STATE OF MARYLAND

STATE LABOR RELATIONS BOARD

IN THE MATTER OF:	*	
AMERICAN FEDERATION OF STATE, COUNTY, AND MUNICIPAL EMPLOYEES, MD ("AFSCME MD"),	* * *	
Complainant	*	SLRB Case No. 12-U-03
v.	*	
CALVERT COUNTY DEPARTMENT OF SOCIAL SERVICES, ET AL.,	*	
Respondents	*	

* * * * * * * * * * * * * *

DECISION AND ORDER DENYING RESPONDENTS' MOTION TO DISMISS OR, IN THE ALTERNATIVE, MOTION FOR SUMMARY DECISION AND GRANTING COMPLAINANT/CHARGING PARTY'S CROSS MOTION FOR SUMMARY DECISION

BACKGROUND AND POSITIONS OF THE PARTIES

This matter is before the State Labor Relations Board (the "Board" or the "SLRB") as the result of an Unfair Labor Practice Complaint filed on September 28, 2011, by American Federation of State, County, and Municipal Employees, MD, ("AFSCME MD") (hereinafter "Complainant" or "Charging Party") pursuant to COMAR 14.32.05. In its Complaint, Charging Party alleges that the Calvert County Department of Social Services, et al., (hereinafter "Respondents" or the "Employer") violated the state collective bargaining statute, State Personnel and Pensions Article (hereinafter "SPP"), Section 3-502(a) which obligates an employer to engage in collective bargaining with the exclusive representative of its employees. Section 3-306(a)(8) makes it an unfair labor practice for the "State" to "(8) refus[ing] to bargain in good faith." Charging Party further contends that the collective bargaining statute at SPP Sec.

3-101(C)(1)(ii) and (C)(2) further requires bargaining regarding "clarifying terms and conditions of employment" and "administration of terms and conditions of employment."

The essence of the Employers'[1] defense is that a representative of the Employer, on June 6, 2011, by e-mail sent the following message to the employees in the bargaining unit:

> "Would anyone be interested in extending the possible flex from 30 to 60 minutes. No compressed work schedule, just an extension of the flex."

According to the Employer, because the Charging Party did not file a complaint challenging the above action until September 28, 2011, it's action is untimely and must be dismissed because under SLRB regulations, a complainant has 90 days "from the later of the alleged violation or following the time that a reasonable person would, upon exercising due diligence, have discovered the occurrence of the alleged violation." COMAR 14.32.05.01c. Thus, the Employer's position is that the operative date for the 90 day filing period to begin was the date of the email - June 6, 2011.

In response, it is the Charging Party's position that the alleged violation did not arise until August 24, 2011 (the date the Employer first implemented the flex time change) and not on June 6, 2011, the date of the manager's above referred to e-mail seeking input from bargaining unit employees on a change to the existing flex policy.

On October 14, 2011, the Employer filed its "Motion to Dismiss for Untimeliness, or in the Alternative, Motion for Summary Judgment." The Employer also filed its "Answer" on October 14, 2011.

On November 7, 2011, Charging Party filed its "Opposition of Charging Party to Motion to Dismiss, or for Summary Decision, and Cross Motion for Summary Decision."

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[1] The Calvert County Department of Social Services is the local office of the Maryland Department of Human Resources ("DHR") in Calvert County.

On November 22, 2011, the Employer filed its "Reply and Motion for Summary Judgment."

On November 30, 2011, counsel for the Charging Party informed Executive Director Snipes that the charging Party was relying on its November 7, 2011 filing and elected not to file further papers.

DISCUSSION AND CONCLUSIONS

For the reasons set out below, it is the opinion of this Board that the Respondents' Motion to Dismiss for Untimeliness, or in the Alternative, Motion for Summary Decision be denied and that the SLRB find that the Respondents violated their duty to bargain in good faith in violation of the Maryland CBS.

We find that the June 6 e-mail was, in fact, conditional, seeking the input of employees as to a change. It cannot be found to be an effective notice to the Union that a change in policy had or would occur. The operative date was, in our opinion, as argued by the Charging Party, August 24, 2011, the date in which the change in the flex policy was implemented, thus making the filing of the complaint on September 28, 2011 timely (i.e. 90 days "from the later of the alleged violation or following the time that a reasonable person would, upon exercising due diligence, have discovered the occurrence of the alleged violation." COMAR 14.32.05.01C.

Additionally, the Board accepts the proposition raised by the Charging Party when it states that "the statutory representative is the one with whom the [employer] must deal in conducting bargaining negotiations...it can no longer bargain directly or indirectly with the employees," General Elec. Co., 150 NLRB 192, 194 (1964). Thus, including Union shop steward Edwin Gabler, a member of the bargaining unit, on the e-mail list is not, in our opinion, official notice to the Union.

In NLRB v. Acme Industrial Co., 385 U.S. 432 (1967) the Supreme Court held that an employer's duty to bargain "extends beyond the period of contract negotiations and applies to labor-management relations during the term of an agreement."

While the words of SPP Sec. 3-301(b) permit a represented employee to initiate and conduct a discussion with his employer, if the employee so elects, this language does not permit the employer to solicit, initiate and conduct a discussion without notice to or approval from the bargaining representative. General Elec. Co., 150 NLRB 192 (1964)

The duty to bargain includes the duty to bargain over the time, manner and effects of a policy change. The Respondents declined to bargain, to discuss with the Charging Party when and how a change in flex time could be adopted. The Respondents set out to change the flex time window for the unit. The Respondents never discussed this with the Charging Party nor did they come to a written agreement to change the window. Instead, the respondents refused the Charging Party's demand to bargain.

