State of Maryland
State Higher Education Labor Relations Board

In the matter of:	)	
	)	
AMERICAN FEDERATION OF STATE, COUNTY AND MUNICIPAL EMPLOYEES, LOCAL 1072, AND COUNCIL 3,	)	
	)	
Petitioner,	)	
	)	
v.	)	SHELRB ULP 2021-01
	)	
UNIVERSITY OF MARYLAND, COLLEGE PARK,	)	
	)	
Respondent.	)	
	)	

DECISION AND ORDER

DECISION

A. Procedural Background

On July 13, 2020, the American Federation of State, County and Municipal Employees, Local 1072 and AFSCME, Maryland Council 3 (collectively referred to as "AFSCME"), filed with the State Higher Education Labor Relations Board ("SHELRB") an Unfair Labor Practice Complaint ("Complaint") against the University of Maryland, College Park ("UMCP").

In its Complaint, AFSCME asserts that UMCP violated Sections 3-306(a)(1) and 3-306(a)(8) of the State Personnel and Pensions ("SPP") Article. More specifically, AFSCME claims that UMCP committed an unfair labor practice by failing and refusing to negotiate with AFSCME concerning health and safety issues relative to COVID-19.

On August 5, 2020, UMCP filed a response to AFSCME's Complaint ("Response"), in which the University denied that it had committed any unfair labor practices. AFSCME filed a reply to UMCP's response ("Reply") on September 4, 2020.

On September 18, 2020, the Executive Director issued an Investigative Report & Recommended Determination in which she found that "probable cause exists such that the alleged collective bargaining related violations should move forward for review," and recommended "that this matter… be addressed in a hearing before the SHELRB or through a delegation to the Office of Administrative Hearings…."

On March 8, 9, and 10, 2021, the SHELRB conducted a hearing in this matter via Zoom Video Conferencing. The parties, thereafter, filed post-hearing briefs and on May 21, 2021, the SHELRB heard Closing Argument via Zoom Video Conferencing.

B. Facts

1. Background and Relevant Contract Language

AFSCME Local 1072 is the certified exclusive bargaining representative of certain exempt and non-exempt employees of UMCP. Local 1072 is affiliated with AFSCME Maryland Council 3.

AFSCME and UMCP have been signatories to successive Memoranda of Understanding ("MOU") since approximately 2005. There are separate MOUs covering the exempt and non-exempt bargaining units. Both MOUs were effective from June 22, 2018, to June 21, 2021.

Article 18 of both MOUs contains several identical provisions relating to the health and safety of employees.

Article 18, Section 1 ("General Duty") "recognize[s] the need for an effective health and safety program for the mutual benefit of employees and the University," and creates a Labor-Management Problem Solving Committee ("LMPSC") tasked with making recommendations concerning "any conditions affecting the safety and health of employees."

Article 18, Section 2 ("Duties of the Health and Safety Committee") provides as follows:

> With regard to this Article, the Labor-Management Problem Solving Committee (LMPSC) created under this MOU may review or recommend new or revised safety and health rules, discuss current safety conditions or problems and discuss laws and regulations concerning OSHA, MOSH, and/or Federal and State regulatory agencies having appropriate jurisdiction of safety issues.
>
> However, it should be understood that the establishment and enforcement of safety and health rules and regulations is a proper function of Management and to this end the final determination as to adoption and implementation of safety and health rules shall be the sole responsibility of the University.

Based on testimony introduced at the hearing, Article 18, Section 2 has existed in its current form since the parties' first memorandum of understanding. AFSCME's chief negotiator testified that no similar language exists in any other memorandum of understanding entered into between any other University System of Maryland university or college and AFSCME.

The evidence established that prior to the execution of this MOU, a fire and a mold outbreak occurred on campus raising serious health and safety concerns about which AFSCME sought to bargain. UMCP refused AFSCME's request to bargain, citing its sole responsibility

for safety and health rules as expressly provided for in Article 18, Section 2. AFSCME witnesses testified that despite UMCP's refusal to bargain over health and safety issues posed by those events, AFSCME chose not to propose any changes to Article 18, Section 2 during the negotiations for the current MOU.

