

State of Maryland
State Higher Education Labor Relations Board

In the matter of:)	
<i>Fraternal Order of Police Lodge 129</i>)	
<i>University of Maryland,</i>)	
<i>Baltimore County,</i>)	
)	
)	
Petitioner)	
)	SHELRB ULP 2019-01
v.)	
)	
<i>University of Maryland,</i>)	
<i>Baltimore County,</i>)	
)	
)	
Respondent)	
)	

Executive Director’s Investigative Report & Recommended Determinations

On October 18, 2018, the Fraternal Order of Police Lodge 129, University of Maryland Baltimore County (FOP 129) filed an Unfair Labor Practice (ULP) against the University of Maryland Baltimore County (UMBC). This ULP was filed pursuant to State Higher Education Labor Relations Board (SHELRB) regulations at COMAR 14.30.07, and after receipt of the ULP, the Executive Director notified the respondent of the complaint and requested that a response be filed with the SHELRB. On November 6, 2018, UMBC filed a Response to this charge, requesting dismissal with prejudice. On November 13, 2018, the parties to this matter, agreeing that the response UMBC had filed was essentially a motion to dismiss to which FOP 129 was permitted to respond, jointly requested a stay and delay in the response. Per COMAR 14.30.02.02, the Board permitted an extension of time for FOP 129 to respond to the motion to dismiss. On November 30, 2018, FOP 129 responded to the UMBC request for dismissal.

Pursuant to SHELRB Regulations at COMAR §14.30.07.04F - G, the Executive Director must investigate allegations contained in a properly filed ULP petition to determine whether probable cause exists for the SHELRB to proceed on the case. After having reviewed the pleadings, exhibits and documentary evidence from both parties, in addition to conducting my own investigation, I hereby recommend to the full membership of the SHELRB that the alleged violation should move forward for further Board review and decision.

Undisputed Facts

The parties agree that FOP 129 represents certain employees at UMBC for the purpose of collective bargaining. They agree on negotiations dates, hiring of labor counsel, and the content of various communications between them. The parties also agree that they are at impasse on the remaining issue of wages.

Disputed Items

The parties disagree on the following items:

- bargaining table conduct alleged
- allowance of the university to implement last and best offers in the event of impasse
- interpretation of the timelines of §3-501(c)(3) of the Collective Bargaining Law
- application of various federal standards (NLRA, federal case law) to determine the outcome of this dispute.

Petitioner's Position/Information

FOP 129 states that the parties to this matter were previously working under a Memorandum of Understanding ("MOU") that expired on October 26, 2015. Further, FOP 129 provides that in June 2016¹, the parties signed ground rules, and began bargaining for a new MOU, and throughout 2016 and 2017, the parties signed extension agreements for the current MOU. FOP 129 states that UMBC issued its best and final offer "in late 2017 or 2018" (complaint, p. 3), and that a majority of the union members rejected this offer. Following rejection of the offer, FOP 129 hired attorneys from Schlachman, Belsky, and Weiner, P.A., to represent them in contract negotiation, and apprised UMBC of this representation by letter dated January 12, 2018. FOP 129 states that UMBC hired attorney Jay Krupin, Esq., of Baker & Hostetler, LLP, as its labor counsel, and communicated that fact to FOP 129 by letter dated February 20, 2018.

FOP 129 states that during subsequent negotiations, the parties communicated by telephone and e-mail, as well as at the bargaining table. On April 20, 2018, the parties met with their chief negotiators, and made proposals and demands, including a wage proposal made by FOP 129. At this meeting, the parties reached seven tentative agreements, memorializing them on May 17, 2018. Remaining on the table were wages, leave approval, and leave cancellation proposals. The parties met again on May 17, 2018, during which meeting they reached a tentative agreement on all issues except wages. At the May 17, 2018 meeting, UMBC also made a counter proposal on wages, subject to approval by the Board of Regents. In June 2018, UMBC contacted FOP 129 and indicated that the Board of Regents did not approve of its prior wage proposal, and UMBC made a new wage proposal. Subsequently, FOP 129 indicates that the parties continued to bargain over wages.

¹ Please note that where specific dates are given, the petitioner provided specific dates in their filings, but where the month is listed with no accompanying date, the petitioner provided only the month in their filings.

