

State of Maryland
State Higher Education Labor Relations Board

In the matter of:)	
Fraternal Order of Police, Lodge 129,)	
)	
)	
Certified Bargaining Representative,)	
)	SHELRB ULP 2019-01
and)	
)	
University of Maryland,)	
Baltimore County,)	
)	
State Employer.)	
)	

DECISION AND ORDER

I. DECISION
a. Procedural Background

On October 18, 2018, the Fraternal Order of Police, Lodge 129 (FOP) filed an Unfair Labor Practice (ULP) Complaint against the University of Maryland Baltimore County (UMBC) pursuant to State Higher Education Labor Relations Board (SHELRB) regulations, COMAR 14.30.07. On November 6, 2018, UMBC filed a response to the ULP, requesting dismissal with prejudice. FOP replied to UMBC’s Response on November 30, 2018.

Pursuant to SHELRB Regulations at COMAR §14.30.07.04F - G, the Executive Director investigated the allegations contained in FOP’s ULP Complaint. Following the investigation, the Executive Director concluded that probable cause existed and recommended that the Complaint should move forward for SHELRB review.

On October 17, 2019, a Pre-Hearing Conference was held before Harriet E. Cooperman, Vice Chair¹ of SHELRB. At the pre-hearing conference, the parties agreed that there were five legal issues (set forth herein in the “Issues” section) that may be dispositive of the case and the material facts pertaining to these issues were not in dispute. Accordingly, it was agreed that the parties would submit a stipulation of facts and legal briefs setting forth their respective legal arguments. SHELRB, thereafter, would hold a non-evidentiary hearing on these issues and permit the parties to present oral argument.

On February 12, 2020, a Hearing was held by SHELRB at UMBC.

¹ Since the time of this Pre-Hearing Conference, Governor Hogan appointed Ms. Cooperman as Chair of the SHELRB.

b. Stipulated Facts

Pursuant to SHELRB's Pre-Hearing Conference Report and Order, the parties submitted a Joint Statement of Stipulated Facts ("Stipulated Facts") relevant to the determination of the legal issues presented in this matter.

FOP is a labor organization within the meaning of Maryland Code Ann., State Personnel and Pensions Art. § 3-101(e). UMBC is an institution of higher education within the meaning of Maryland Code Ann., State Personnel and Pensions Art. § 3-101(g).

FOP is the certified labor representative for police officers at UMBC for the purposes of collective bargaining. At all relevant times, the bargaining unit has consisted of approximately fifteen (15) officers.

The parties were signatories to a Memorandum of Understanding ("MOU") which was effective from October 27, 2012 through October 26, 2015. After its expiration, the parties extended the MOU five separate times. As a result of these extensions, the MOU ultimately expired on June 30, 2018.

The parties commenced negotiations for a successor MOU in June 2016. Ultimately, the parties reached a comprehensive tentative agreement for a new MOU, subject to ratification by the bargaining unit members and approval by the University System of Maryland ("USM"). FOP's membership rejected the proposed agreement, and FOP informed UMBC by email that the membership failed to ratify the proposed agreement.

Both parties thereupon engaged legal counsel to serve as their respective chief negotiators and resumed negotiations on April 20, 2018. FOP's negotiator was Kieran Dowdy; UMBC was represented by Jay Krupin and Louis Cannon.

At the April 20, 2018 negotiating session, UMBC and FOP advanced written proposals. Among FOP's proposals was to replace the existing language in Article 6, Sections 1 and 2 of the parties' MOU with a "step" wage scale that was in place for the FOP's bargaining unit at the University of Maryland at Baltimore. Under this proposal, any merit increases provided would trigger a one step "advance" on the wage scale proposed by FOP. UMBC's position was that there should be no change in the MOU's existing language.

UMBC and FOP reached several tentative agreements at the April 20, 2018 bargaining session, and memorialized those agreements in a written document.

The parties had one more bargaining session on May 17, 2018, during which session the parties reached tentative agreement on all open items except wages.

At this negotiating session, UMBC proposed a modification to FOP's April 20, 2018 wage proposal, which provided that all officers would move to the wage scale set forth in FOP's April 20, 2018 proposal, but without any step or merit increase above what the State might provide. UMBC's offer was contingent on approval by the USM. At this session, FOP verbally offered a counter-proposal to UMBC's offer, accepting the structure of the proposal but adding a

COLA of four percent (4%), to be effective on July 1, 2019. UMBC agreed to present these proposals to USM.

UMBC presented the proposals to USM. USM, however, did not support either UMBC's proposal or FOP's counterproposal.