The Maryland Collective Bargaining statute ("CBS") sets out the rights of employees of the State of Maryland to enter into collective bargaining with the State concerning wages, hours and other terms and conditions of employment. Md. Code Ann., State Personnel and Pensions, ("SPP") §§ 3-101 through 3-602 (2004). SPP § 3-301(2) gives employees the right to "be fairly represented by their exclusive representative, if any, in collective bargaining." Further, SPP § 3-501 (b) obligates the State and collective bargaining representatives for employees of state agencies to "meet at reasonable times and engage in collective bargaining in good faith." Section 3-502 defines mandatory matters of negotiations, stating "Collective bargaining shall include all matters relating to wages, hours, and other terms and conditions of employment."

Section 3-101. Definitions (c) Collective Bargaining defines "collective bargaining", inter alia, as meaning (1) good faith negotiations by authorized representatives of employees and their employer with the intention of: (ii) clarifying terms and conditions of employment

(emphasis added). This last section, 3-101(c)(ii) was added by the 2006 amendments. Similar language is not to be found in the National Labor Relations Act, as amended (NLRA).[2]

Under federal law, an employer is required by the NLRA to maintain the status quo with regard to mandatory subjects of bargaining, while negotiating a collective bargaining agreement with the authorized representative of its employees as well as during the term of an already negotiated collective bargaining agreement. NLRB v. Katz, 369 U.S. 736 (1962); Our Lady of Lourdes Health Center, 306 NLRB 337 (1992). Indeed, an employer's obligation to refrain from unilateral changes in the wages, hours and other terms and conditions of employment of bargaining unit employees extends beyond the duty to provide notice to the Union and an opportunity to bargain about a subject matter. It encompasses a duty to refrain from implementing such changes at all, absent overall impasse on bargaining for the agreement as a whole. Bottom Line Enterprises, 102 NLRB 373 (1991).

Thus, unilateral changes by an employer during the course of a collective bargaining relationship concerning matters that are mandatory subjects of bargaining are normally regarded as per se refusals to bargain. See Litton Fin. Printing Div. v. NLRB, 501 U.S. 190, 198 (1991), ("an employer commits an unfair labor practice if, without bargaining to impasse, it effects a unilateral change of an existing term or condition of employment."). The Supreme Court has deemed such unilateral changes in working conditions to be destructive to the collective bargaining relationship. See id. As the Circuit Court for the District of Columbia noted in NLRB v. McClatchy Newspapers, 964 F.2d 1153 (D. C. Cir. 1992), unilateral change "interferes

[2] 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.

with the right of self-organization by emphasizing to the employee that there is no necessity for a collective bargaining agent."

CONCLUSION

For the reasons stated herein, it is the decision of this Board that the Complaint herein was timely filed and that the Respondents refused to bargain in violation of their duties, as set forth above, under the Maryland CBS.

ORDER

IT IS HEREBY ORDERED THAT:

(1) Respondents' MOTION TO DISMISS IS DENIED.

(2) Complainant AFSCME MD's CROSS MOTION FOR SUMMARY DECISION IS GRANTED.

Consistent with our Decision, we find that Respondents unlawfully implemented unilateral changes in the method of permitting "flex time" requests to be made resulting in changes in how scheduled assignments would be made, without giving the Charging Party an opportunity to bargain and clarify the changes prior to implementation. Generally, the normal remedy involving employers that have implemented unlawful unilateral changes is to make employees whole for any loss of wages or other benefits they may have suffered as a result of the unlawful conduct. See, e.g., Southside Hospital, 344 NLRB 634, 635 (2005); Fiberboard Paper Products Corp. v. NLRB, 379 U.S. 203, 216 (1964). Because of our decision in AFSCME MD v. Department of Budget and Management, SLRB Case No. 10-U-04 (2010), we lack, absent legislative approval, the authority to order employees be made whole for monetary losses. No specific request for such losses has been made here. We do, however, have the authority to order restoration of the status quo ante, a typical remedy invoked by the NLRB in cases involving unlawful unilateral changes.

Therefore, we order Respondents to reinstate the "flex time" ("Compressed Work Week Schedule") policy in effect prior to the implementation of the new policy on August 24, 2011 and within 15 days of this Order and upon request by the Charging Party meet with the Charging Party for the purpose of bargaining (including "effects" bargaining) regarding changes in said policy and to reduce to writing the terms of any such agreement that may be concluded between the parties.

We further order that, pursuant to the SLRB's authority under Section 3-205(b)(3) of the CBS to "investigate and take appropriate action in response to complaints of unfair labor practice. . ." as well as normal NLRB practice and procedure, within 14 days after service of the attached notice marked "Appendix," copies of the notice, provided by the Executive Director of the SLRB, after being signed by Respondents' authorized representative, shall be posted and maintained for 60 consecutive days in a place where notices to employees are customarily posted. The Executive Director of the SLRB will contact the parties ten days after this Decision and Order is mailed, to request positions on number of copies of the Appendix/Notice needed and proper posting location(s).

Finally, it is ordered that the parties shall report back to the Board with a progress report at the expiration of 30 days from service of this Decision and Order.

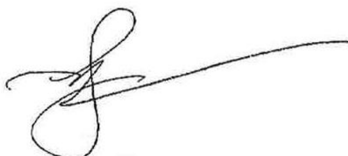
BY ORDER OF THE STATE LABOR RELATIONS BOARD

Sherry Mason, Member

Laird Patterson, Member

Susie Jablinske, Member

June Marshall, Member



LeRoy Wilkison, Member

Glen Burnie, MD

March 13, 2012

APPEAL RIGHTS

Any party aggrieved by this action of the Board may seek judicial review in accordance with Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222 and MD R CIR CT Rule 7-201 et seq.