2. COVID-19 and UMCP's Response

In early 2020, the COVID-19 pandemic struck the United States. As a result of increasing cases and spread of the virus throughout the country, Governor Larry Hogan declared a state of emergency on March 5, 2020.

Immediately thereafter, and following the identification of the first case of COVID-19 in Prince George's County, UMCP initiated its own response on March 9, 2020, issuing COVID-19 guidance including travel restrictions and a ban on large gatherings.

Continuing its response, on March 10, 2020, UMCP announced a transition to online instruction (starting March 30, 2020), and the extension of Spring Break by one day. The University further directed that the campus was to remain open with reduced operation the week of March 23, 2020. Telework was left to the discretion of supervisors, with guidance to follow, and employees were expected to report for work that could be performed either by telecommuting or in person, as determined by their respective supervisor.

As a result of the quickly changing conditions, on March 13, 2020, UMCP and AFSCME established a standing weekly teleconference to discuss COVID-19 and the University's response thereto. Multiple representatives of each party attended these calls, which continued throughout the pandemic.

Over the following weeks, UMCP issued a letter to employees about working on and off campus, telework, and health protocols, among other matters. UMCP announced that the remainder of instruction for the semester would be online, that residence halls would close on April 5, 2020 (with all residents moving out on terms to be announced at a later date), and that telework would remain in effect until April 10, 2020, for those who could perform remotely.

On April 2, 2020, following a request by AFSCME to UMCP asking for information regarding the University's COVID-19 protocols, UMCP provided AFSCME with a response, which included, among other things, a list of employees who may be required to work on campus. The next day, AFSCME and UMCP met by conference call, and AFSCME submitted to UMCP a document with approximately fourteen demands relating to health and safety arising from COVID-19.

Over the next several weeks, UMCP announced additional actions it was taking in response to the pandemic, including, among other things, that all students and employees on campus were required to wear masks, all summer instruction would be online, and various measures and processes that would be implemented for reopening. Additionally, without any prior notification to or discussion with AFSCME, UMCP announced that student move-out from dormitories would take place between May 22 and June 15, 2020.

On May 21, 2020, AFSCME sent a memo to UMCP formally demanding that the parties "bargain over subjects of health and safety on campus, and particularly campus-wide COVID-19 protocols and procedures." AFSCME identified five specific areas that the parties should address in negotiations. These included: (1) campus-wide, mandatory screening procedures, (2) COVID-19 testing of all AFSCME-represented workers, (3) supplies of PPE, (4) COVID-19-specific training, and (5) timely and effective communications so that AFSCME-represented employees receive relevant information.

UMCP declined AFSCME's bargaining demand on the basis that Article 18, Section 2 of the parties' MOU grants the University sole responsibility for the promulgation and implementation of health and safety rules. Over the ensuing months, AFSCME made repeated demands to bargain, all of which were rejected by UMCP.

Although UMCP refused to bargain with AFSCME over health and safety matters, the University offered to meet and discuss these issues with the Union. The evidence established that over the course of 2020, UMCP and AFSCME met at various times and discussed COVID-19 health and safety matters. AFSCME presented proposals concerning safety protocols and procedures, some of which UMCP agreed to and adopted, and others it rejected. UMCP provided AFSCME with written responses to various issues and proposals raised by AFSCME and outlined the actions UMCP was taking in response to COVID-19. UMCP, however, remained steadfast in its refusal to engage in collective bargaining negotiations with AFSCME regarding health and safety matters.

In or around the summer of 2020, UMCP constituted a Return to Campus Operations Work Group to address resumption of operations. This was one of many committees on campus tasked with addressing UMCP's COVID-19 response. Other campus committees included the Incident Response Team, the Infectious Disease Management Committee, the Health and Safety and Risk Management Group, the Emergency Management Council, and the Student Advisory Working Group. UMCP invited one AFSCME representative to serve on the Return to Campus Operations Work Group. AFSCME agreed to participate but indicated that it was reserving its right to bargain.

