

**State of Maryland**  
*State Higher Education Labor Relations Board*

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In the matter of:	)	
<i>American Federation of State, County,</i>	)	
<i>and Municipal Employees,</i>	)	
<i>Council 3,</i>	)	
	)	
	)	
Petitioner	)	
	)	SHELRB ULP 2019-04
v.	)	
	)	
<i>Baltimore City Community College,</i>	)	
<i>Michelle Williams, Director,</i>	)	
<i>Human Resources,</i>	)	
	)	
Respondent	)	
_____	)	

Executive Director’s Investigative Report & Recommended Determinations

On June 7, 2019, the American Federation of State, County & Municipal Employees, Council 3 (“AFSCME Council 3”) filed this Unfair Labor Practice (“ULP”) matter against Baltimore City Community College (“BCCC”) and its Director of Human Resources, Michelle Williams (“Williams”). 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 July 2, 2019, BCCC filed a response to this ULP, stating that the college had not committed a ULP and requesting that this matter be dismissed. On July 8, 2019, AFSCME Council 3 filed a written request with the Executive Director of the SHELRB, asking permission to file a response to BCCC’s submission. The Executive Director allowed for the response, with a due date of July 22, 2019. AFSCME Council 3 filed a position paper with attached exhibits responding to BCCC’s response submission on July 22, 2019. On July 31, 2019, BCCC requested the opportunity to reply to AFSCME Council 3’s July 22, 2019 submission. On August 9, 2019, BCCC submitted its reply, should the Executive Director permit it to be included in the SHELRB record for this matter. The Executive Director responded to both parties on August 9, 2019, indicating that she had received the reply from BCCC, and would address allowance of that reply in due course as the materials in the matter were reviewed. At this time, the date of this report, the Executive Director will view and consider the BCCC reply submitted on August 9, 2019.

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

- AFSCME Council 3, and Local 1870, are certified as the Exclusive Bargaining Representative for three units of BCCC employees—nonexempt, exempt, and sworn police officers.

- BCCC and AFSCME Council 3 have negotiated agreements on wages, hours, and working conditions of unit employees based on the requirements of §3-502 of the State Personnel & Pensions Article.

- In previous agreements between BCCC and AFSCME Council 3, employees have been scheduled to be at the college for eight and a half hours, during which eight hours are for work, and one half-hour is for lunch.

- In a Memorandum issued on May 21, 2019 by Michelle Williams, Director of Human Resources, wrote “Effective June 4, 2019, all employees will be expected to work...8:00 a.m. to 5:00 p.m., with a one hour lunch break, Monday through Friday.” The Memorandum went on to note that this schedule would be for all full time PIN and contractual employees.

- AFSCME Council 3 requested that this change not be implemented, and requested bargaining over the change.

- BCCC did not agree to bargain over the change, and implemented it on June 20, 2019.

### Disputed Items

The general facts are not in dispute in this matter, aside from the date of implementation of Williams’ memo. AFSCME Council 3’s charge indicates a June 4, 2019 implementation date, while BCCC provides information indicating the implementation date was revised to June 20, 2019. The overarching issue, however, is the application of the Collective Bargaining Law to the change in schedule implemented by BCCC.

### Petitioner’s Position/Information

AFSCME Council 3 argues that BCCC's conduct in implementing the schedule change described in the largely undisputed facts above, and refusing to bargain with AFSCME Council 3 over that change, is in violation of the duty to bargain in good faith under State Personnel & Pensions Article §3-306. AFSCME Council 3 also offers U.S. Supreme Court and Maryland State Labor Relations Board case precedent to support its arguments that BCCC has failed to bargain in good faith. As remedy, AFSCME Council 3 requests that the SHELRB fully and fairly investigate this matter, that the SHELRB order BCCC to rescind the change to the employee schedule, that the SHELRB order BCCC to cease and desist from such unfair labor practices, and that the SHELRB order any additional relief as the cause may require.

### Respondents' Position/Information

BCCC argues that both State law and the Collective Bargaining agreements between the parties allow the college the unilateral right to set operating hours and employees' schedules, so long as lunch is between thirty and sixty minutes long, and BCCC provides three weeks' advance notice of the changes. These last two points—length of lunch period and notice provided to the bargaining representative, are taken from language in the Memorandum of Understanding (“MOU”)<sup>1</sup> between BCCC and AFSCME Council 3. In its response to the ULP charge, BCCC notes that Articles 8 and 13 of the MOU address the right of BCCC to “determine the hours of operation and schedules [sic] tours of duty” (Article 8) and note the recognized operating hours of the college—8:00 a.m. through 5:00 p.m. (Article 13). BCCC also notes, per Article 13 of the MOU, that nothing contained in that article limits the authority of the college to determine office hours at any level (division or individual) so long as those hours are necessary based on the office/division needs or the business needs of the college.