On June 7, 2018, Mr. Cannon called Mr. Dowdy to inform him that USM did not support FOP's wage proposal. During the call, Mr. Cannon presented a new wage proposal, which provided for six percent (6%) increase in the salaries of Master Police Officers ("MPOs"), and a twelve percent (12%) increase in the salaries of MPOs upon their achieving MPO status.

In a subsequent phone call, Mr. Dowdy conveyed to Mr. Cannon a counter-proposal of nine percent (9%) increase to all salaries, regardless of MPO status. Mr. Cannon responded that UMBC's June 7, 2018 proposal was its best and final offer on wages.

The above conversations were memorialized in a letter to Mr. Dowdy from Jay Krupin on July 2, 2018.

UMBC's best and final proposal was presented for ratification to FOP's membership, which rejected the proposal. In a letter dated July 27, 2018, Mr. Dowdy informed UMBC of the rejection and stated that FOP would be willing to meet in the event UMBC was willing to modify its wage proposal. Mr. Dowdy also stated that FOP would be pursuing fact-finding as provided in Maryland Code Ann., State Personnel and Pensions Art. § 3-501(c)(3).

On August 20, 2018, Mr. Krupin sent Mr. Dowdy a letter stating that UMBC remained firm on its final wage proposal and the parties were at a bargaining impasse. The letter further notified FOP that UMBC was implementing five (5) items that either had been either tentatively agreed upon by the parties or were contained in UMBC's final offer, including wage increases.

On August 23, 2018, UMBC sent a letter to all officers notifying them of the impasse and identifying those items it would immediately implement.

Both FOP and UMBC agreed that a bargaining impasse existed no later than August 2018, before UMBC implemented portions of its final proposal.

FOP filed a notification of impasse to SHELRB on October 18, 2018. FOP also filed this timely unfair labor practice on October 18, 2018.

c. Issues

In accordance with the agreement of counsel as set forth in the November 8, 2019 Pre-Hearing Report and Order, the legal issues to be determined are as follows:

- i. Is the 2018 amendment to SPP § 3-603(b), stating that "all terms of a memorandum of understanding shall continue in force and effect without change until a successor memorandum of understanding is agreed to and ratified," to be applied retroactively or prospectively?

- ii. Did UMBC have the right under the State Higher Education Labor Relations Act (SHELRA) to implement its last best offer once an impasse in negotiations had been reached?
- iii. Was UMBC required to delay implementation of its final offer until after the timeframe for the fact-finding process had expired?
- iv. Was FOP foreclosed from implementing the fact-finding process?
- v. If the fact-finding process cannot be completed within the prescribed time frame, is a party precluded from invoking fact-finding and/or is the other party relieved of any obligation to participate in fact-finding?

d. Analysis

1. Should the 2018 Amendment to SPP § 3-603(b) Be Applied Retroactively or Prospectively?

In 2018, the Maryland State Legislature amended SPP § 3-603 to provide that:

Notwithstanding § 3-601(b) of this subtitle, all terms of a memorandum of understanding shall continue in force and effect without change until a successor memorandum of understanding is agreed to and ratified.

Governor Hogan signed this legislation into law and it became effective on October 1, 2018. Acts 2018, c. 23, § 1, eff. Oct. 1, 2018; Acts 2018, c. 26, § 1, eff. Oct. 1, 2018. Prior to this amendment there was no statutory requirement that the terms of a memorandum of understanding remain in effect for any period of time following expiration of the agreement.

FOP argues that “[t]he 2018 amendments to the SHELRA should be applied retroactively....” In support of this argument, FOP asserts, “[i]n determining the retroactive effect of a law, Maryland follows a two-part analysis: ‘first a determination that the legislature clearly intended the statute to apply retroactively, and second, a determination that retroactive application does not ‘impair vested rights, deny due process, or violate the prohibition against ex post facto laws.’” FOP claims that “[i]t is clear that the legislature intended § 3-603 to be retroactively applied.... [UMBC was not] deprived of fair notice... [n]or did the enactment of §3-603 ‘severely impact future interests of vested rights of interested parties.’”

In contrast, UMBC asserts, “[t]he October 1, 2018, amendment to the statute establishes that implementation upon impasse was lawful in August 2018 and that the amendment to the law was prospective.... Moreover, there is no expression of intent in either the statute or the legislative history that the amendment should have any retroactive effect such that it would have prohibited... [UMBC]’s August 2018 implementation.”