On July 20, 2020, UMCP adopted and issued a set of COVID-19 protocols entitled University of Maryland Health and Safety Measures and Practices.

In November 2020, UMCP contacted AFSCME to commence "early" negotiations for a new MOU. AFSCME declined this request, insisting that UMCP should first bargain over the pandemic health and safety issues.

C. Positions of the Parties

In its Complaint, AFSCME asserts that "[h]ealth and safety practices of an employer are recognized as conditions of employment and are mandatory subjects of bargaining" and that, "[t]he effects of the COVID-19 pandemic are a matter necessarily subject to new, exigent bargaining." AFSCME contends that, "[b]y its acts, UMCP has failed to bargain over mandatory subjects of bargaining in violation of § 3-306(a)(8) of the State Personnel and

Pensions Article, and by its acts has and continues to interfere with, restrain, and/or coerce employees in the exercise of their collective bargaining rights in violation of § 3-306(a)(1)."

In its Response, UMCP admits that it "has declined the Union's demand to bargain because the parties have already bargained over health and safety matters. Specifically, Article 18 (Health and Safety)… state[s] that it is the *sole responsibility* of University management to adopt and implement safety and health rules." UMCP further argues that "the Union has waived its right to bargain over health and safety during the life of the MOUs, leaving such matters within the University's sole discretion."

D. Analysis

At issue in this case is whether UMCP has committed an unfair labor practice by refusing to bargain with AFSCME over terms and conditions of employment relating to the COVID-19 pandemic. In resolving this dispute, the SHELRB must address three issues.

First, does the University have an obligation to bargain with AFSCME, its employees' exclusive representative, over health and safety issues in the workplace, and does a state of emergency, such as the COVID-19 pandemic, create an exception to the duty to bargain?

Second, assuming the parties have an obligation to bargain over health and safety issues, did AFSCME waive its right to bargain regarding health and safety issues during the term of the MOU?

Third, in the event it is determined that in Article 18, Section 2 of the MOU, AFSCME waived its right to bargain about health and safety matters, was the COVID-19 pandemic an unforeseeable event so that AFSCME cannot be found to have intended to waive its right to bargain over health and safety issues caused by the pandemic when it agreed to the language of Article 18, Section 2?

We discuss each issue in turn.

1. The obligation to bargain over health and safety issues in the workplace.

Md. Code Ann., State Personnel and Pensions, ("SPP") §§ 3-101 - 3-602, grants employees of Maryland institutions of higher education, the right to form, join, support and participate in employee organizations of their choosing, § 3-301(1), and to "be fairly represented by their exclusive representative, if any, in collective bargaining," SPP § 3-301(2). The statute obligates the State and the employees' collective bargaining representatives to "meet at reasonable times and engage in collective bargaining in good faith," SPP § 3- 501(b).

The statute obligates the University employer and its employees' representative to bargain over "all matters relating to wages, hours, and other terms and conditions of employment." SPP § 3-502(a)(1). These matters are referred to as "mandatory subjects of bargaining." *See* FOP, Lodge 129 v. Univ. of Maryland, SHELRB ULP 2019-01 (2019) (imposing a duty on employers to bargain in good faith with their employees' union

representative concerning wages, hours and terms and conditions of employment, which are considered "mandatory subjects of bargaining").

While the SHELRB has not itself addressed the question of whether topics relating to the health and safety of employees are mandatory subjects of bargaining, as discussed more fully below, it is commonly accepted among the National Labor Relations Board ("NLRB") and many public sector labor relations agencies that health and safety matters are mandatory subjects of bargaining. *See* American Federation of State, County, and Municipal Employees, Maryland Council 3 v. Pugh, SHELRB ULP 2014-04 (2015) (relying on the NLRB, as well as state and federal case law, in deciding unfair labor practice complaints).