FOP 129 states that UMBC made its best and final wage offer on July 2, 2018. FOP 129 presented this offer to the membership at a meeting held at UMBC police headquarters on July 11, 2018. Pursuant to FOP 129 bylaws, a ratification vote was held. FOP 129 states that a majority of the union membership rejected the UMBC offer. On July 27, 2018, FOP 129 informed UMBC by letter that its best and final offer on wages had been rejected, and that unless UMBC intended to offer additional wage proposals, the parties had reached impasse, and FOP 129 intended to seek a fact finder. In a letter dated August 20, 2018, UMBC indicated that it agreed that the parties were at an impasse regarding wages. Further, FOP 129 alleges that in its August 20, 2018 letter, UMBC states it would “unilaterally and immediately, implement its best and final wage proposal as well as the four tentative agreements from the April 20, 2018 meeting.” (Complaint, p. 5). FOP 129 alleges that subsequent to this letter, UMBC implemented its best and final wage proposal, “including but not limited to, adjusting pay rates for all members of the unit, and increasing parking fees.” (Complaint, p. 5).

FOP 129 states that based on the exchanges between the parties, and the ultimate implementation of its best and final wage offer, UMBC has refused to bargain in good faith in violation State Personnel & Pensions Article §3-306(a)(8), noting that wages are matters to be negotiated between parties based on State Personnel & Pensions Article §3-502(a). Further, FOP 129 alleges that UMBC’s actions also constitute a violation of State Personnel & Pensions Article §3-501(c)(3), interference with the right of an exclusive bargaining representative to seek fact finding. As relief for these two alleged violations, FOP 129 requests that the SHELRB declare that UMBC engaged in the unfair labor practices alleged and order such further actions as the SHELRB may require.

In support of its allegations, FOP 129 also submits the following documentation: (1) MOU between FOP 129 and UMBC, October 27, 2012 through October 26, 2015; (2) UMBC and FOP 129 “Tentative Agreements”, May 14, 2018; (3) July 2, 2018 letter from UMBC labor counsel to FOP 129 labor counsel; (4) July 27, 2018 letter from FOP 129 labor counsel to UMBC labor counsel; (5) August 20, 2018 letter from UMBC labor counsel to FOP 129 labor counsel.

Respondents’ Position/Information

UMBC contends that the FOP 129 complaint should be dismissed because it lacks merit. UMBC argues that there is one issue—wages—remaining on the table, both parties agree that they are at impasse on that topic, and established labor law dictates that when parties are at impasse, the employer may put in place all or part of any final proposal. UMBC recognizes that FOP 129 has indicated the intent to seek fact finding; however, UMBC notes that the State Personnel & Pensions Article at §3-501(c)(3) gives a particular timeline over which fact-finding and reporting must occur. While FOP 129 indicated its desire for fact-finding in advance of the close of the various deadlines, one of which is that if the parties haven’t concluded negotiations by October 25 either party may request a fact finder, UMBC argues that FOP 129 failed to take action to advance the process, such that a factfinder wasn’t employed (by November 1, based on State Personnel & Pensions Article

§3-501(c)(3)(i)), and would likely not be able to issue a report and recommendations prior to the end of the timeline, November 20.

Further, UMBC argues that the bargaining history between the parties indicates a general lack of good faith bargaining on the part of FOP 129. UMBC notes that the parties have continued to extend a contract that expired on October 26, 2015, the last extension concluding on June 30, 2018. While the parties began negotiating for a new MOU shortly after the 2015 expiration date, UMBC argues that it took more than two years for the negotiating committees to reach a tentative successor agreement, and even then it was an agreement that the FOP 129 members ultimately rejected. UMBC argues that FOP 129 has further shown a lack of good faith bargaining, by signing off on a tentative agreement that it “‘suspected’ from the outset would not be ratified” by its members. (Response, p. 2).

In its response to the ULP filing, UMBC gives a timeline of negotiations after both parties were represented by council, which provides the same meeting and tentative agreement information as does the complaint. UMBC however, emphasizes that at the close of the last portion of negotiations, when it was clear that the parties would not come to an agreement over wages, FOP 129 “conditioned further bargaining” upon UMBC changing its position on wages. (Response, p. 3) UMBC argues that it had already made clear that its position on wages was its best offer, and at that point, the parties were at impasse and it was proper that UMBC implement all the tentative agreements, as well as its final position on those matters that were at impasse.

Regarding the implementation of offers on which the parties are at impasse, UMBC argues that although there is no Maryland or SHELRB case law on point, the SHELRB has had a history of taking guidance from National Labor Relations Board (NLRB) in other SHELRB matters. Specifically, UMBC states that *University of Maryland College Park, SHELRB Case No. ULP 2014-04 (September 2, 2015)* cites and relies on NLRB cases regarding an employer’s duty to provide a union with information. (Response, p. 4). To that end, UMBC provides federal and NLRB case law supporting that when an impasse in bargaining is reached, an employer may put in place all or part of its proposals given in negotiations, as long as those proposals were given at the bargaining table and discussed with the union.

