

State of Maryland
State Higher Education Labor Relations Board

In the matter of:)	
<i>American Federation of State, County,</i>)	
<i>and Municipal Employees,</i>)	
<i>Council 3,</i>)	
)	
)	
Petitioner)	
)	SHELRB ULP 2020-02
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 October 22, 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. After one permitted filing extension, BCCC filed a response to this ULP on November 21, 2019, stating that the ULP is without merit, BCCC has not acted in bad faith, and that AFSCME Council 3’s complaint should be dismissed. AFSCME Council 3 requested the opportunity to reply to BCCC’s response, which was granted by the Executive Director. AFSCME Council 3 filed its reply on December 17, 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. The details of this recommendation will be shared in the concluding portions of this report.

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.

- BCCC and ASFCME Council 3 are currently in negotiations to modify the agreements that expired on June 15, 2019. Part of the negotiations concern a wage proposal presented by AFSCME Council 3 on March 26, 2019, and a revised proposal presented by AFSCME Council 3 on August 30, 2019.

Disputed Items

The parties' relationship is not in dispute, nor is the existence of wage proposals offered by AFSCME Council 3 in the course of ongoing contract negotiations between the parties. The dispute lies in whether the response from BCCC to the wage proposals given by AFSCME Council 3 amounts to an unfair labor practice in violation of the State Personnel & Pension Article and applicable COMAR sections as well.

Petitioner's Position/Information

AFSCME Council 3 alleges that BCCC has refused to provide counteroffers to AFSCME Council 3's wage proposals or engage in "meaningful negotiations" (AFSCME Council 3 petition, page 2) over wages. As support for its allegations, AFSCME Council 3 presents the timeline of negotiations regarding this issue. AFSCME Council 3 notes that it offered BCCC a written wage proposal on March 26, 2019 and between March and August, the union and the college met multiple times, during which AFSCME Council 3 made presentations to BCCC which showed that the college had the funds for the proposal, and the discretion to offer enhancements to wages. AFSCME Council 3 states that it requested BCCC to make a counteroffer, but alleges that BCCC failed to do so. AFSCME Council 3 offered an amended wage proposal on August 30, 2019, but alleges that BCCC similarly rejected that proposal as well, with a written response, stating:

[T]he College is going through significant change with a new administration. Various areas within the College are being newly assessed. To the extent that the College determines pay increases would be appropriate, they will be implemented strategically, based on a thorough understanding of the College's current operations, financial condition, and strategic plans/goals.

(AFSCME Council 3 petition at p. 2) AFSCME Council 3 argues that this shows that if the

College offers future wage increases, it will be under BCCC terms only, as it pleases. AFSCME Council 3 argues that this response is not bargaining in good faith.

After this response from BCCC, AFSCME Council 3 states that it repeatedly asked BCCC to bargain over wages, and states that the college has refused. AFSCME Council 3 notes an e-mail sent from BCCC to AFSCME Council 3 stating that BCCC believed the wage issue to be settled. AFSCME Council 3 states that this is not the case, and that pointing simply to an administration change at the college, as BCCC has done, is not good faith bargaining. AFSCME Council 3 maintains that BCCC has not satisfied its obligation to bargain, and should be found in violation of State Personnel & Pension Article (“SPP”) §3-306 and COMAR 14.30.07.01. As remedy, AFSCME Council 3 asks that a full and fair investigation be undertaken, that BCCC be ordered to bargain over wages, that BCCC be ordered to cease and desist from engaging in unfair labor practices, and any other remedy that the cause may require.

Respondent’s Position/Information

BCCC argues that AFSCME Council 3’s complaint is meritless and that BCCC is not in violation of SPP §3-306 or COMAR 14.30.07.01. BCCC argues that the Union wants more money for the employees and that it accuses the college of bad faith bargaining, simply because BCCC is maintaining its position that wage increases are not possible nor warranted at this time. BCCC states that the college has a new President and is currently in the process of implementing a legislatively mandated realignment plan and is taking the position that it will not agree to a wage increase for any of its employees in a year where cost-of-living increases and a bonus have already been given to employees. BCCC argues that disagreement with AFSCME Council 3’s demands about wages is not bad faith bargaining constituting an unfair labor practice.