The NLRB has held that "safety provisions constitute an essential part of the employees' terms and conditions of employment, and, as such, are a mandatory subject of bargaining." Gulf Power Co., 156 NLRB 622 (1966), *enforced*, 384 F.2d 822 (5th Cir. 1967); *see also* New Surfside Nursing Home, 322 NLRB 531 (1996) (*citing* American National Can Co., 293 NLRB 901 (1989), *enforced*, 924 F.2d 518 (4th Cir. 1991)) (stating that "'[t]he health and safety of employees are terms and conditions of employment, and thus mandatory subjects of bargaining about which an employer is obligated to bargain with the collective-bargaining representative of its employees'"); Detroit Newspaper Agency, 317 NLRB 1071 (1995) (explaining that "'[h]ealth and safety matters regarding the unit employees' workplaces are of vital interest to the employees and are, thus, generally relevant and necessary for the union to carry out is bargaining obligations.... [and that] [f]ew matters can be of greater legitimate concern").

This principle has been affirmed by the U.S. Supreme Court, *see* Fibreboard Paper Products Corp. v. NLRB, 379 U.S. 203 (1964) (stating, "[w]hat one's hours are to be, what amount of work is expected during those hours, what periods of relief are available, what safety practices are observed, would all seem conditions of one's employment"), and the U.S. Court of Appeals for the 4th Circuit, *see* American Nat. Can Co., *supra* (enforcing NLRB decision ordering employer to allow union access to plant to obtain heat measurements, and explaining that health and safety conditions are mandatory subjects of bargaining).

Similarly, several state labor relations boards have also adopted the view that health and safety matters are mandatory subjects of bargaining. *See* Holland Public Schools, 2 MPER ¶ 20071 (Mich. Pub. Employment Relations Comm'n 1989) (explaining "that safety policies have been held to be mandatory subjects of bargaining); City of Williamsport, 23 PPER 23005 (Pa. Labor Relations Bd. 1991) (stating that topic "rationally related to employe [sic] safety… is therefore a mandatory subject of bargaining."); City of Gainesville, 7 FPER ¶ 12325 (Fla. Pub. Employee Relations Comm'n 1981) (recognizing the NLRB's holding that "matters pertaining to safety were not a prerogative of management, were mandatory subjects of collective bargaining); Marine Engineers Beneficial Association v. Washington State Ferries, Case 24113-U-11-6171 (Wash. Public Employment Relations Comm'n 2011) (holding that unilateral changes to terms and conditions of employment that impact employee safety are mandatory subjects of bargaining); State of Illinois (Department of State Police), 8 PERI ¶ 2007 (Ill. State Labor Relations Bd. 1992) (stating that "examples of the various mandatory subjects about

which the public employer and the employees' exclusive representative are required to bargain about include procedures and practices relating to safety, sanitation and health…").

As a result, we find that topics relating to the health and safety of employees are clearly mandatory topics of bargaining, and therefore, subject to the requirement of good faith bargaining under Section § 3-306(a)(1).

Next, we turn to the issue of whether a state of emergency, such as the COVID-19 pandemic, creates an exception to the duty to bargain over a mandatory subject..

The NLRB, as well as the DC Public Employee Relations Board (DC PERB), have recognized a narrow exception to the duty to bargain in the case of emergencies.

In Port Printing & Specialties, the NLRB explained that an exception to the duty to bargain exists where the employer can demonstrate that "economic exigencies compel[led] prompt action…," but that this exception is "limited to extraordinary events, which are an unforeseen occurrence, having major economic effect requiring that the company take immediate action...." 351 NLRB 1269 (2007), *enforced*, 589 F.3d 812 (5th Cir. 2009).

Additionally, the NLRB has published online a list of advice memoranda and case closing e-mails that deal with a variety of issues related to COVID-19 around the country. In addressing cases alleging an unlawful unilateral implementation of employment policies, the NLRB's general counsel stated that:

> an employer should be permitted to, at least initially, act unilaterally during emergencies such as COVID-19 so long as its actions are reasonably related to the emergency situation. However, in addition, the employer must negotiate over the decision (to the extent there is a decisional bargaining obligation) and its effects within a reasonable time thereafter.