UMBC also notes the passage of a new State Personnel & Pensions Article provision, enacted and effective October 1, 2018, prohibiting implementation of last and best offers at impasse by stating that terms of an MOU must “continue in force and effect without change until a successor memorandum of understanding is agreed to and ratified.” (Response, p. 4). UMBC argues that this provision would not have applied to the parties actions in August 2018, when UMBC implemented its final offer. Further, UMBC notes that the parties agreed that they were at impasse in July 2018, before UMBC implemented its final offer.

Based on the combination of what UMBC alleges was FOP 129’s bad faith bargaining, the presence of an agreed upon impasse and what UMBC argues was lawful implementation of its best and final offer, and the failure of FOP 129 to meet statutory timelines regarding fact-finding and reporting, UMBC argues that the complaint lacks merit and should be

dismissed with prejudice.

Petitioner's Reply

FOP 129 argues that the UMBC response serves as a motion to dismiss and a motion to reject fact-finding, that it should be denied by the SHELRB, and that the SHELRB should order the parties to proceed with employing a fact-finder. FOP 129 reiterates that the parties to this matter met and bargained for a successor agreement to the one that expired on October 26, 2018. The union indicates that the parties were unsuccessful at coming to agreement on all terms, and argues that the parties agree that they are at impasse on the wage issue.

As to UMBC's contention that FOP 129 has bargained in bad faith, the union argues that this claim is unsupported by the university. FOP 129 argues that a union is not obligated to ratify tentative agreements, and that UMBC has presented no evidence of any member of the union's bargaining team acting in bad faith. Further, FOP 129 argues that the FOP counsel and members reminded UMBC, before it had employed counsel that it (FOP 129) did not believe the contract could pass and would not recommend it to the membership. FOP 129 argues that UMBC had the opportunity to take issue with the union's conduct before the December 2017 ratification vote, but did not do so.

FOP 129 argues that, disregarding the factual disputes, UMBC's motion to dismiss should only be granted where there is no "judicable controversy." (reply, p. 3). FOP 129 argues that the Federal laws and standards that UMBC notes, should not be applied as there are "critical differences" between Federal and State Law, which show that allowance of an employer to implement its proposals in the event of impasse would prevent the parties from negotiating or conducting "meaningful fact finding" during impasse (reply, p. 3). Further, the union argues that the new provision of the collective bargaining law does not permit the university to implement its proposals at impasse. Regarding the application of federal case law to this case matter, FOP 129 argues, referencing the SHELRB and federal court decision cited by UMBC, that these decisions indicate that federal cases are instructive and not binding. FOP 129 also provides additional case law supporting the instructive nature of federal decisions. Moreover, FOP 129 argues that since there are distinct differences in the federal allowances regarding impasse, and the impasse provisions contained in the Maryland collective bargaining law, federal case law should not be applied to determine the outcome in this situation. If federal standards were applied, argues FOP 129, there would be no incentive for management to avoid impasse. Finally, FOP 129 argues that even if federal standards are applied, UMBC would still be required under those standards to give adequate notice of its intent to implement its last and best offer, and in this case, FOP 129 argues that UMBC implemented its last and best offer immediately upon declaring impasse.

Regarding UMBC's argument that the union was untimely in its request for fact-finding, FOP 129 states that it notified the SHELRB pursuant to COMAR 14.30.10.01, but that the Collective Bargaining law is silent about who is required to proceed with "selecting, employing and presenting" the fact finder. (Reply, p. 4) FOP 129 notes that the SHELRB must move the parties forward in an impasse—that the Executive Director is notified, must

verify the parties are at impasse, and may suggest voluntary mediation.² Further, the union argues that the timelines in the Collective Bargaining Law are relative to the next fiscal year, not the current fiscal year. Thus, FOP 129 argues that the law requires the parties to request impasse by October 25, and conclude negotiations before January 1, for any item requiring appropriation of funds for the following fiscal year, beginning July 1. Using this interpretation, and, FOP argues, since the parties have not set forth a contract date in any of their proposals, the union argues that it is within an appropriate time table for requesting fact finding, and suggests that the parties can and should be proceeding to fact finding with the assistance of the SHELRB.

Respondent's Supplemental Response

UMBC sent an additional response on December 12, 2018. As a procedural matter, UMBC does not agree that its initial response should be considered a motion to dismiss, and thus argues that FOP 129 is incorrect in its contention that this matter may only be dismissed if "there is no justiciable controversy." (Supplemental response, p. 1) UMBC notes that this is not a court proceeding, and the high bar for dismissal does not apply.

