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May 19, 2021

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Mass. Teachers Association
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James Cox, Esq.
Rubin & Rudman
53 State Street, 15th Floor
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Re: SUP-20-8315, Board of Higher Education and Mass. State College Association

Dear Ms. Houle and Mr. Cox:

The Massachusetts State College Association (MSCA or Union) seeks review of a Department of Labor Relations (DLR) Investigator's dismissal of the above-referenced charge of prohibited practice. The charge alleged that the Board of Higher Education (BHE or Employer) violated Section 10(a)(5) and, derivatively, 10(a)(1) of M.G.L. c. 150E (the Law) by implementing a furlough program at Salem State University (SSU) without bargaining to resolution or impasse and insisting that the MSCA bargain about the proposed furloughs separately from successor contract negotiations.

The Investigator investigated the charge on April 13, 2020. On January 14, 2021, the Investigator dismissed the charge in its entirety. The Investigator concluded that the BHE was not obligated to bargain with the MSCA over the furlough program at SSU because the Union waived its right to bargain by inaction. The Investigator also found that although SSU requested to bargain over furloughs separately from successor contract negotiations, there was no evidence that the BHE or SSU insisted on bargaining over furloughs separately, particularly where the MSCA repeatedly declined SSU's offers to bargain and made no demand to bargain over the furlough program otherwise.

On February 1, 2021, the MSCA filed a timely request for review of the dismissal with the Commonwealth Employment Relations Board (CERB). The BHE filed a response

in opposition to the request on February 8, 2021.[1] After reviewing the investigation record, the dismissal letter, and the parties' arguments on review, the CERB affirms the dismissal in its entirety.[2]

Background[3]

CBA and Successor Contract Negotiations

The MSCA is the exclusive bargaining representative of all full-time and regular part-time faculty and librarians in the Day Division of the nine state universities, including SSU.[4] The BHE and the MSCA are parties to a collective bargaining agreement (CBA) that, by its terms, was in effect from July 1, 2017 through June 30, 2020. Article X covers retrenchment, defined by the CBA as "the laying off of any member of the bargaining unit by reason of financial exigency or declining student enrollment at a University, and shall not mean termination," and provides a specific procedure that must be followed if the president of a university determines that retrenchment may be necessary. The CBA is silent with respect to furloughs.

On January 31, 2020, the BHE and the MSCA began successor contract negotiations and met several times that spring. At a bargaining session on April 14, 2020, both parties expressed interest in a one-year deal solely focused on COVID-19 issues. On July 20, 2020, the parties agreed to temporarily pull proposals unrelated to the pandemic to concentrate on negotiating a one-year deal that maintained the status quo except for proposals related to COVID-19 issues. The parties met again on August 4 and August 27. On August 31, 2020, the parties agreed to a one-year Memorandum of Agreement (MOA) that continued the terms of the prior CBA except for certain

[1] The Employer's response included a newly submitted affidavit from the president of SSU, John P. Keenan. On February 15, 2021, the Union filed a motion to strike Keenan's affidavit. The Employer did not file a response to the motion. Because Keenan did not attend the investigation and the Employer did not request that the Investigator keep the record open in order to respond to evidence presented by the Union at the investigation, we have not considered the contents of Keenan's affidavit. See 456 CMR 15.08 ("The record of the investigation shall consist of the charge, the respondent's answer, evidence presented at the investigation, and any written submissions presented before, during, or after the investigation when allowed by the investigator"); Anderson v. Commonwealth Employment Relations Board, 73 Mass. App. Ct. 909, 909 n. 7 (2009) (CERB properly declined to consider information provided for the first time on appeal). For these same reasons, we have not reviewed or considered additional correspondence the parties sent to the CERB while this review was pending.

[2] CERB Chair Marjorie Wittner recused herself from this matter.

[3] A more detailed recitation of the background may be found in the Investigator's dismissal letter.

[4] Professional employees other than faculty and librarians at SSU are represented by the APA. AFSCME represents two bargaining units of non-professional employees at SSU.

modifications that were inserted to address operational circumstances caused by the pandemic. A memorandum of understanding attached to the MOA laid out specific COVID-19 related protocols, including but not limited to the wearing of masks by students, the ventilation standards in buildings, and the notification process if a student tested positive for the virus.