In its response to this complaint, BCCC notes that in 2017, the Maryland General Assembly passed realignment legislation due to BCCC facing significant deficits as compared with Maryland’s other community colleges. BCCC’s enrollment was declining and it had a low graduation rate compared with other community colleges in Maryland. BCCC states that it was ordered to fix certain areas or face defunding from the General Assembly. One of the tasks required was that BCCC hire a new President, which it did, and Dr. McCurdy began her tenure in the position on May 1, 2019. Despite taking measures per the Legislature’s mandates, BCCC states that it continued to meet with AFSCME Council 3 in negotiations—meeting for bargaining on nine dates between March 5, 2019, and August 30, 2019. BCCC states that over those dates, the parties discussed and came to agreement on multiple provisions of the new agreements. Regarding the wage proposal offered by AFSCME Council 3, BCCC maintains that it was not required to submit a counteroffer of a lower amount of a wage increase, and that maintaining the position that it would offer no wage increases at this time, was an appropriate response. Further, when AFSCME Council 3 requested BCCC to provide copies of its financial statements, BCCC states that the College did provide what AFSCME requested. However, when BCCC was again presented with a wage increase proposal by AFSCME Council 3, and BCCC maintained its position on wages, BCCC states that at that point AFSCME representatives “stormed out of the meeting, and

negotiations came to a standstill.” (response page 4)

BCCC states that it reached out to AFSCME Council 3 representatives less than a week after the Union representatives left the negotiations meeting to schedule another bargaining session. BCCC states that the Union’s response was that AFSCME Council 3 was considering its’ options since the college had “made it clear that you refuse to bargain over both mandatory and permissible subjects.” BCCC provides the e-mail correspondence in which this statement was made, with its response to the ULP complaint. BCCC states that later in September, 2019, it reached out to AFSCME Council 3 representatives in an effort to resolve a separate ULP (SHELRB ULP 2019-04) between the parties, pertaining to hours and BCCC’s decision to implement an 8-5 work schedule for regular full time employees and directing supervisors to no longer approve flexible schedules. BCCC argues that the Union responded that it would bargain over the hours issue, if BCCC would bargain over wages. BCCC maintains that it thought the parties had bargained over wages and that issue was resolved. BCCC states that AFSCME Council 3 threatened to file another ULP if BCCC did not agree to the Union’s demand. BCCC responded to AFSCME Council 3 by stating to the Union that BCCC would be willing to negotiate over the hours issue in good faith, but as for as the wages issue, BCCC believed that issue had been settled—that BCCC had reviewed AFSCME Council 3’s wage proposal and provided an explanation regarding BCCC’s decision not to accept it. BCCC noted to AFSCME Council 3 that once there is progress with the realignment and the circumstances at the college improve, the parties could reopen negotiations about wages. BCCC states that the responsive communication from AFSCME Council 3’s representative was that another ULP would soon be filed, which is the instant case.

BCCC reiterates its argument that it did not act in bad faith regarding wage negotiations. BCCC provides Maryland Court of Appeals decisions applying the National Labor Relations Act, 29 U.S.C. §§158(a)(5) and (b)(3), noting that the standard for good faith is subjective, applying to the totality of circumstances, not requiring that agreement be reached or concessions be made, but rather that a serious attempt be made to resolve differences and reach a common ground. BCCC notes that in the cases it cites, the court found good faith to be a subjectively measured concept, and based on the totality of the circumstances between the parties. BCCC argued that court found it important that the parties continued to meet to discuss the issue in dispute, and did not find it to be bad faith when the party in question stayed with a position that it sincerely held. BCCC compared its circumstances to those of the employer in the matters considered by the Court of Appeals. The parties met several times, BCCC did not refuse to provide information requested, and even though it was AFSCME Council 3 representatives who left negotiations meetings and refused to return to the bargaining table on a separate matter unless BCCC agreed to negotiate over wages, BCCC was still willing to reach out and set up negotiations sessions.