UMBC argues that there is no statute or regulation to support the union's argument that implementing last and best offers after reaching impasse was not available to a higher education employer prior to October 1, 2018. Further, UMBC argues that the procedures to be followed at impasse under Maryland's Collective Bargaining law are not, as FOP 129 argues, distinctly different from the procedures under the National Labor Relations Act (NLRA). Under both laws, the procedures under impasse are voluntary, and while implementation post-impasse has existed for many decades under the NLRA, Maryland's Collective Bargaining Law and the SHELRB COMAR regulations are silent on the subject. UMBC questions why the regulations failed to mention the concept of immediate implementation of last offers at impasse, if it is unavailable to employers. Further, UMBC disputes the union's argument that since employees are prohibited to strike, that employers are prohibited to implement last offers at impasse. UMBC argues that the corresponding prohibition to the no strike provisions, is that the employer may not lock out its employees. Implementation at impasse is separate matter.

UMBC reiterates that the change to the Collective Bargaining Law effective October 1, 2018, that MOUs shall continue in force and effect without change until a new MOU is agreed to, does not apply here, as the bargaining and changing of language and impasse agreement occurred before the new law went into effect.

UMBC disputes FOP 129's argument that an employer must first give notice of its intention to implement last and best offers at impasse and give the union the opportunity to respond. UMBC provides federal case law under the NLRA, where an employer's ULP violation was upheld because the parties were not at impasse when the employer enacted its last and best offer. In the instant case, UMBC argues that it and FOP 129 were at impasse on

² FOP 129 did file an impasse request, and the SHELRB Executive Director did appropriately, with Board oversight, determine there was impasse, and suggested voluntary mediation per COMAR 14.30.10.04. This information was provided to the parties on December 10, 2018.

the agreement of both parties, so implementation was appropriate. Further, UMBC argues, this implementation is appropriate because the state of being at impasse may change quickly based on a change in bargaining position from either party. UMBC notes that the NLRB has found employers to be in compliance with the NLRA when a valid impasse existed and the employer implemented its last and best offer. UMBC provides NLRB case law to support its contention in this area.

Finally, UMBC disputes FOP 129's interpretation of the timeframes prescribed by §3-501(c)(3) of the Collective Bargaining Law, and that its filing is untimely. UMBC argues in favor of the application of all dates in §501(c)(3), and that since fact-finding and reports to the legislature were not concluded by December 1, there is no reason for the SHELRB to now order fact-finding that would trigger a report and request for state funds.

Analysis

COMAR §14.30.07.04F – G authorizes various actions undertaken by the Executive Director regarding unfair labor practices filed before the SHELRB. Under these sections, the Executive Director shall, subject to SHELRB review, consider properly filed complaints, and investigate the facts. Further, the Executive Director should recommend SHELRB dismissal of the matter if a petitioner fails to state an actionable claim under State Personnel & Pensions Article §§3-101 through 3—602, or appropriate COMAR regulations; or determines that the SHELRB has no jurisdiction over the claims presented. This matter was properly filed as an allegation of violations of various sections of the State Personnel & Pensions Article, with appropriate service to the respondent, and FOP 129 has alleged that these violations of statutory provisions have been committed by a public higher education employer over which the SHELRB has jurisdiction. As to an investigation of the facts, it seems FOP 129 and UMBC allege opposing positions on the conduct of the parties during negotiations, the appropriateness of UMBC implementing its last offer upon impasse, the application of federal law and standards to the determination of outcome, and the timeliness of this charge.


COMAR 14.30.07.04G authorizes the Executive Director to set forth a written report as to whether probable cause exists to believe that the unfair labor practice has occurred. In this matter, FOP 129 alleges that, based on actions and communication between the parties, and an appropriately presented position regarding statutory and regulatory application, an unfair labor practice has occurred.

FOP 129 has sufficient probable cause to allege an unfair labor practice—the fact that UMBC has raised factual and legal defenses, presented different statutory interpretations, or disputed FOP 129's claims, does not in and of itself indicate a lack of probable cause. The complaint filed by FOP 129, as well as its further filings, and the answer, request for dismissal and further response given by UMBC, would be appropriate for the full Board to consider.

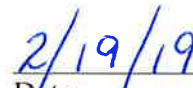
Recommendation

Based on the evaluation of the evidence gathered during the course of this investigation, and discussed in the above analysis, the Executive Director finds and recommends that FOP 129 has appropriately filed an unfair labor practice violation before the SHELRB, and that probable cause exists such that the alleged violation should move forward for review. Further, the Executive Director recommends that this matter should be addressed in a hearing before the SHELRB or through a delegation to the Office of Administrative Hearings in a manner and scope that the SHELRB deems appropriate.

Pursuant to SLRB Regulations at COMAR §14.30.05.02G - H, this report will be sent to the full membership of the SLRB as well as to the parties. Any party aggrieved by the Executive Director's Report and Recommended Determinations is permitted to request reconsideration by the full board **no later than fifteen days** after the issuance of this report.



Erica L. Snipes, Executive Director
State Higher Education Labor Relations Board



Date