

State of Maryland
State Higher Education Labor Relations Board

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In the matter of:)	
<i>Maryland Classified Employees</i>)	
<i>Association, Inc.,</i>)	
)	
)	
Petitioner)	
)	SHELRB ULP 2019-05
v.)	
)	
<i>Salisbury University,</i>)	
)	
Respondent)	
_____)	

Executive Director’s Investigative Report & Recommended Determinations

On June 27, 2019, the Maryland Classified Employees Association, Inc. (“MCEA”) filed this Unfair Labor Practice (“ULP”) matter against Salisbury University (“SU”). This ULP was filed pursuant to State Higher Education Labor Relations Board (“SHELRB,” “Board”) 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 23, 2019, SU filed a response to this ULP, denying that the University has taken any actions that constitute an unfair labor practice, and arguing that MCEA’s Complaint does not state a claim upon which the Board may grant relief. SU asks that the SHELRB find that either SU did not commit an unfair labor practice, or that the union does not state a claim upon which the Board may grant relief.

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 investigating this matter per these COMAR requirements, I hereby recommend to the full membership of the SHELRB that this matter should move forward for further Board review and decision. This recommendation is discussed more particularly in the Analysis and Recommendation section at the close of this Report.

Undisputed Facts

- MCEA serves as the bargaining representative for the Nonexempt unit of employees at SU.

- Karen Penuel and Dawn Carey are members of the Nonexempt bargaining unit, and serve on the MCEA negotiating team. Additionally, Ms. Penuel serves as President of MCEA's Chapter at SU.
- There was an e-mail exchange between Ms. Carey and Barri Zimmerman (budget officer), and a reply from Ms. Zimmerman (who copied Tony Pasquariello, Associate Vice President for Administration and Finance on the reply) on March 19, 2019.
- There was another e-mail exchange between Ms. Penuel and Ms. Barton (budget analyst) and reply from Marvin Pyles, Vice President of Administration and Finance, who copied various University Officials on his response, including the Provost, a College Dean, staff and leadership from Human Resources, as well as Ms. Penuel's and Ms. Carey's supervisors. This e-mail exchange happened on March 29, 2019.

Disputed Items

- Whether copying the e-mail responses to additional personnel constitutes a ULP.
- Whether there were factual errors in Pyles's response to the e-mail from Penuel on March 29, 2019.
- Whether there has been an impact to Carey's and Penuel's participation in Collective Bargaining Activities after the March 29, 2019 email from Pyles was sent.

Petitioner's Position/Information

MCEA alleges that SU's conduct described in the petition is in violation of State Personnel & Pensions Article ("SPP") § 3-306(1) and (4) in that it interferes with, restrains, or coerces employees in exercising their rights under the SPP, and that it discriminates in hiring, tenure, or terms and conditions of employment in such a way as to discourage or encourage membership in a labor organization. MCEA provides an enumerated narrative of events surrounding inquiries made and electronic mail messages sent pertaining to two SU employees, Karen Penuel and Dawn Carey, who are members of the Nonexempt bargaining unit, and serve on the MCEA negotiating team. Additionally, Ms. Penuel serves as President of MCEA's Chapter at SU. In its narrative, MCEA alleges that on March 29, 2019, Marvin Pyles, SU Vice President of Administration and Finance, sent an e-mail message to Penuel and Carey in response to a question asked to Monica West, the University System of Maryland (USM) Director of the Office of Budget Analysis. West herself was not copied on the e-mail, but other SU officials were, including the Chairs of the SU Chemistry and Physics Departments, Provost Karen Olmstead, Dean Michael Scott, of the Henson School of Science and Technology, Tony Pasquariello, Associate Vice President for Administration and Finance, Budget Officer Elizabeth Zimmerman, Kevin Vedder, Associate Vice President of Human Resources, and Wendy Ringling, the Director of Human Resources Operations.

MCEA alleges that Pyles' e-mail message contained factual errors that questioned the work performance and ethics of Penuel and Carey, and made a veiled threat regarding their continued employment, and the e-mail message was copied to the Chairs of Carey's and Penuel's departments. MCEA provides documentation to support these allegations regarding the March 29, 2019 e-mail message.

As background, MCEA states that Carey had contacted University Budget Officer Barri Zimmerman by e-mail on March 19, 2019, regarding the questions asked of Ms. West, and included Tony Pasquariello (a recipient of the March 29, 2019 message) in that message. MCEA states that the questions from Carey were resolved less than two hours from sending the March 19 message. Further, MCEA provides that Penuel was in touch with Kathryn Barton, an executive administrative assistant with the USM Office of Budget Analysis regarding the relationship between USM and the universities. The inquiry made to Ms. Barton, MCEA alleges, was sent to Ms. West, and to Ms. Zimmerman, and subsequently to the SU Office of Administration and Finance. Neither Zimmerman nor Pasquariello responded to Penuel directly. Penuel's only response to her inquiry came through the message sent by Mr. Pyles described above.