BCCC rejects AFSCME Council 3’s argument that by refusing to counteroffer the Union’s wage proposal with a wage increase of some lower amount, BCCC is refusing to bargain in good faith. BCCC states that courts across the country have also rejected this argument, and provides multiple examples. BCCC argues that the SHELRB should dismiss AFSCME Council 3’s Complaint.

Petitioner's Reply

AFSCME Council 3 replied to BCCC's response on December 17, 2019. In its' reply, AFSCME Council 3 reiterates its position that the parties are obligated to bargain over wages, hours, and working conditions under SPP § 3-502. AFSCME Council 3 also provides the language in the current agreements between itself and BCCC regarding wage rates, noting that the language also addresses the point of bonuses and salary reopeners. AFSCME Council 3 argues that BCCC is obligated to bargain by statutory law and by contract.

AFSCME Council 3 states that it commenced bargaining at an early point at BCCC— noting that it was beginning in March 2019 for a contract that would expire in June. The union states that it made its first proposal to include a flat rate increase of \$1500 for all employees for each successive fiscal year. The Union maintains that it explained its purpose and rationale to BCCC for this increase, but alleges that BCCC offered no meaningful response to AFSCME Council 3's proposals, with BCCC stating only orally that it had no interest in changing compensation for its employees.

AFSCME Council 3 states that for the negotiations sessions after March 2019, BCCC did not have as part of its bargaining team any person with knowledge of or with the power to engage in discussions about wages or other financial matters. Additionally, AFSCME Council 3 argues that BCCC provided nothing in writing in response to the Union's wage proposal. Further, AFSCME Council 3 argues that BCCC offered no discussion or comment on wage adjustments, the scope of any wage proposal, the basis for a wage adjustment, the means of making a wage adjustment, the timing of a wage adjustment, the funding source for any wage adjustment, or any other issue connected to wages. On August 30, 2019, AFSCME Council 3 lowered its proposal to seeking a \$1000 flat rate increase for all employees, and stated that at that time, BCCC declined to implement pay increases, citing the administration change and assessments happening at multiple areas on campus, as the reasoning behind wages not being adjusted at this time. AFSCME Council 3 again reiterated that it had come to understand that BCCC would not bargain with the union about wages and would determine any future wage adjustment on its own, unilaterally, without union input. Despite AFSCME Council 3's belief about the status of bargaining over wages, the union continued to request bargaining over wages, for which AFSCME Council 3 alleges it received a refusal from BCCC each time.

AFSCME Council 3 provides a list of NLRB cases in which the NLRB held that a refusal to discuss and compromise on wages and compensation is bad faith. AFSCME Council 3 provides parenthetical information for all of the cases it cites, indicating that the NLRB has held that willingness to meet and discuss the subject of wages is not enough, and that the parties must approach bargaining with an open mind and a desire to reach agreement. Additionally, the NLRB has held that obstructing or not providing information indicates a lack of desire to reach agreement. AFSCME Council 3 argues that the NLRB has in multiple decisions held that rigid positions from employers show bad faith bargaining and are in violation of the National Labor Relations Act. Finally, AFSCME Council 3 notes that while parties under the NLRA are not obligated to make concessions or give up on a position that is fairly maintained, the parties are obligated to go into bargaining with a serious intent and that

negotiations shouldn't become a sham. AFSCME Council 3 compares BCCC's alleged actions relative to bargaining about wages to the many instances where the NLRB has found bad faith bargaining. Based on its arguments and presentations of case law examples, AFSCME Council 3 asks that the Executive Director recommend that the Union has established probable cause in this matter and direct the matter for further Board action.

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 opposing positions on the conduct of the college based on applicability of certain sections of the State Personnel & Pension Article.

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 BCCC 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, due to the status of negotiations between the parties, the Board should consider this matter along with current ULP 2019-04 (concerning BCCC's implementation of a different workday schedule for employees, and directing various supervisors to not approve flexible schedules). Indeed based on communications between the parties, it appears that the subjects of negotiations

(hours and wages) have become linked and offered as a means of getting back to the table. For convenience to both the Board and the parties, these case matters should be considered in a consolidated fashion and 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 SHELRB Regulations at COMAR §14.30.05.02G - H, this report will be sent to the full membership of the SHELRB 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

1/2/2020
Date