In determining the retroactive effect of a statute, the Maryland Court of Appeals has

stated,

As a general rule, statutes are presumed to operate prospectively and are to be construed accordingly. The presumption against retrospectivity is rebutted only where there are clear expressions in the statute to the contrary. Moreover, even where permissible, retrospective application is not found except upon the plainest mandate in the legislation. The rationale underlying the general rule provides that retroactive application, which attempts to determine the legal significance of acts that occurred prior to the statute's effective date, increases the potential for interference with persons' substantive rights.²

(Citations omitted). *Washington County Suburban Com'n v. Riverdale Heights Volunteer Fire Co. Inc. et al*, 308 Md. 556 (Md. 1987).

Looking to the plain language of SPP § 3-603(b), there is no clear expression - either in the statute itself nor its legislative history - that this provision was intended to apply retrospectively. Moreover, the retrospective application of this provision would clearly infringe on UMBC's right, as discussed below, to impose its last best offer upon impasse – a right that is clearly substantive (and not merely procedural) in nature. We, therefore, find that the amendment to SPP § 3-603(b) is to be applied prospectively only.

Did UMBC have a Right to Implement its Final Offer Upon Impasse?

We now turn to the question of whether UMBC had the right under the SHELRA, as it existed in August 2018, to implement its last best offer once an impasse in negotiations had been declared.

SPP § 3-501(c) states:

(1) The parties shall make every reasonable effort to conclude negotiations in a timely manner for inclusion by the principal unit in its budget request to the Governor.

(2)(i) The parties shall conclude negotiations before January 1 for any item requiring an appropriation of funds for the fiscal year that begins on the following July 1. (ii) In the budget bill submitted to the General Assembly, the Governor shall include any amounts in the budgets of the principal units required to accommodate any additional cost resulting from the negotiations, including the actuarial impact of any legislative changes to any of the State pension or retirement systems that are required, as a result of the negotiations, for the fiscal year beginning the following July 1 if the legislative changes have been negotiated to become effective in that fiscal year.

² An exception to this rule of general applicability applies to “a statute governing procedure or remedy....” *Id.* At 564.

(3)(i) If the parties do not conclude negotiations for the next fiscal year before October 25, either party may request that a fact finder be employed to resolve the issues. (ii) The fact finder shall be employed no later than November 1. (iii) A fact finder shall be a neutral party appointed by alternate striking from a list by the parties provided: 1. by the Federal Mediation and Conciliation Service; or 2. under the Labor Arbitration Rules of the American Arbitration Association. (iv) The fact finder: 1. may give notice and hold hearings in accordance with the Administrative Procedure Act; 2. may administer oaths and take testimony and other evidence; 3. may issue subpoenas; and 4. before November 20, shall make written recommendations regarding wages, hours, and working conditions, and any other terms or conditions of employment that may be in dispute. (v) The written recommendations of the fact finder shall be delivered to the Governor, the exclusive representative, the President of the Senate, and the Speaker of the House of Delegates by the Secretary on or before December 1.

(Emphasis added).

FOP asserts that UMBC “does not have the right to implement its last best and final offer once impasse has been declared because it is bound by statutory impasse procedures....” In support of this argument, FOP contends, “[t]he statutory collective bargaining framework is the exclusive process for resolving impasse between the parties... [and that] Maryland’s SHELRA is clear when the parties are unable to reach an agreement, they may either retain the status quo or proceed to fact-finding.”

UMBC counters that, “[p]rior to October 1, 2018, no statutory authority prevented an employer from implementing upon impasse,” and that “the law in place at the time UMBC implemented elements of its final offer permitted such action by the University. This is made clear by the plain language of the statute, the legislative history, and by reference to the National Labor Relations Board [NLRB]... precedent interpreting the National Labor Relations Act [NLRA].” UMBC urges SHELRB to look to established NLRA precedent for guidance in resolving this issue.

In deciding ULP complaints, SHELRB has looked to and relied upon decisions of the NLRB. While these decisions are not binding, they are nevertheless instructive in evaluating complaints brought under the State Personnel and Pensions Article. *AFSCME Council 3 v. Pugh*, SHELRB ULP 2014-04 (Sept. 2, 2015). Similarly, Maryland court decisions analyzing unfair labor practice complaints, and more specifically, those dealing with a public employer’s duty to bargain in good faith, are equally instructive in resolving disputes brought under the SHELRA.

