

**STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

Service Employees International Union,)	
Local 73,)	
)	
Charging Party)	
)	
and)	Case No. S-CA-12-163
)	
Village of Oak Park,)	
)	
Respondent)	

**DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**

On November 20, 2012, Executive Director Melissa Mlynski deferred charges filed by Service Employees International Union Local 73 (Charging Party) against the Village of Oak Park (Respondent) in the above-referenced case. Pursuant to Section 1200.135(a) and Section 1220.65(d)¹ of the Rules and Regulations of the Illinois Labor Relations Board, 80 Ill. Admin. Code Parts 1200 through 1240, Charging Party filed a timely appeal of that deferral. Respondent filed a timely response. For the reasons which follow, we affirm the Executive Director's deferral.

¹ Section 1220.65(d) provides:

If the motion to defer the resolution of an unfair labor practice charge is made during the investigation, the Executive Director will rule on the motion by issuance of an order or a complaint for hearing. Parties may appeal the Executive Director's orders in accordance with 80 Ill. Adm. Code 1200.135(a). Complaints for hearing are not appealable. If the motion to defer the resolution of an unfair labor practice charge is made after the issuance of a complaint for hearing, the Administrative Law Judge shall rule on the motion in accordance with 80 Ill. Adm. Code 1200.45. Parties may appeal the Administrative Law Judge's ruling on the motion to defer in accordance with 80 Ill. Adm. Code 1200.135(b).

At the time the instant charge was filed on April 12, 2012, the parties were operating under a collective bargaining agreement entered into between the Respondent and the International Association of Machinists and Aerospace Workers, AFL-CIO District 8, which was effective from January 1, 2009, through December 31, 2010. On September 7, 2011, the Charging Party was certified as the representative for the bargaining unit by an election in Case No. S-RC-12-001, and on January 5, 2012, Charging Party and Respondent began negotiating a successor agreement.

The charges arise out of actions taken with respect to two of Respondent's employees. In April 2012 Respondent hired a new part-time cashier, causing a reduction in the hours of part-time cashier Nakia Husbands. Respondent refused to bargain over the reduction in hours, and on April 24 Charging Party filed a grievance alleging a failure to post the new part-time position and a subsequent reduction in Husbands' hours. This grievance was at step 3 at the time the Executive Director issued a deferral.

The other action concerned parking enforcement officer Alvia McNeal. In 2011 McNeal sought leave to undergo surgery for a non-work related condition. She was off work from July 2011 through March 2012. On February 20, 2012, Respondent's human resources manager sent McNeal a memo giving her the option of returning to her prior position with an accommodation or of finding another open position. McNeal chose the first option and submitted to a functional capacity evaluation. The work evaluation issued on March 28, 2012 found that McNeal could perform all six essential functions of the parking enforcement officer job description, but also recommended McNeal limit lifting, carrying, pulling or pushing to no more than 10 pounds occasionally. On April 10, 2012, the human resources manager issued a memo to McNeal stating she was unable to perform the essential function of installing and removing vehicle

immobilization devices and that Respondent had no choice but to terminate her employment. On April 16, Charging Party demanded to bargain over what it termed a change in the parking enforcement officer job description. McNeal was terminated on April 26, 2012, and on April 30, 2012 Charging Party filed a grievance claiming Respondent violated the collective bargaining agreement by terminating McNeal without just cause. That grievance, too, was at step 3 at the time the Executive Director issued her deferral.

In its unfair labor practice charges, Charging Party claims Respondent violated Section 10(a)(4) of the Act by unilaterally reducing Husbands' hours and by unilaterally changing the essential functions of McNeal's job description. Respondent denies these charges. The Executive Director found deferral applicable to both situations pursuant to City of Mt. Vernon, 4 PERI ¶ 2006 (IL SLRB 1988), and Dubo Mf'g Corp., 142 NLRB 431 (1963).

In its appeal, Charging Party claims deferral is inappropriate on two alternative grounds: either 1) Respondent refuses to recognize that a contract exists between the parties and therefore will not waive all obstacles to a fair arbitration proceeding; or 2) there is no contract between the parties upon which to base a deferral to arbitration. Charging Party takes the position that the contract between IAM Local 8 and Respondent still applies despite the fact that the bargaining unit is now represented by SEIU Local 73. It claims Respondent takes the opposite position--that there is no collective bargaining agreement covering these employees—and cites these words from Respondent's grievance response: "the Village has been advised by its outside counsel that because the Village has no agreement with [the union] to arbitrate this grievance, the Village is not legally required to arbitrate this matter." It also notes that Respondent offered to mediate as a "substitute," rather than arbitrate as an obligation. Charging Party argues deferral is inappropriate either because Respondent is correct and there is no contract, or because Charging

Party is correct about the existence of the contract and the Respondent refuses to “credibly assert . . . its willingness to arbitrate the dispute.”

Charging Party faults the Board’s investigators for not contacting Respondent and obtaining a waiver of all obstacles to arbitration before the deferral was issued. It stresses that the Board’s standards for deferral include reference to the credibility of a party’s waiver of all procedural obstacles to arbitration, and worries Respondent might claim it intends to arbitrate merely to prevent the Board from hearing this dispute.

