

State of Maryland
State Higher Education Labor Relations Board

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| In the matter of: |) | |
| Fraternal Order of Police, Lodge 141, |) | |
| |) | |
| |) | |
| Certified Bargaining Representative, |) | |
| |) | SHELRB UC 2020-01 |
| and |) | |
| |) | |
| University of Maryland, Baltimore, |) | |
| |) | |
| State Employer. |) | |
| |) | |

DECISION AND ORDER

I. DECISION

a. Procedural Background

On January 16, 2020, the Fraternal Order of Police, Lodge 141 (“FOP, Lodge 141”) filed with the State Higher Education Labor Relations Board (“SHELRB”) a Motion for Reconsideration of the SHELRB’s January 10, 2020, Decision and Order, which denied FOP, Lodge 141’s Clarification/Contest of Unit Designation Petition seeking a determination by the SHELRB that Sergeants employed by the University of Maryland, Baltimore (“UMB”) are not supervisors, and, therefore, should be included in the Sworn Police Unit represented by FOP, Lodge 141.

b. Arguments of FOP, Lodge 141

FOP, Lodge 141 asserts the following grounds as its basis for the Motion for Reconsideration: (a) the SHELRB’s January 10, 2020, Decision and Order “violates the Maryland Administrative Procedures Act, Md. Code Ann. State Gov’t § 10-201 *et seq.*,” (b) the SHELRB “conducted an incomplete investigation and made factual determinations without the benefit of sworn testimony or developing a complete record of the relevant facts,” (c) FOP, Lodge 141 “was not provided with the Executive Director’s Recommendation and an opportunity to respond,” and (d) the Decision and Order “errs in its over-reliance on non-binding NLRB [National Labor Relations Board] case law that interprets distinguishable statutory language.”

We address each argument in turn.

c. Analysis

With regard to FOP, Lodge 141's argument that the SHELRB's January 10, 2020, Decision and Order "violates the Maryland Administrative Procedures Act, Md. Code Ann. State Gov't § 10-201 *et seq.*," FOP, Lodge 141 more specifically states that the SHELRB's "failure to conduct a contested case hearing and give notice of the proposed decision violates Maryland law and are reason alone for rescinding the Board's Decision and Order." Section 3-2A-07 of the State Personnel and Pensions Article ("Investigations and Hearings") states in relevant part, "[t]he Board **may** hold a hearing in accordance with Title 10, Subtitle 2 of the State Government Article whenever necessary for a fair determination of any issue or complaint arising under this title or a regulation adopted under it." Md. Code Ann., SPP § 3-2A-07(b) (emphasis added). The use of the word "may" in this Section indicates that holding a hearing is permissive, not mandatory. See Charles County Supporting Services Employees Local Union 301 v. Board of Education of Charles County, 48 Md. App. 339 (Md. Ct. Spec. App. 1981) (explaining that while "legislative use of the word 'may' or 'shall' does not, in itself, control judicial construction of the relevant statute as permissive or mandatory, citing Hitchins v. City of Cumberland, 215 Md. 315, 323 (Md. 1958), "the word (may) bears its ordinary significance of permission unless the context (or) the purpose of the statute shows that it is meant to be imperative...." Fleishman v. Kremer, 179 Md. 536, 541 (Md. 1941)). FOP, Lodge 141 has provided no evidence that, in enacting Section 3-2A-07, the legislature intended to require the SHELRB to hold a hearing under the circumstances of this case, nor do we find the purpose of the statute to impose such a mandate. As a result, we reject this argument.