BCCC provides meeting dates between BCCC President and the AFSCME Council 3 leadership, in which the parties spoke about BCCC employees having inconsistent hours, and discussed certain customer oriented offices at BCCC opening late and closing early, which at times forced those employees who did maintain consistent schedules to ensure proper continued work operations. BCCC argues that both AFSCME Council 13 and BCCC representatives agreed that these employee hour inconsistencies were a problem and reflected poorly on BCCC. BCCC argues that Williams' memo was issued in light of these concerns and conversations shared between AFSCME Council 3 leadership and the college representatives. BCCC notes that the memo was issued with an original effective date of June 4, 2019, but that AFSCME Council 3 notified BCCC that the notice was deficient—that BCCC did not send a separate notice of the schedule change to the union and that BCCC had provided only two weeks' notice of the change. BCCC subsequently amended the effective date of implementing the change to June 20, 2019. BCCC acknowledges receiving AFSCME Council 3's request for bargaining over the schedule change; however, BCCC declined to bargain over the change because it argues that unilateral schedule changes are a

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<sup>1</sup> BCCC provides language from both its Nonexempt and Exempt Unit MOU, noting the article numbers and subject area are the same in both units' MOU.

“privileged right” of the college under the State Personnel & Pensions Article and under the MOU between the parties. BCCC cites SPP §3-302(1)(i) as listing “determine...tours of duty” as a State right. BCCC notes that language of this particular State right provision is also included in Article 8 of the parties’ MOU, detailing Management rights, including determining hours of operation and scheduled tours of duty. Further, BCCC maintains that the schedule change complies with the MOU because the 8:00 a.m. through 5:00 p.m. schedule is recognized as the standard operating day in the MOU, the MOU provides for a one hour lunch break (without a requirement that the break be spent at the college).

Finally, BCCC argues that the schedule change helps to fulfill the mission of the college. In order to serve its students and the greater Baltimore community, BCCC argues that its offices must maintain consistent hours. BCCC notes the conversations held between AFCME Council 3 leadership and college leadership and bargaining representatives, in which both parties agreed that the lack of consistent hours, particularly in customer oriented offices, reflected poorly on BCCC.

BCCC argues that it was not obligated to bargain with AFSCME Council 3 over the changes to the employee schedule because such changes are a State right under SPP §3-302, the specific changes made satisfied the requirements of the parties’ MOU, and the change of the schedule was a matter that fell under the mission of the college. Given these points, BCCC requests that AFSCME Council 3’s ULP charge be dismissed.

### Petitioner’s Reply

AFSCME Counsel 3 replied to BCCC’s response on July 22, 2019. In its’ reply, AFSCME Counsel 3 reiterates the recognized AFSCME Council 3 representation of particular employees at BCCC, and thus the collective bargaining relationship between the college and the union. AFSCME Council 3 also acknowledges that the parties to this matter have bargained multiple agreements and are currently working under an agreement, expiring in June of 2019, but continuing in effect because a successor agreement has not yet been reached. AFSCME Council 3 reiterates that SPP §3-502 requires that the parties bargain over wages, hours, and working conditions (emphasis added by AFSCME Council 3), and notes that the current MOU similarly references that bargaining is required regarding “wages, hours, and other terms and conditions of employment for all permanent and probationary full-time and regular part-time employees.” (MOU, emphasis added by AFSCME Council 3). AFSCME Counsel 3 provides language from Article 4 of the MOU, stating that the College is to provide the Union with notice regarding any change in practice or of a new policy no later than thirty days of a change to wages, hours, or other terms/conditions of employment. Article 4 goes on to note that the Union may subsequently submit proposals in response to the upcoming change, and that the College is to negotiate with the Union about the change.