MCEA alleges that in his e-mail message of March 29, 2019, Mr. Pyles "improperly conflated the inquiries made" by Penuel and Carey and used their inquiries as "an opportunity to question their work quality and quantity" and circulated that e-mail message to Penuel's and Carey's department chairs, their Dean, the University Provost, and to the heads of the SU Personnel Office. MCEA states that at the time when this message was circulated, both Penuel and Carey were at the bargaining table with SU, and that two of the individuals copied on the message were on SU's bargaining team. MCEA alleges that this e-mail message had a "chilling effect" on Penuel's and Carey's ability to participate fully in collective bargaining. *Quoted sections from p. 2 of MCEA's narrative within its' petition.*

MCEA further alleges that during this same time frame, Penuel and Carey were both involved with litigation, through the grievance process, concerning their classifications. MCEA argues that questioning the work (amount and degree) of these two employees while they are actively challenging their classifications, is both "threatening and retaliatory." (*p. 2, MCEA narrative attached to charge*) As of the filing date of MCEA's petition, the Circuit Court had awarded Penuel the reclassification she sought, and denied Carey's reclassification. Both matters have been appealed to and are pending at the Court of Special Appeals. (*p. 2, MCEA narrative attached to charge*)

In addition to allegedly questioning the work amount and quality of Penuel and Carey, MCEA also alleges that the e-mail message sent by Pyles, references the University budget process being something that employees "wouldn't know or even understand." As this message was copied to Penuel's and Carey's immediate supervisors, MCEA argues it is detrimental since both Penuel and Carey are responsible for maintaining the budgets of their own departments.

Finally, MCEA notes that Penuel and Carey have devoted a lot of time to representing the nonexempt employees at the bargaining table, and argues that public implication that

either of these employees has abused their responsibility to the bargaining unit, has a negative impact on their future participation in the collective bargaining process, and possibly an effect on the willingness of others to participate as well.

Based on its position, MCEA asks that the Board find SU to be in violation of State Personnel & Pensions Article (“SPP”) § 3-306, specifically subsections (1) and (4)—that SU has interfered with, restrained, or coerced employees in the exercise of their rights under title 3 of the State Personnel & Pensions Article, and that SU has discriminated in hiring, tenure, or any other term or condition of employment to encourage or discourage membership in an employee organization. As remedy, MCEA asks that the SHELRB order SU to cease and desist from its alleged intimidation and threatening of members of MCEA’s bargaining team, that SU be ordered to rescind its March 29, 2019 electronic mail—notice of which would be sent to all those who originally received the message. MCEA asks further remedy and relief as may be required by the nature of the complaint.

Respondents’ Position/Information

SU denies that it has taken any actions that are in violation of the collective bargaining laws. In its response to the MCEA petition, SU provides detailed information regarding the questions that were included in the e-mail messages MCEA referenced in its complaint. In particular, SU states that Ms. Carey sent an e-mail message to Budget Officer Barri Zimmerman (“Zimmerman”) on March 19, 2019, asking whether a salary increase for a PIN employee means the State makes an adjustment to the amount of money the university receives for the PIN. SU notes that Zimmerman responded less than an hour later, copying Tony Pasquariello, Associate Vice President for Administration and Finance (“Pasquariello”), and providing an answer to the question. Pasquariello responded as well, confirming Zimmerman’s answer and adding additional information. SU states that Carey send a secondary e-mail less than two hours later on the same morning with follow-up questions about funding and salary increases, to which Pasquariello provided responsive information.

SU states that on March 29, 2019, Ms. Penuel sent a similar e-mailed question to Katheryn Barton, Budget Analyst at the University System of Maryland (“USM”), asking if a PIN salary gets adjusted, does that get included into the amount that USM gives the University for the PIN in the next year(s). This message was sent to Monica West, Director of the Office of Budget Analysis, who forward it to Budget Officer Zimmerman. On the same date Marvin Pyles (“Pyles”), Vice President of Administration and Finance, sent a responsive message to Penuel, Carey, both of their supervisors, as well as the University Provost, the Dean of the Henson School of Science and Technology, Human Resources Operations leadership and staff members, as well as Pasquariello and Zimmerman. Pyles gave the same answers that had originally been given to Carey’s and Penuel’s original messages, as well as expressing concern that Penuel’s union activities were crossing over onto work time, and noting that a continuation of this would question the actual amount and degree of work time and responsibilities.

SU argues that these e-mail exchanges have not interfered with, restrained or coerced

Penuel and Carey in exercising their collective bargaining rights, and additionally that SU has not discriminated in hiring, tenure, or any other condition of Penuel's or Carey's employment so as to encourage or discourage union membership. SU notes that Pyles' e-mail message shows that he believed Penuel's and Carey's e-mail messages were related to the negotiations happening between MCEA and the University, and noted that Penuel and Carey sent those messages during their normal work hours (based on the time stamp of the messages). Knowing that Penuel and Carey were on the MSEA bargaining team, SU additionally argues that Pyle had every reason to believe these questions were related to collective bargaining and not to Penuel's and Carey's job responsibilities. Further, SU states that based on these e-mail exchanges, University Counsel notified MCEA representatives that by requesting certain financial information of the university, Penuel and Carey had violated a portion of the parties' ground rules, according to which, requests for collective-bargaining related information should be made by/to the chief negotiators of the appropriate party.