Mercy Health General Campus, 07-CA-258425 (Case Closing E-mail, June 10, 2020).

The DC PERB recently adopted the NLRB's reasoning in the context of a public employer's obligation to bargain over health and safety issues during the COVID-19 pandemic. In Washington Teachers' Union, Local #6, PERB Case No. 20-U-30 (2020), the DC PERB noted that, "the health and safety of employees is a mandatory subject of bargaining which must be negotiated." Similarly, in Fraternal Order of Police/Dep't. of Corrections Labor Comm. v. D.C. Dep't. of Corrections, Case 20-U-24 (2020), the Board held that "health and safety conditions of employment[]… are mandatory subjects of bargaining and the [employer]… is not relieved of its duty to bargain because of the pandemic." The DC PERB, however, noted that:

> in an instance of an extraordinary event, which was an unforeseen occurrence, requiring an agency to take immediate action, management has the right to take actions it deems necessary to carry out its mission. But it must bargain the impact and effects of its decision. Moreover, if during the state of emergency,

> the need for immediate decision-making has passed, then management must engage in substantive bargaining over mandatory subjects of bargaining.

Id.

We recognize that an exception to the duty to bargain may exist in exigent circumstances, such as at the onset of the COVID-19 pandemic, where quick and immediate decision-making and action is necessary to protect the public health, including the safety and health of employees and students. However, this exception is not without limit. When the need for immediate decision making and action has ended, absent waiver or other exception to the duty to bargain, the obligation to bargain over mandatory subjects of bargaining is reactivated, and the parties are required to negotiate over such topics.

As explained above, shortly after Governor Hogan declared a state of emergency, UMCP took immediate and unilateral action – transitioning students from in person to online instruction, implementing telework policies and procedures for employees, mandating masks on campus, establishing procedures for student move out, and implementing of myriad of additional health and safety policies and protocols. It was not until May 21, 2020, that AFSCME made its initial request to bargain with AFSCME over the actions UMCP was taking in response to COVID-19.

By the time AFSCME made its request to bargain, the period for immediate unilateral action and decision-making had passed. Absent waiver, bargaining over health and safety matters relating to COVID-19 would otherwise have been required under the collective bargaining statute.

2. Waiver of a Union's right to bargain during the term of the Memorandum of Understanding.

Even though health and safety matters are mandatory subjects of bargaining, the question remains as to whether AFSCME waived its right to bargain over these matters during the term of the parties MOU by agreeing to the language in Article 18, Section 2 of the MOU.

Neither the SHELRB nor Maryland courts have addressed whether a labor organization may waive its right to bargain over a mandatory subject of bargaining through language contained in the parties' memorandum of understanding. NLRB and court decisions interpreting the National Labor Relations Act ("NLRA") and other states' labor relations statutes are instructive.

The NLRB has explained that "[i]t is well established that an employer does not violate the… [NLRA] if the collective-bargaining agreement does, in fact, grant the employer the right to take certain actions unilaterally (i.e., without further bargaining with the union)." MV Transportation, Inc., 368 NLRB No. 66 (2019). In determining whether a union waived its right to bargain over a subject matter during the term of the parties' memorandum of understanding, thus permitting the employer to take unilateral action, for 70 years the NLRB applied a strict

"clear and unmistakable waiver" standard until 2019, when the NLRB abandoned that approach and adopted a much broader "contract coverage" standard.

Under the "clear and unmistakable waiver" standard, waiver does not exist "unless a provision of the collective bargaining agreement 'specifically refers to the type of employer decision' at issue 'or mentions the kind of factual situation' the case presents." Id. In other words, where such a waiver is claimed, the test is whether the putative waiver is in "clear and unmistakable" language.