AFSCME Council 3 argues that BCCC’s points about the right to determine “hours of its operation and schedule tours of duty” (Exhibits F & G, and Article 8) are separate and not the same thing as working hours of employees. Specifically, AFSCME Council 3 argues that hours of operation are when the College is open to provide various services, whereas hours of work are when staff are scheduled to provide services. AFSCME Council 3 states that it and

BCCC both recognize that the hours of operation mean that all BCCC offices should be covered between 8:00 a.m. and 5:00 p.m.. AFSCME Council 3 argues that within the hours of operation, departments at BCCC have long held the flexibility to schedule employee work hours based on the need of that particular department and its employees. AFSCME Council 3 argues that the MOU between the parties specifically details the right of the various departments to allow flexibility, adjustment, modifications, and changes regarding employee work schedules as appropriate. As examples of this flexibility, AFSCME Council 3 notes that some employees take half-hour lunches, with a total work day of eight and a half hours, whereas others take an hour for lunch and have a nine hour work day. Also, arrival and leaving times are staggered among employees. AFSCME Council 3 maintains that employees have scheduled child care and transportation and other life needs based on the flexibility of scheduling. The Union argues that with this change, BCCC has ended all flexibility and any arrangements and agreements that support flexibility of scheduling and that forcing an 8:00 a.m. through 5:00 p.m. with one hour lunch break on employees will compel nine hour days.

AFSCME Council 3 noted the immediate outcry from employees who were upset about this change, and stated that BCCC, when challenged about the change, stated through an e-mail exchange from Williams, that BCCC's leaders had the right to change the schedule of employees as the MOU states, and that the college would not bargain over this issue. Aside from its arguments against the schedule change in and of itself, AFSCME Council 3 argues against the timing of the change and that it happened during contract negotiations. The Union argues, providing National Labor Relations Board (NLRB) case law in support, that during contract negotiations, an employer may not make unilateral changes to bargaining unit employees' terms and conditions of employment without bargaining to the level of impasse. AFSCME Council 3 also provides a Maryland State Labor Relations Board case to support its arguments—in *AFSCME MD v. Calvert County Department of Social Services*, the State Labor Relations Board held that the Department of Social Services violated the State Personnel & Pension Article when it implemented a change to its flex time policy without giving AFSCME notice of the proposed change. Further, AFSCME Council 3 notes a history of BCCC acting in bad faith, citing SHELRB ULP 2014-02, in which the SHELRB held that BCCC acted in bad faith by failing to provide the Union information it needed for bargaining.

Regarding the case precedent cited by BCCC in support of its arguments in response to this ULP matter, AFSCME Council 3 provides arguments to counter BCCC's position. AFSCME Council 3 continues to differentiate employee work hours from hours of operation and tours of duty used by the College, and provides case precedent which indicates that despite the argument supporting an employer's right to determine hours of operation and tours of duty, employees have not given up their right to bargain over hours of work. Finally, AFSCME Council 3 states that BCCC's argument that changes that pertain to the mission of the college may be made as BCCC deems fit, is wrong, because negotiating employee hours of work is an obligation given by law, by MOU, and by common practice and association between these parties.

## Respondent's Supplemental Response

BCCC's Supplemental Response was submitted on August 9, 2019, and per the statement earlier in this report, it will be considered as part of the record submitted in this matter. In this response, BCCC again maintains its argument that a tour of duty means an employee's daily start and quit times. BCCC argues that to use any other meaning for tour of duty would run counter to the State Personnel & Pensions Article at §3-302(1)(i), which determines "tour of duty" to be a State right.

BCCC argues that the MOU between the parties provides for unilateral schedule changes made by the College with appropriate notice to the union, and does not require bargaining about schedule changes. BCCC acknowledges its initially inadequate notice given to the Union about this change, and notes that it corrected the mistake. Further, BCCC notes that in the language of both the nonexempt unit MOU and the exempt unit MOU, lunches of one half hour and one hour are both anticipated, and for the exempt unit in particular, the MOU states that BCCC can change lunch breaks based on the business needs of the College.

## 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 AFSCME Council 3 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 AFSCME Council 3 and BCCC have taken opposing positions on the conduct of the college based on applicability of certain sections of the State Personnel & Pension Article. Regarding the reference and application of the current MOU between the parties, I note that the SHELRB does not have jurisdiction to adjudicate actions alleged to be permitted by or in violation of an MOU between parties. Therefore my analysis and recommendation to the SHELRB only references the allegations of violations of the State Personnel & Pensions Article and appropriate SHELRB regulations.


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, AFSCME Council 3 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.

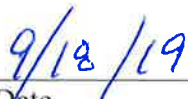
AFSCME Council 3 has sufficient probable cause to allege an unfair labor practice—the fact that BCCG has raised factual and legal defenses, presented different statutory interpretations, or disputed AFSCME Council 3’s claims, does not in and of itself indicate a lack of probable cause. The complaint filed by AFSCME Council 3, and all subsequent filings by AFSCME Council 3 and BCCC in this matter, 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 AFSCME Council 3 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