SU points out that the Memorandum of Understanding ("MOU") between the parties includes a rule that union members are allowed to participate in non-work activities (including union related activities) during breaks from work (lunch, for example) and during any official release time. SU provides a copy of the MOU for reference to this point, additionally noting that release time to work on union-related activity conducted within normal work hours, must be approved in advance by the Associate Vice President for Human Resources. SU states that neither Penuel or Carey had requested or been approved for release time for union related activity at the time they sent their e-mail messages, nor, based on the time stamp of the messages, were they on a break when they would have been permitted to participate in union activity.

SU notes various employer rights under SPP §3-302(1)(ii)—permitting the University to determine its own mission, budget, organization, numbers, types/grades of employment, work projects, tours of duty, methods, means, and personnel needed to conduct its operations. Further, SU argues, the University has the right to maintain and improve upon the efficiency/effectiveness of its work and operations. Relative to these rights, SU argues, the University controls and determines when its employees must be performing University work and thus not be involved in non-work-related matters at the same time. SU states that working on union-related activities when employees are supposed to be working for the University is not a protected right under Title 3 of the SPP. SU argues that nothing in Pyles's e-mail message is an interference with collective bargaining rights under Title 3 of the SPP, and the message was a reminder that Penuel and Carey should not be working on union-related matters when they are supposed to be working for the University and that budget questions are to be asked internally.

Regarding MCEA's allegation that Pyles copying his answer to Penuel's e-mail message to Human Resources leadership and staff has had a chilling effect on Penuel's and Carey's ability/willingness to participate in collective bargaining, SU argues that this statement is conclusory. SU states that MCEA does not explain how copying the message to Human Resources leadership and staff has affected Penuel's and Carey's ability/willingness to participate in collective bargaining activities. SU argues that MCEA's claim does not show

that Penuel or Carey have stopped or lowered their participation level in collective bargaining after Pyles copied the message. SU further argues that, based on affidavits of Human Resources staff, Penuel and Carey have continued to participate in collective bargaining.

Finally, SU notes that although MCEA has claimed their were factual errors in Pyles's e-mail, MCEA fails to explain what the factual errors were and how their existence interfered with, coerced, or restrained Penuel and Carey in exercising their collective bargaining rights, discriminated in hiring, tenure, or any term or condition of Penuel's or Carey's employment, or served to encourage or discourage membership in an employee organization. SU argues that no adverse employment action has been taken against Penuel or Carey, they have not been denied a position, disciplined, or been threatened with discipline. SU maintains that Penuel and Carey have been treated no differently than any other employee would be if the University believed they were spending time on non-work activities during work hours. For all these reasons, SU argues that it has not engaged in a ULP, and requests that the SHELRB dismiss MCEA's Petition.

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 MCEA 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 that largely the parties are in agreement about what has happened—two series of e-mail messages were sent out regarding Penuel's and Carey's budget questions, and the questions are whether copying certain staff (namely, Penuel's and Carey's supervisors, as well as leadership of the University) on the answers and follow up to those questions was in violation of the collective bargaining law in and of itself, and whether the sending of the e-mail served to impact Penuel's and Carey's participation in collective bargaining negotiations, or had an impact, generally, on collective bargaining participation among Salisbury University collective bargaining unit members. Penuel and Carey each allege, through my investigation of this matter, that the treatment they have received at the bargaining table after March 29, 2019, has been chilled, accusatory, improper irrelevant, and has made them feel less comfortable with university officials, less able to present materials at negotiations sessions, and less able to recruit and encourage other unit members to be active in union activities.

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, MCEA 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.

MCEA has sufficient probable cause to allege an unfair labor practice—the fact that SU has raised factual and legal defenses, presented different statutory interpretations, or disputed MCEA’s claims, does not in and of itself indicate a lack of probable cause. The complaint filed by MCEA and the response filed by SU in this matter, would be appropriate for the full Board to consider, however, only to the extent that the facts alleged have an impact on the collective bargaining related activities of Penuel and Carey. MCEA’s allegations of a decreased participation level in the bargaining unit, and specifically potentially less effective work of Penuel and Carey at the bargaining table (supported by Penuel & Carey through this investigation process) are allegations that merit further Board review because collective bargaining rights are allegedly being violated. However, the allegation that the message sent by Pyle was detrimental to their employment because it referenced understanding of University budgetary issues (when their jobs are partly to maintain the budgets for their departments) and was copied to their immediate supervisors, does not in and of itself note a collective bargaining right being violated. Therefore, per COMAR 14.30.07.04(F)(2)(a), I recommend that to the extent that MCEA alleges that copying the e-mail response to Penuel’s and Carey’s supervisors is an unfair labor practice, there is not an actionable claim under Maryland’s Collective Bargaining Law at SPP §§3-101—3-602.

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 MCEA has appropriately filed an unfair labor practice violation before the SHELRB, and that probable cause exists such that the alleged *collective bargaining related* violations 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