The Second, Third, Fourth, Sixth, Eighth, Ninth and Tenth Circuit Courts of Appeals have consistently deferred to the NLRB's application of the "clear and unmistakable waiver" standard. *See* Electrical Workers Local 36 v. NLRB, 706 F.3d 73 (2d Cir. 2013) (holding that that contractual waivers of statutory rights must be "clear and unmistakable" and "explicitly stated"); Furniture Rentors of America, Inc. v. NLRB, 36 F.3d 1240 (3d Cir. 1994) (explaining that contractual waivers of statutory bargaining rights must be "clear and unmistakable in order for courts to enforce them"); Bonnell/Tredegar Industry v. NLRB, 46 F.3d 339 (4th Cir. 1995) (same); United Bd. of Carpenters & Joiners of Am. v. NLRB, 891 F.2d 1160 (5th Cir. 1990) (same); East Tennessee Baptist Hospital v. NLRB, 6 F.3d 1139 (6th Cir. 1993) (same); American Oil Co. v. NLRB, 602 F.2d 184 (8th Cir. 1979) (same); American Distributing Co. v. NLRB, 715 F.2d 446 (9th Cir. 1983) (same); Capitol Steel & Iron Co. v. NLRB, 89 F.3d 692 (10th Cir. 1996) (same).

Despite its decades-long application, in 2019, the NLRB replaced the "clear and unmistakable waiver" standard with the "contract coverage" standard, thereby applying a much broader approach to cases involving waiver. MV Transportation, Inc., 368 NLRB 66 (2019).

In MV Transportation, Inc., the NLRB explained that:

> [u]nder contract coverage, the Board will examine the plain language of the collective-bargaining agreement to determine whether action taken by an employer was within the compass or scope of contractual language granting the employer the right to act unilaterally. For example, if an agreement contains a provision that broadly grants the employer the right to implement new rules and policies and to revise existing ones, the employer would not… [commit an unfair labor practice] by unilaterally implementing new attendance or safety rules or by revising existing disciplinary or off-duty-access policies. In both instances, the employer will have made changes within the compass or scope of a contract provision granting it the right to act without further bargaining. In other words, under contract coverage the Board will honor the parties' agreement, and in each case, it will be governed by the plain terms of the agreement.
>
> On the other hand, if the agreement does not cover the employer's disputed act, and that act has materially, substantially and significantly changed a term or condition of employment constituting a mandatory subject of bargaining, the employer will have… [committed an unfair labor practice] unless it

> demonstrates that the union clearly and unmistakably waived its right to bargain over the change or that its unilateral action was privileged for some other reason. Thus, under the contract coverage test…, the Board will first review the plain language of the parties' collective-bargaining agreement, applying ordinary principles of contract interpretation, and then, if it is determined that the disputed act does *not* come within the compass or scope of a contract provision that grants the employer the right to act unilaterally, the analysis is one of waiver.

Id. at 2.

The D.C., First, and Seventh Circuit Courts of Appeals have similarly applied this standard. *See* NLRB v. United States Postal Service, 8 F.3d 832 (D.C. Cir. 1993) (explaining that "[a] waiver occurs when a union knowingly and voluntarily *relinquishes* the right to bargain about a matter; but where the matter is covered by the collective bargaining agreement, the union *has exercised* its bargaining right and the question is irrelevant"); Bath Marine Draftsmen's Assn. v. NLRB, 475 F.3d 14 (1st Cir. 2007) (stating "we adopt the District of Columbia Circuit's contract coverage test to determine whether the [u]onions have already exercised their right to bargain); Chicago Tribune Co. v. NLRB, 974 F.2d 933 (7th Cir. 1992) (stating "'where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather the contract will control and the 'clear and unmistakable' intent standard is irrelevant").

