2001-02 (Shared Governance)

The crux of AFSCME's ULP asserts that SU committed unfair labor practices, as defined under Board Regulation 14.30.70.01A and B, by using a management dominated Shared Governance Program to support a campaign for voting for "no exclusive representative" in a Board ordered election which also included the Maryland Classified Employees Association, Inc. (MCEA) on the ballot.^{3/} However, in the subject election, none of the three choices on the ballot, i.e., "AFSCME," "MCEA," and "No Exclusive Representative," received a majority of the valid votes cast. Consequently, pursuant to §3-405(d) of the Collective Bargaining Statute and the Board Order of Election, a run-off election was held between the choices that received the two highest number of votes. The choices were MCEA and AFSCME, respectively.

Based on the foregoing, the actual results of the subject election vitiated any effect SU's alleged acts and conduct may have had on achieving the result that AFSCME asserts SU intended. As such, we conclude that the election results rendered moot the allegations and claims contained in this petition.

ULP 2002-03 (Progressive Discipline Policy)

As noted above, AFSCME, SU and MCEA had been engaged in an election campaign which was initiated by an October 15, 2001 election petition filed by AFSCME. The election was held on December 12, 2001. AFSCME alleges that SU committed unfair labor practices, as defined under Board Regulation 14.30.70.01A, B and H, by bargaining with SU's Staff Senate over a new "Progressive Discipline Policy" after AFSCME had filed its representation petition and prior to and during the Board-ordered election proceeding.

^{3/} MCEA participated as an intervenor pursuant to Title 3 of the Personnel and Pensions Article, Annotated Code of Maryland, §3-405(c).

AFSCME asserts that SU's Staff Senate is a management dominated entity established under SU's "Shared Governance Program." ^{4/}

Board Regulations 14.30.07.01A, B and H provide as follows:

The following acts by an employer, or its agents or representatives, are unfair labor practices:

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

B. Dominating, interfering with, contributing financial or other support to, or assisting in the formation, existence or administration of any labor organization.

* * * *

H. Refusing to bargain in good faith with the exclusive bargaining representative;

In Case No. ULP 2001-03 (included with Case No. ULP 2002-01 in Opinion No. 7), the Board made clear that it will not consider alleged violations of its regulations that took place before the regulations were promulgated.^{5/} In that same opinion, however, the Board further stated that it has the authority and responsibility to investigate violations of the provisions of the Collective Bargaining Statute, which establish rights and obligations of employees, employers and certified representatives of employees.^{6/}

^{4/} As AFSCME points out, the University System of Maryland operates "several" Shared Governance Programs throughout the campuses. Included in these are Campus Senates, Senate Executive Committees, Campus Parking Advisory Committees, Staff Affairs Committees, and the Continuous Quality Improvement Task Force on Visitor Parking Problems. AFSCME notes further, that the primary Shared Governance Program run by USM schools is the Council of University System Staff (CUSS).

^{5/} See generally AFSCME v. Salisbury University (SHELRB Opinion 7, Case No. ULP 2001-03), at pp. 4-5.

^{6/} See *id.* at pp. 5-6.

Turning to the existence and promulgation of a Progressive Discipline and Attendance Policy at Salisbury University, in order for AFSCME to raise a complaint that the Board can consider, the claim must allege a specific statutory violation rather than a ULP under the Board's regulations, since the challenged activity occurred prior to the Board's promulgation of the regulations defining ULPs. The only statutory reference that AFSCME makes here concerns a failure of Salisbury University to bargain in good faith. However, in order to raise a claim that the University has failed to bargain in good faith, AFSCME must first be certified as the exclusive representative for the employee unit on behalf of which it is seeking to remedy the alleged statutory violation. Section 3-101(c) of the Collective Bargaining Statute defines collective bargaining as "good faith negotiations by authorized representatives of employees and their employer with the intention of (a) reaching an agreement about wages, hours, and other terms and conditions of employment; and (b) incorporating the terms of the agreement in a written memorandum of understanding."

AFSCME was not the "authorized" or "exclusive representative" of the affected bargaining unit either at the time of the alleged violation or at any time since. The authorized representative is the employee organization certified as the exclusive representative as prescribed by §3-406(a) of the Collective Bargaining Statute. The authorized exclusive representative of the bargaining unit has yet to be determined and certified. (That determination is the subject of the objections filed by AFSCME in Case 2002-04 currently pending before OAH.)

In view of the above, we conclude that AFSCME lacks standing to bring a claim under the Statute alleging that SU refused to bargain. Section 3-407 of the Collective Bargaining Statute accords "an employee organization certified as the exclusive bargaining representative...to serve as the sole and exclusive bargaining agent for all employees in the unit[.]" AFSCME is not the certified exclusive bargaining representative and therefore SU possessed no duty or obligation to bargain with AFSCME over the disputed progressive disciplinary policy.^{7/}

^{7/} The only remaining claim that AFSCME raises is that the Staff Senate at Salisbury University is an employer dominated union. Board Regulation 14.30.07.01(B) makes it a ULP for an employer to

In the Board's disposition of this ULP, we are mindful of the fact that at the time of the filing of this ULP, bargaining unit employees had already expressed their will in the first election for representation as between two legitimate labor organizations. The ultimate disposition of the Objections in ULP 2002-04 will result in the certification of one of the two of these labor organizations as the exclusive bargaining representative for this unit of employees. Once that has occurred, we anticipate conformance by both SU and the exclusive representative to the clearly prescribed rights, obligations and responsibilities attendant to the bargaining relationship under the Collective Bargaining Statute.

ORDER

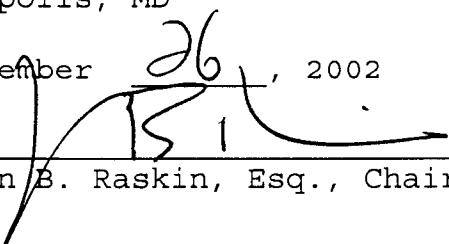
IT IS HEREBY ORDERED THAT:

1. The Motion to Dismiss ULP Case Nos. 2001-02 and 2002-03 is granted.
2. The Unfair Labor Practice Petitions in Board Case Nos. 2001-02 and 2002-03 are dismissed.

BY ORDER OF THE STATE HIGHER EDUCATION LABOR RELATIONS BOARD

Annapolis, MD

September 26, 2002



Jamin B. Raskin, Esq., Chairman

dominate a labor organization. The Statute, however, contains no similar prohibition. As we have explained above, given that the regulation defining this ULP was not in effect at the time of the alleged unlawful domination, there can be no consideration of AFSCME's claim. *See id.*

Appeal Rights

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