SSU's Budget for FY21

On June 10, 2020, SSU's Board of Trustees voted to approve a budget for fiscal year 2021 (FY21 budget) that included a "furlough placeholder" of $8.5 million in anticipated savings from employee furloughs. The overview to the FY21 budget noted that furloughs "must be bargained with each union and approved by the Massachusetts Board of Higher Education."

On June 25, 2020, Department of Higher Education Commissioner Carlos Santiago (Santiago) sent a memorandum to all state university presidents titled "University Budget Actions during the Current Pandemic and Financial Exigency." The memorandum acknowledged that that the universities would likely have to implement cost control measures to address anticipated decreases in revenue in the Fall 2020 semester, including retrenchments or furloughs. Santiago informed the presidents that the BHE would delegate its authority as employer of record to a state university upon its request to implement a retrenchment or furlough plan with the university's collective bargaining representatives, but such authority was contingent upon the BHE "playing an active role in all negotiations or other meetings on retrenchments, lay-offs and furloughs, including but not limited to, attending all bargaining and other meetings on the personnel actions" and that no commitments were to be made on behalf of the BHE without the BHE's approval.

Notwithstanding the budget shortfall and Santiago's memorandum, neither party submitted any proposals related to furloughs at SSU during successor contract negotiations that took place from June through August 2020.[5]

SSU's Furlough Proposal

By letter dated June 30, 2020,[6] SSU General Counsel Rita Colucci (Colucci) notified MSCA President Christopher O'Donnell (O'Donnell)[7] that SSU had a projected budget shortfall for FY21 and sought to bargain with the MSCA over the manner in which

[5] It is undisputed that the parties have bargained mid-term over matters unique to SSU in the past. Most recently in 2019, the parties negotiated a voluntary separation incentive program at SSU that offered MSCA members various incentives if they retired or voluntarily left their positions.

[6] All dates hereinafter refer to the year 2020 unless otherwise stated.

[7] Colucci and O'Donnell were members of the bargaining teams for the BHE and the MSCA, respectively, at successor contract negotiations.

cost-saving measures would be achieved. Specifically, Colucci explained that while "cost-saving measures can take many forms," SSU was advancing a proposal in which every MSCA bargaining unit member would be furloughed for five weeks because SSU believed that a furlough plan was fairer and preferable to retrenchment. Colucci concluded that the SSU was seeking to expedite bargaining so that employees had as much notice as possible and asked O'Donnell to suggest some meeting dates and times.

On July 12, O'Donnell responded to Colucci's letter by email, stating in relevant part:

> The MSCA Board of Directors voted -unanimously- not to authorize the MSCA day Bargaining Committee to enter mid-term negotiations. The MSCA is committed to the financial viability of the university, but I believe the furloughing o[f] faculty and librarians – the heart and soul of any university – is not necessary and that the university has other avenues to address the budget shortfall.

Colucci replied on July 20 to clarify that she was asking the MSCA "to bargain over the impact of our decision which includes the means by which the savings will be achieved," and provided additional information about SSU's financial situation and other cost-saving measures that it had taken in recent years. Colucci asked the MSCA to provide its availability to bargain within the coming weeks or to confirm that it was "waiving its right to engage in bargaining over cost-saving measures, including the imposition of furloughs, and other measures."

On July 23, O'Donnell responded via email to Colucci, stating in pertinent part:

> The MSCA is not waiving any of its rights, nor is the MSCA authorizing the Salem State University administration to furlough MSCA-represented faculty or librarians. The Salem State University administration does not have the legal authority to unilaterally decide the means by which the university may save costs regarding the MSCA bargaining units. The MSCA day collective bargaining agreement contains cost saving mechanisms which were mutually agreed to at the bargaining table and ha[ve] been in place for decades. The Union declines to bargain an alternative method. The MSCA is under no obligation to bargain a new means of cost savings because "Salem State is of the opinion that furloughs are preferable to retrenchment."