State public employment relations boards throughout the country are divided when it comes to which standard to apply. *Compare* Service Employees International Union, Local 73, 20 PERI ¶ 110 (Ill. Labor Relations Bd. 2003) (rejecting "contract coverage" standard and finding that "[a] contractual waiver of a right… must be clear and unmistakable") and City of Shelton, Case No. MPP-33, 574 (Ct. Bd. of Labor Relations 2020) (explaining that, "in order for a provision in a collective bargaining agreement to operate as a waiver of a union's statutory right to negotiate changes in conditions of employment, the provision must be clear and unmistakable," and that "[a]bsent contract language making 'specific reference to the subject of the change', we will not find waiver") *with* CWA Local 7076, 76-PELRB-2012 (N.M. Pub. Employer Labor Relations Bd. 2012) (explaining that "[t]he Employer may be excused from its ongoing duty to bargain where it can be shown that the issue over which the union seeks to bargain is 'covered by' the parties' CBA"), *and* International Brotherhood of Electrical Workers, Local 1536, Case No. 1427 (Neb. Comm'n of Indus. Relations 2017) (rejecting "clear and unmistakable" standard for "contract coverage" standard).

In considering which of the two standards best effectuates the purposes of the SPP, the SHELRB has determined that the contract coverage standard is the appropriate analysis to apply in determining whether a party in the negotiated memorandum of understanding has waived its right to bargain about a particular subject matter during the MOU's term.

"Contract coverage supports the practice and procedure of collective bargaining , , , by encouraging employers and unions to 'engag[e] in the effort . . . to foresee potential labor-

management relations issues, and resolve those issues' through collective bargaining 'in as comprehensive a manner as practicable.'" MV Transportation, *supra*, at 8 [citation omitted].

As the D.C. Circuit explained in Postal Service, "the duty to bargain under the Act does not prevent parties from negotiating contract terms that make it unnecessary to bargain over subsequent changes in terms or conditions of employment. 'The union may exercise its right to bargain about a particular subject by negotiating for a provision in a collective bargaining contract that fixes the parties' rights and forecloses further mandatory bargaining as to that subject.'" 8 F.3d at 836 (quoting Local Union No. 47, IBEW, 927 F.2d at 640). Accordingly, "when the employer and union bargain about a subject and memorialize that bargain in a collective bargaining agreement, they create a set of rules governing their future relations. Unless the parties agree otherwise, there is no continuous duty to bargain during the term of an agreement with respect to a matter covered by the contract." Id. The Seventh Circuit similarly has observed that "where the contract fully defines the parties' rights as to what would otherwise be a mandatory subject of bargaining, it is incorrect to say that the union has 'waived' its statutory right to bargain; rather the contract will control and the 'clear and unmistakable' intent standard is irrelevant." Chicago Tribune v. NLRB, 974 F.2d 933, 937 (7th Cir. 1992).

Application of the clear and unmistakable waiver standard, furthermore, results in a labor board sitting in judgment upon the substantive terms of a collective-bargaining agreement, which is beyond the scope of its statutory authority. As the NLRB in MV Transportation observed,

> [i]n every case in which a contract provision is cited as authorizing unilateral action, the parties will have already bargained, reached an agreement, and reduced that agreement to writing, as Congress envisioned. Under the clear and unmistakable waiver test, however, the Board will refuse to give effect to contract provisions granting rights of unilateral action to the employer unless those provisions meet the exacting standards imposed by the Board. . . Since application of the clear and unmistakable waiver standard typically results in a refusal to give effect to the plain terms of a collective-bargaining agreement, the Board in applying that standard effectively writes out of the contract language the parties agreed to put into it. Doing so, the Board sits 'in judgment upon the substantive terms of collective bargaining agreements,' thereby exercising a power it does not possess.

368 NLRB No. 66 at 4 [citations omitted].

Accordingly, the SHELRB, in applying the contract coverage standard, will examine the plain language of the parties' MOU to determine whether action taken by an employer was within the scope of MOU's language granting the employer the right to act unilaterally.

Turning to the case at hand, we find that in agreeing to the language of Article 18, Section 2, UMCP was given sole authority to decide and implement health and safety rules, and AFSCME waived its right to bargain over health and safety matters.