In its response, Respondent states it is willing to arbitrate the matters raised in the charge and to waive all procedural objections relating to the arbitration of those matters and that it made that position clear to the Board’s investigator. It also states it clearly communicated to Charging Party its agreement to arbitrate. It states it is irrelevant that it may have, in other contexts, stated it had no obligation to arbitrate: the Board’s test for deferral does not ask whether the employer is willing to arbitrate all grievances; merely that it is willing to arbitrate the matters contained within the charge. On that point, it states its “answer is unequivocally yes.”

Respondent has now affirmatively stated to the Board that it will submit to the arbitration process and will waive all procedural objections. Any potential defect that may have existed to deferral has, by these assertions, been cured. Should Respondent not live up to its promises, we will allow Charging Party to reinstate these charges and will in that context consider a motion for sanctions. With this contingency, we affirm the Executive Director’s deferral to arbitration.

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett
John J. Hartness, Chairman

/s/ Paul S. Besson
Paul S. Besson, Member

/s/ James Q. Brennwald
James Q. Brennwald, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting in Chicago, Illinois on April 16, 2013; written decision issued in Chicago, Illinois on July 19, 2013.

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EXECUTIVE DIRECTOR'S DEFERRAL TO ARBITRATION

On April 26, 2012, Service Employees International Union, Local 73 (Charging Party or Union) filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board), in Case No. S-CA-12-163, alleging that the Village of Oak Park (Respondent or Employer), engaged in unfair labor practices in violation of Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2010), *as amended*. On May 14, 2012, the Charging Party amended this charge. After an investigation conducted in accordance with Section 11 of the Act, I determined that the charge should be deferred until the parties have exhausted the contractual grievance process.

I. INVESTIGATORY FACTS

The Charging Party is the exclusive bargaining agent for a group of the Respondent's full and part-time clerical and secretarial employees (Unit). The parties are operating under a collective bargaining agreement (Agreement) between the Respondent and the International Association of Machinists and Aerospace Workers, AFL-CIO District 8 (IAM) that was effective from January 1, 2009 through December 31, 2010. On September 7, 2011, the Charging Party was certified as the representative for the Unit by an election in Case No. S-RC-12-001. On January 5, 2012, the Charging Party and the Respondent began negotiating a successor Agreement.

Nakia Husbands is employed by Respondent as a part-time cashier. In April 2012, Respondent hired a new part-time employee to work as a cashier. As a result of this new hire, Respondent reduced Husbands' hours. On April 18, 2012, Chief Union Steward Marijo Lopez, Union Steward Patrick Coyne and Union Vice President Timothy McDonald met with Assistant Village Manager Lisa Shelley and Village Human Resources Director Frank Spataro for a bargaining session. McDonald demanded to bargain over the reduction in Husbands' hours. Spataro refused to bargain and said that Respondent did not need to bargain over the reduction in hours because it was a management right to reduce Husbands' hours.

On April 24, the Charging Party filed a grievance claiming that the Respondent violated Article 10 of the Agreement by hiring a part-time cashier without posting the position and subsequently reducing Husbands' hours without notifying the Charging Party or bargaining. Article 10 of the Agreement is titled "Promotions and Transfers." This grievance is currently at step 3 of the grievance process.

Alvia McNeal was employed by Respondent as a Parking Enforcement Officer beginning in 1999. McNeal sought leave to undergo surgery for a non-work related condition. On June 24, 2011, McNeal's doctor filed a U.S. Department of Labor certification of her condition under the Family and Medical Leave Act (FMLA) with the Respondent. McNeal was off work from July 2011 through March 2012. On February 20, 2012, Spataro sent McNeal a memo regarding her return to work. This memo gave McNeal the option to return to her position with an accommodation or find an open position. McNeal chose to return to her position with an accommodation and submitted to a functional capacity evaluation on February 27, 2012, by a doctor at Loyola Medical Center.

On March 28, 2012, a doctor at Loyola issued a return to work evaluation that found that McNeal could perform all six of the essential functions of the Parking Enforcement Officer job description. The evaluation also recommended McNeal limit lifting, carrying, pulling or pushing to not exceed 10 pounds of force occasionally. On April 10, 2012, Spataro issued a memo to McNeal stating that she is unable to

perform the essential function of installing and removing immobilization devices on vehicles. The memo stated that the Respondent therefore had no choice but to terminate McNeal's employment due to her inability to perform the essential functions of a parking enforcement officer. On April 16, 2012, McDonald demanded to bargain over what he believed to be the change in the Parking Enforcement Officer job description.

On April 26, 2012, the Respondent terminated McNeal's employment because she could not perform all the essential functions of her job. On April 30, 2012, the Charging Party filed a grievance alleging that the Respondent violated Article 3 of the agreement by terminating McNeal without just cause. Article 3 of the Agreement is titled "General Conditions." This grievance is currently at step 3 in the grievance process.