On September 1, Colucci sent an email to O'Donnell asking whether the MSCA had other cost-savings ideas that SSU should consider or favored retrenchment for its members over any other manner of cost-saving measures, and noted that it would be difficult to realize the necessary savings during FY21 even if the University were to invoke the retrenchment process due to the notice requirements in the CBA. Colucci stated that SSU was seeking the MSCA's input and had twice invited the MSCA to bargain over the issue. Colucci notified O'Donnell that SSU had negotiated up to four weeks of furloughs during FY21 with the APA and AFSCME and reiterated that SSU wished to discuss those measures and other cost-saving approaches with the MSCA.

O'Donnell replied to Colucci via email on September 17, stating in relevant part as follows:

> The MSCA does not waive any bargaining rights. Your rhetorical argument is erroneous; we are not waiving our bargaining rights. The MSCA declines Salem State University's request to enter mid-term negotiations.
>
> As a member of management's bargaining team, you are aware that the MSCA just concluded negotiations on a one-year successor agreement. The BHE could have raised this issue at the bargaining table during those negotiations.[8]
>
> If the MSCA wishes to negotiate changes prior to the expiration of the 2020-2021 CBA we will assert our bargaining rights at that time. So again, the MSCA reserves all rights.
>
> If the Salem State University administration wishes to discuss the MSCA's perspective of its financial situation in a non-bargaining venue-such as a labor-management meeting-please let us know.

On October 7, Colucci emailed O'Donnell requesting dates and times "to meet to discuss the University's financial situation." O'Donnell did not respond. On October 14, Colucci sent O'Donnell another email suggesting three days in late October on which the

[8] The Investigator noted that the MSCA presented information during the investigation that at a labor management meeting in the summer of 2020, the MSCA's SSU Chapter leaders asked SSU President Keenan whether there was going to be a second furlough proposal for less than five weeks and, if so, why could it not be submitted as part of main table negotiations. According to the MSCA, Keenan indicated that he had checked with the BHE and main table bargaining was not possible. The BHE, in response, argued that historically, the SSU President and the Chapter leaders did not have bargaining authority, which the MSCA did not dispute. Although the BHE delegated authority to the university presidents to bargain over furloughs, the parties agree that other than this alleged discussion, all communications between the parties on this issue took place in writing between Colucci and O'Donnell, both of whom also participated in successor contract negotiations. Thus, although the MSCA presented information that the Chapter leaders asked Keenan why a second furlough proposal could not be submitted as part of main table negotiations, this was not sufficient to overcome the SSU's reasonable belief that the MSCA declined to bargain over furloughs. See Whitman-Hanson Regional School Committee, 9 MLC 1573, MUP-4794 (January 12, 1983) (chair of union bargaining committee statement at faculty meeting that elimination of a convention day was a "matter for collective bargaining and should not be discussed at a faculty meeting" not sufficient to constitute a demand to bargain as a demand must be "clear and unequivocal"). Indeed, as discussed in detail *infra*, the MSCA acknowledged that it never made an explicit demand to engage in main table bargaining on this issue, and therefore, Keenan's alleged statement to the Chapter leaders does not amount to an unlawful insistence on bargaining separate from successor negotiations.

parties could meet. Again, O'Donnell did not respond. By letter dated November 6, Colucci summarized their correspondence related to furloughs through October 14 and stated in pertinent part:

> Despite the University's multiple attempts to engage the MSCA on this matter, your response, to date, has been an unequivocal refusal to meet. The MSCA's suggestion that the University use the cost-savings vehicle in the parties' collective bargaining agreement, namely retrenchment, is not a viable alternative for the University in that savings cannot be realized in FY21, the year for which we communicated the need for reductions. Unfortunately, by refusing to meet with the University to collaboratively discuss cost-saving measures, the University has been denied the benefit of your input. Your refusal to bargain in good faith with Salem State leaves the University with no alternative other than to move forward with a furlough plan for MSCA unit members working at Salem State. As the available dates for faculty furloughs are limited by the academic calendar to periods when classes are not in session, and because those dates are fast approaching, the University must act promptly.

Colucci notified O'Donnell that SSU negotiated a three-week furlough program with the APA and AFSCME and would implement that program for MSCA members as well. That same day, SSU sent a notice notifying faculty members and librarians that they would be required to take three weeks of furlough during the 2020-2021 academic year and providing details as to how those furloughs would be implemented, prompting the Union to file the instant charge.