Reviewing FOP, Lodge 141's assertion that the SHELRB "conducted an incomplete investigation and made factual determinations without the benefit of sworn testimony or developing a complete record of the relevant facts," COMAR 14.30.04.10(B) is controlling. This regulation states that the SHELRB "shall grant or deny the petition following the appropriate investigation and recommendation to the Board by the Executive Director **or** hearing in accordance with COMAR 14.30.11." (Emphasis added). Looking to the plain language of this provision, the SHELRB is provided with two options when making a determination with regard to a Clarification/Contest of Unit Designation Petition – grant or deny the petition after: (1) an appropriate recommendation by the Executive Director, or (2) a hearing. Again, pursuant to this regulatory language, neither a hearing (nor sworn testimony) is required, and, in lieu of a hearing, the SHELRB may rely on the Executive Director's recommendation in granting or denying a petition. See New Board of School Commissioners v. Public School Administrators and Supervisors Association of Baltimore City, 142 Md. App. 61 (Md. Ct. Spec. App. 2002) (explaining that, where regulations provided that "[t]he State Board [of Education] may issue a decision on a motion for summary affirmance when there are no genuine issues as to any material facts," it was entirely proper for the State Board to decide matter without first hearing evidence; and while the State Board might have properly chosen to hear the legal arguments of counsel, it is apparent that the Board believed that it had been sufficiently apprised of the parties' positions by way of the memoranda and other documents that had been filed). In this instance, the SHELRB exercised the first option.

Furthermore, the outcome of our decision, which we incorporate herein, relied on material facts that were not in dispute – i.e., that "there have been no recent, substantial changes

to the job duties or responsibilities of the Sergeants at issue as to create a real doubt as to whether the individuals in such classification continue to fall within the category-excluded or included-that they occupied in the past” – thereby rendering any need for an evidentiary hearing null. Therefore, this argument is rejected.

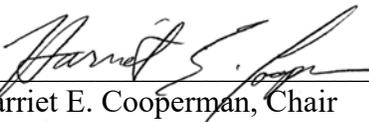
Looking to FOP, Lodge 141’s argument that FOP, Lodge 141 “was not provided with the Executive Director’s Recommendation and an opportunity to respond,” as indicated above, COMAR 14.30.04.10 simply states that the SHELRB “shall grant or deny the petition following the appropriate investigation and recommendation to the Board by the Executive Director....” There is no requirement (either statutory or regulatory) that either party to a clarification/contest of unit designation dispute be provided with the Executive Director’s recommendation.¹ Consequently, we also reject this argument.

Finally, with regard to FOP, Lodge 141’s assertion that the Decision and Order “errs in its over-reliance on non-binding NLRB case law that interprets distinguishable statutory language,” State Personnel and Pensions § 3-2A-05 is instructive. Section 3-2A-05(a) states that “[t]he Board is responsible for administering and enforcing provisions of this title relating to employees...” covered thereunder. Therefore, should the SHELRB decide to rely on decisions of the NLRB (or not rely on them) in making its own, that is the responsibility of the SHELRB. It is common for this Board, other public sector employment relations boards throughout the country, and courts to rely on such decisions. In fact, the Court of Appeals of Maryland has recognized and approved reliance on NLRB decisions in State Labor Relations Boards decisions interpreting Maryland’s collective bargaining law. *See Montgomery County Council of Supporting Services Employees, Inc. v. Board of Education of Montgomery County, et al.*, 277 Md. 343 (Md. 1976). That being said, even notwithstanding NLRB case law in support of its decision, the SHELRB’s Decision and Order also stands on its own. As a result, this argument is also rejected.

II. ORDER

For the foregoing reasons, and in furtherance of the SHELRB’s January 10, 2020, Decision and Order in this matter, IT IS HEREBY ORDERED THAT THE MOTION FOR RECONSIDERATION IS DENIED.

BY ORDER OF THE HIGHER EDUCATION LABOR RELATIONS BOARD:



Harriet E. Cooperman, Chair

¹ COMAR 14.04.07.04(G), which addresses the process surrounding relief from unfair labor practices, requires that the Executive Director to provide the results of her investigation and recommendation to the involved parties; however, the regulations addressing the process for resolving a contest/clarification of unit designation dispute is separate and distinct from the process for resolving an unfair labor practice – and does not include a similar requirement. The lack of similar regulatory language is evidence that the SHELRB, in establishing its regulations, did not intend for there to be such a requirement.

Annapolis, MD

May 6, 2020

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.