II. POSITIONS OF THE PARTIES

The Charging Party claims that the Respondent violated Section 10(a)(4) of the Act by unilaterally reducing the hours of a part-time employee and by unilaterally changing the essential function of a job description. The Charging Party alleges that both are mandatory subjects of bargaining and neither is an inherent managerial right. Finally, the Charging Party claims that even if those changes are within the Respondent's inherent managerial authority, the burden of bargaining is minor because the parties are already bargaining over a collective bargaining agreement and the Respondent cited no exigent circumstances that necessitated making a change without bargaining.

The Respondent claims that they did not violate Section 10(a)(4) of the Act because the Charging Party is really claiming that the Respondent acted inconsistently with the Agreement, which essentially makes this a claim that the Respondent violated the Agreement. The Respondent alleges that this claim is not an unfair labor practice unless the change repudiates the entire Agreement, which it does not. The Respondent also claims that they did not make any unilateral changes to the Agreement or work rules.

The Respondent alleges that the Agreement gives the Employer the right to assign hours to a part-time employee as long as it is less than 37 ½ hours per week, that they made changes to Husbands' schedule and hired a new part-time employee to ensure that Husbands did not work over 1,000 hours in the year. Additionally, the Respondent alleges that Husbands has worked hours that varied in the past. As to McNeal, the Respondent claims that they never changed her job duties because Parking Enforcement Officers have been required to install and remove vehicle immobilization devices for at least 11 years.

III. DISCUSSION AND ANALYSIS

In City of Mt. Vernon, 4 PERI ¶ 2006 (IL SLRB 1988), the then-State Board adopted a policy of deferring charges involving the application or interpretation of collective bargaining agreements. In that case, the Board listed the primary deferral doctrines employed by the National Labor Relations Board (NLRB). Each of these policies is known by the lead case in the area, namely, Spielberg Manufacturing Co., 112 NLRB 1080 (1955); Dubo Manufacturing Corp., 142 NLRB 431 (1963); and Collyer Insulated Wire, 192 NLRB 837 (1971). Spielberg concerns deferral to an existing arbitration award. Dubo applies in cases where the union has voluntarily initiated a grievance. Collyer concerns cases where the union has not initiated a contract grievance.

A Dubo deferral is applicable in the instant case. In a Dubo deferral, the Board will defer the processing of an unfair labor practice charge if (1) the parties have already voluntarily submitted their dispute to their agreed-upon grievance arbitration procedure, (2) that procedure culminates in final and binding arbitration, and (3) there exists a reasonable chance that the arbitration process will resolve the dispute. State of Illinois, Department of Central Management Services (Department of Human Services), 19 PERI ¶ 114; PACE Northwest Division, 10 PERI ¶ 2023 (IL SLRB 1994); City of Mt. Vernon, 4 PERI ¶ 2006 (1988); Dubo Manufacturing Corporation, 142 NLRB 431.

The situation involving Husbands is a Dubo deferral case, as there is evidence that the Charging Party has initiated a grievance concerning the Respondent hiring a part-time cashier

without posting the position and subsequently reducing Husbands' hours without notifying the Charging Party or bargaining. Under these circumstances, deferral to the pending grievance is appropriate.

The situation involving McNeal is also a Dubo deferral case, as there is evidence that the Charging Party has initiated a grievance regarding the termination of McNeal. McNeal was terminated because her medical restrictions prevented her from installing and removing a vehicle immobilization device. Charging Party claims this work is beyond the scope of McNeal's job description. Therefore, it is likely that the final disposition of this grievance, via a grievance resolution or an arbitration award, will address whether the installation and removal of the immobilization device is encompassed in the job description of a Parking Enforcement Officer. Because that question must be answered before any bargaining obligations can be determined, deferral to the pending grievance is appropriate.¹

IV. ORDER

Accordingly, this charge is deferred to the parties' grievance procedure until they have completed that process regarding the underlying disputes. Within 15 days after the termination of the contractual procedure for both the existing Husbands grievance and the existing McNeal grievance, the Charging Party may request that the Board reopen the case for the purpose of resolving any substantial issues left unresolved by the grievance procedure or proceed with the charge on the basis that the award is contrary to the policies underlying the Act. If the Charging Party fails to make such a request within the time specified, the Board may dismiss this charge upon request of the Respondent or on its own motion.

This order may be appealed to the Board any time within 10 calendar days of service hereof. The appeal must be in writing, contain the case caption and number, and addressed to the General

¹ During the investigation, Respondent indicated that it would not object to the processing of grievances under the previous contract's grievance procedure, which culminates in arbitration.

Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago Illinois, 60601-3103. The appeal must contain detailed reasons in support thereof, and be served upon all other parties at the same time that it is served upon the Board. A statement asserting that all other parties have been served must accompany an appeal, or the Board will not consider it. If the Board does not receive an appeal within the specified time, this order shall become final and binding upon the parties to this matter.

Issued in Springfield, Illinois, this 20th day of November, 2012.

**ILLINOIS LABOR RELATIONS BOARD
STATE PANEL**



Melissa Mlynski, Executive Director