As explained above, Article 18, Section 2 of the parties' MOU states, in pertinent part:

> … it should be understood that the establishment and enforcement of safety and health rules and regulations is a proper function of Management and to this end **the final determination as to adoption and implementation of safety and health rules shall be the sole responsibility of the University.**

(Emphasis added). It is clear from the plain language of this provision that when the parties negotiated the MOU, they addressed safety and health. As a result, AFSCME and UMCP agreed to include Article 18, Section 2 language in the MOU. This language grants UMCP sole responsibility to adopt and implement safety and health rules.

Accordingly, applying the contract coverage standard to these facts, we find that UMCP acted within its contractual authority to decide and implement rules, procedures, and protocols in response to the COVID-19 pandemic without the duty to bargain about these matters with AFSCME.[1] To find otherwise would render this provision meaningless and invalidate UMCP's negotiated unfettered right to determine, adopt, and implement health and safety rules.

For these reasons, we find that UMCP did not violate either Section 3-306(a)(1) or (8) of the SPP by refusing to bargain over health and safety issues related to the COVID-19 pandemic.

3. Was the COVID-19 pandemic unforeseeable so as to require the SHELRB to conclude that AFSCME could not have intended to waive bargaining over such an event when it agreed to the terms of Article 18, Section 2?

We do not find that the COVID-19 pandemic negated the waiver established under Article 18, Section 2 of the parties' MOU, so as to obligate UMCP to bargain over health and safety issues created by the COVID-19 pandemic.

While unexpected, pandemics are not unforeseeable, especially in a university setting where large groups of students from around the globe are living together in a close-knit setting. In fact, over the past several decades, universities have had to deal with the threat of ongoing health and safety risks relating to virus outbreaks such as SARS, H1N1, Zika, and Ebola, to name a few. Centers for Disease Control and Prevention, Global Disease Detection Timeline, https://www.cdc.gov/globalhealth/infographics/global-health-security/global-disease-detection-timeline.html (last visited September 14, 2021).

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[1] Indeed, given the clear and explicit language in the MOU together with the bargaining history described herein, our conclusion would be the same even if we were to apply the clear and unmistakable waiver standard. Specifically, during the term of the parties' prior MOU, a fire and mold outbreak occurred on campus. AFSCME demanded that the parties bargain over safety and health concerns relating to these events, however, UMCP refused to do so, citing its exclusive right over these subjects under Article 18, Section 2. Despite this experience, AFSCME made no attempt to renegotiate the language of Article 18, Section 2 during the negotiations for the current MOU. Instead, the Union chose to leave in place the existing language giving UMCP ultimate authority to address health and safety matters.

In addition, the evidence produced at the hearing indicates that UMCP had in place protocols and standing committees to deal with emergencies and threats to the health and safety of employees and students on campus, including the Incident Response Team, the Infectious Disease Management Committee, the Health and Safety and Risk Management Group, and the Emergency Management Council, and had dealt with such threats previously when addressing the fire and mold outbreak on campus. At the time of negotiations of the MOU, AFSCME was aware of these committees and protocols dealing with health and safety matters on campus, and could have negotiated a change to Article 18, Section 2 to eliminate the waiver, but chose not to.

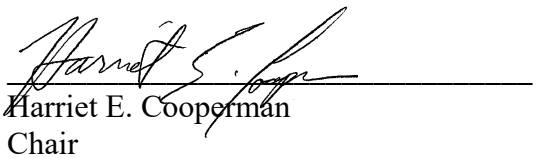
For the foregoing reasons, we dismiss the ULP complaint.

ORDER

IT IS HEREBY ORDERED THAT the ULP Complaint in SHELRB ULP 2020-01 is hereby dismissed.

BY ORDER OF THE HIGHER EDUCATION LABOR RELATIONS BOARD:

November 18, 2021



Harriet E. Cooperman
Chair
State Higher Education Labor Relations Board

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 Maryland Rule 7-201, *et seq.*, Maryland Rules of Practice and Procedure.