The NLRA like SHELRA, imposes a duty on employers to bargain in good faith with their employees’ union representative concerning wages, hours and terms and conditions of employment, which are considered “mandatory subjects of bargaining.” Employers are prohibited from making any unilateral changes in such terms without first bargaining with the union. *NLRB v. Katz*, 369 U.S. 736, 738 (1962). However, where the parties have engaged in good faith negotiations but are unable to reach an agreement, resulting in a *bona fide* impasse in

negotiations, the NLRB and courts have recognized that an employer is legally permitted to implement all or part of the last best offer it made to the union. *Id.*; *See In re Taft Broadcasting Co.*, 163 N.L.R.B. 475 (1967), *enfd. sub. nom. Television Artists, AFTRA v. NLRB*, 395 F. 2d 622 (D.C. Cir. 1968),

The Maryland Court of Appeals recognized and relied on this NLRB precedent in *Montgomery County Council of Supporting Services Employees, Inc. v. Board of Education of Montgomery County*, 277 Md. 343 (Md. 1976). There, the union representing non-certificated employees of Montgomery County Board of Education, alleged that the county school board committed a ULP under the collective bargaining provisions of the State Education Article when it implemented the final wage increase it had proposed in negotiations, but which the union rejected. Citing NLRA caselaw, the Court explained as follows:

Generally, the unilateral institution by an employer of a change in conditions of employment under negotiation constitutes bad faith. *Labor Board v. Katz*, 369 U. S. 736, 743, 82 S. Ct. 1107, 8 L.Ed.2d 230 (1962); [*355] *Labor Board v. Crompton Mills*, 337 U. S. 217, 223, 69 S. Ct. 960, 93 L. Ed. 1320 (1949). Such action is tantamount to a refusal to bargain since the bargaining process is, in effect, thereby abandoned. *See May Stores Co. v. Labor Board*, 326 U. S. 376, 385, 66 S. Ct. 203, 90 L. Ed. 145 (1945). It is not bad faith, however, to initiate a program already offered to the union once negotiations have reached an impasse. *Labor Board v. Crompton Mills, supra*, 337 U. S. at 224; Cox, *The Duty to Bargain in Good Faith, supra* at 1423.

The Court of Appeals, therefore, concluded that that the school board did not commit a ULP by implementing its final wage proposal after the parties had reached an impasse in their contract negotiations.

Here, it is undisputed that FOP and UMBC had reached an impasse on August 20, 2018 when UMBC announced that it would implement portions of its final offer. FOP, moreover, does not contend that UMBC acted in bad faith during the negotiations. As such, in accordance with above-cited Court of Appeals and NLRB precedent, we find that UMBC had the right to implement its last best offer once impasse had been reached.

Was UMBC Required to Delay Implementation of its Final Offer Pending Fact-Finding?

FOP asserts that UMBC was required to delay implementation of its final offer until after the fact-finding process had terminated. However, FOP offers no rationale in support of its position, other than the statute provides for a fact-finding process. We find that FOP's right to invoke the fact-finding process did not preclude UMBC from exercising its right to lawfully implement its last best and final offer without waiting for the fact-finding process to expire. Moreover, nothing barred the parties from proceeding with the fact-finding process after UMBC implemented its proposals.

The Remaining Issues Relating to the Fact-finding Process

In its July 27, 2018, letter to UMBC, FOP stated that it “intends to employ a fact finder as provided for in Md. State Personnel and Pensions Code, Ann., 3-501(c)(3)” if UMBC did not issue a counteroffer to its latest wage proposal. FOP, however, never followed through with its stated intent. In other words, while the fact-finding process was contemplated by FOP, it was never actually initiated by FOP.³ In fact, FOP not only failed to initiate the fact-finding process in 2018, but it also failed to initiate this process in 2019, which it could have done. Therefore, we need not address the remaining issues outlined above.

For the foregoing reasons, we dismiss the ULP complaint.

II. ORDER

IT IS HEREBY ORDERED THAT the ULP Complaint in SHELRB ULP 2019-01 is hereby dismissed.

BY ORDER OF THE HIGHER EDUCATION LABOR RELATIONS BOARD:



Harriet E. Cooperman, Chair

Annapolis, MD

August 31, 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.

³ FOP filed a notification of impasse with SHELRB on October 18, 2018. This notification did not invoke the fact-finding process. SPP § 3-501(c) in no way obligates SHELRB or its Executive Director to initiate, process, or even facilitate the fact-finding process between FOP and UMBC. Instead, it is the obligation of the parties to initiate and facilitate that process by mutually selecting a neutral party, through either the American Arbitration Association or Federal Mediation and Conciliation Service, and participating in the fact-finding process with the ultimate goal of obtaining a written recommendation.