Analysis

We address the failure to bargain at the main table allegation first. The Law does not prohibit either party from proposing to bargain over a term not covered by a collective bargaining agreement separate from successor contract negotiations. City of Boston, 31 MLC 25, 32, MUP-1758 (August 2, 2004). However, an employer may not refuse to bargain by insisting on mid-term bargaining during the time in which the parties historically engage in successor contract negotiations. City of Leominster, 23 MLC 62, MUP-8528, 8530, 8534, 8535 (August 7, 1996) (citing Town of Brookline, 20 MLC 1570, 1596, n. 20 (May 20, 1994)).

The MSCA argues that the Investigator erred in finding that SSU or the BHE never insisted on bargaining furloughs separate from ongoing successor contract negotiations. Rather, the MSCA contends that by delegating authority to negotiate furloughs to the state universities, failing to seek clarification from the MSCA as to whether it was refusing to bargain over furloughs in successor negotiations, and pushing forward with its furlough proposal after the parties completed successor negotiations demonstrates its intent that "any and all furloughs across the state university system would only be negotiated piecemeal."

We are not persuaded by this argument because the mere fact that the BHE delegated authority to the state universities to bargain over furloughs with their respective unions separate from ongoing successor negotiations is insufficient to support a finding that the BHE unlawfully insisted on doing so. First, contrary to the MSCA's assertion that the BHE delegated authority to the individual universities "with the only requirement that a BHE designee be present," Santiago's memorandum required that a BHE representative not just be present but "play[] an active role in all negotiations," that the BHE be "regularly informed of all proposals, bargaining priorities and positions taken by all parties," and that "[n]o commitments should be made on behalf of the [BHE] without approval." It is therefore clear that the BHE intended to be fully involved in any negotiations involving furloughs.[9] Second, the investigation record demonstrates that the parties have voluntarily negotiated mid-term over issues specific to SSU, such as the voluntary separation incentive program in 2019. Thus, SSU's request to bargain with the MSCA over an issue separately from successor contract negotiations is not unprecedented and, without more, does not support a finding that SSU or the BHE insisted on doing so.

Further, although SSU offered to bargain with the MSCA over its furlough proposal after successor contract negotiations concluded, that was SSU's third attempt to engage the MSCA in bargaining. Colucci first requested to meet with the MSCA on June 30 and July 12. O'Donnell was a member of the MSCA's negotiating team and knew successor contract negotiations were ongoing and yet he repeatedly declined SSU's offer to bargain. At no point prior to the completion of main table bargaining did O'Donnell state or suggest that the appropriate place to raise the furlough proposal was at ongoing successor contract negotiations. It was only after the parties reached a successor agreement that O'Donnell stated that SSU should have raised furloughs at main table negotiations. Thus, we agree with the Investigator that although SSU repeatedly offered to bargain over furloughs separately from successor contract negotiations, it never insisted on doing so.

The MSCA argues that such a finding imposes "a never-before-articulated standard" that requires the party declining to engage in mid-term negotiations to affirmatively state its willingness to negotiate over the issue at the main table. We disagree. When an employer notifies the union of a proposed change, the union has an affirmative obligation to make a timely demand to bargain or to otherwise preserve its right to do so. Boston School Committee, 4 MLC 1912, 1915, MUP-2611 (April 27, 1978); County of Middlesex, 6 MLC 2056, 2058, MUP-3449 (March 31,1980); Town of Plymouth, 26 MLC 131, MUP-1251 (March 6, 2000). This precedent is well-established and, despite the MSCA's claim that it found no decisions in Massachusetts that impose that burden, is

[9] Similarly, although SSU's Board of Trustees voted to approve the FY21 budget with a "furlough placeholder" of $8.5 million in anticipated savings from employee furloughs, it recognized that furloughs "must be bargained with each union and approved by the Massachusetts Board of Higher Education."

supported in all but one case cited by the Union in its request for review.[10] See Town of Brookline, 20 MLC 1570, MUP-8426, 8478, 8479 (May 20, 1994) (town engaged in bad faith bargaining when it repeatedly requested to bargain with union about health insurance separately from other successor bargaining issues, and union consistently refused but stated its willingness to bargain the issue during successor negotiations); Cambridge Health Alliance, 37 MLC 168, MUP-08-5162 (March 24, 2011) (employer unlawfully insisted on bargaining over parking fees separately from successor contract negotiations after union demanded to bargain at main table); City of Boston, 31 MLC 25, MUP-1758 (August 2, 2004) (city violated the Law by insisting on bargaining over changes to paid details apart from successor negotiations after union stated that bargaining over changes to paid details should not be conducted separately); Boston School Committee, 35 MLC 277, MUP-03-3886 (May 20, 2009) (school committee violated the Law when it refused union's request to address proposed health insurance changes at scheduled successor contract negotiations and insisted on bargaining changes separately); City of Leominster, 23 MLC 62, MUP-8528, 8530, 8534, 8535 (August 7, 1996) (school committee unlawfully insisted over union's objection that parties bargain over proposed changes in indemnity plan apart from successor negotiations). A union cannot charge an employer with refusing to negotiate when it has made no attempt to bring the employer to the bargaining table. Town of North Andover, 1 MLC 1103, MUP-529 (September 3, 1974). Thus, the MSCA failed to adequately preserve its right to bargain by repeatedly declining SSU's offers to bargain over the furlough proposal and by never seeking to bargain the issue during ongoing successor contract negotiations if that is where the MSCA believed the bargaining should take place.

We also affirm the Investigator's finding that the MSCA waived by inaction its right to bargain over SSU's furlough proposal. Where a public employer raises the affirmative defense of waiver by inaction, it bears the burden of proving that the union had: 1) actual knowledge of the proposed change; 2) a reasonable opportunity to negotiate prior to the employer's implementation of the change; and 3) unreasonably or inexplicably failed to bargain or to request bargaining. School Committee of Newton v. Labor Relations Commission, 388 Mass. 557, 570 (1983). Such a waiver will not be lightly inferred. Town of Natick, 2 MLC 1086, 1092, MUP-2098, 2102 (August 26,1975).

[10] In Town of Northbridge, 37 MLC 74, MUP-07-5008, 5009 (H.O. decision, October 8, 2010), the employer defended its request to bargain with the union over health insurance co-payments separate from ongoing successor negotiations by arguing that the union failed to request that copayments be bargained at the main bargaining table. The hearing officer rejected that argument and found that the union was not obligated to do so because the employer presented the issue to the union as a fait accompli. Here, the investigator correctly found no probable cause to believe that SSUE presented the MSCA with a fait accompli because four months passed between the time SSU informed the MSCA that it was considering the use of furloughs and when it planned to implement the program, during which time it repeatedly asked MSCA to discuss the furlough proposal or other possible means of cost-savings, reduced the length of furloughs as a result of negotiations with the APA and AFSCME and postponed implementation beyond the originally scheduled date.

The investigation record shows that SSU gave the MSCA the opportunity to bargain over its furlough proposal on June 30, July 20, September 1, October 7, and October 14, 2020, and the MSCA repeatedly declined. Although O'Donnell claimed in his July 23 and September 17 emails to Colucci that the MSCA was not waiving its rights to bargain, the MSCA nonetheless declined SSU's offers to discuss the furlough proposal and denied that it had any obligation to do so. Even when the MSCA offered to discuss SSU's "perspective of its financial situation in a non-bargaining venue," it failed to respond to SSU's attempts to take the MSCA up on that offer. The MSCA, therefore, had actual and sufficient notice of the proposed furloughs and ample opportunity to bargain over that change, and its repeated refusal to bargain was inexplicable and unreasonable.

Conclusion

For the foregoing reasons, we affirm the Investigator's dismissal of the charge in its entirety.

Very truly yours,

COMMONWEALTH OF MASSACHUSETTS
COMMONWEALTH EMPLOYMENT RELATIONS BOARD

_____
JOAN ACKERSTEIN, CERB MEMBER

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KELLY STRONG, CERB MEMBER

APPEAL RIGHTS

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, Section 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c. 150E, Section 11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.