

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

American Federation of State, County and	)	
Municipal Employees, Council 31,	)	
	)	
Charging Party	)	
	)	
and	)	Case No. S-CA-14-142
	)	
State of Illinois, Department of Central	)	
Management Services,	)	
	)	
Respondent	)	

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

On September 26, 2014, Executive Director Melissa Mlynski deferred to arbitration a charge filed by the American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Charging Party) against the State of Illinois, Department of Central Management Services (CMS or Respondent). The charge alleges that CMS violated Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (Act), by making unilateral changes to health benefits during the term of a collective bargaining agreement. AFSCME has appealed the Executive Director's deferral pursuant to Sections 1200.135(a) and 1220.65 of the Board's Rules and Regulations, 80 Ill. Admin. Code Parts 1200 through 1240. CMS filed a response, arguing among other things that the appeal was untimely. AFSCME has tendered a reply addressing solely the timeliness of its appeal. We affirm the Executive Director's deferral.

**The appeal is timely**

As an initial matter, we find the appeal was timely filed. The Executive Director's deferral was issued on September 26, 2014, a Friday. The Board assumes service is completed

three days later, 80 Ill. Admin. Code § 1200.30(c), but when a time period is less than seven days, its rules also provide that intervening Saturdays, Sundays and holidays do not count, *id.* §1200.30(b). Consequently, Board rules assume service on October 1, 2014, rather than September 29, 2014 as CMS assumes.<sup>1</sup> AFSCME had 10 days to appeal, *id.* §1200.135(a)(1), so the mailing of its appeal on October 10, 2014 constituted timely filing.

### **The Executive Director's deferral**

The Executive Director deferred under the standards set by the National Labor Relations Board in Dubo Mfg. Corp., 142 NLRB 431 (1963), a practice expressly incorporated by this Board in City of Mt. Vernon, 4 PERI ¶ 2006 (IL SLRB 1988), and permitted by Section 11(i) of the Act.<sup>2</sup> The issue in Mt. Vernon was whether bargaining unit work was being reassigned outside the unit, and the employer's purported right to make such reassignments was grounded in a collective bargaining agreement management rights clause. The Board reasoned: "In order to determine whether the City breached its duty to bargain, the contractual language must be interpreted. We believe that such an interpretation is peculiarly within an arbitrator's area of expertise and therefore, we will defer this case to the parties' grievance and arbitration procedure for an arbitral determination of the contractual issue."

### **AFSCME's appeal**

Under Dubo, the Board will defer a matter to arbitration if (1) the parties have already voluntarily submitted their dispute to the grievance arbitration process; (2) the process

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<sup>1</sup> Even if AFSCME had actually received it earlier, City of St. Charles v. Ill. Labor Relations Bd., 395 Ill. App. 3d 507, 511-12 (2d Dist. 2009), holds that only the recipient has the right to rebut the three-day presumption. 395 Ill. App. 3d 507.

<sup>2</sup> Section 11(i) provides:

If an unfair labor practice charge involves the interpretation or application of a collective bargaining agreement and said agreement contains a grievance procedure with binding arbitration as its terminal step, the Board may defer the resolution of such dispute to the grievance and arbitration procedure contained in said agreement.

culminates in final and binding arbitration; and (3) there exists a reasonable chance that the arbitration process will resolve the dispute. PACE Northwest Div., 10 PERI ¶ 2023 (IL SLRB 1994); Dubo Mfg. Corp., 142 NLRB 431 (1963). AFSCME concedes that the first two criteria are present, but challenges the third. It claims “the grievance at issue does not present an issue identical to that before the Board in that the grievance process involves a contract interpretation issue, while the instant charge is a bargaining issue.”

The unfair labor practice charge describes the circumstances at issue as follows:

The Employer is moving forward to unilaterally implement changes to be effective July 1, 2014 that affect bargaining unit health insurance out of pocket maximum levels and other insurance benefits. These changes are being made in violation of the collective bargaining agreement and without fulfilling the Employer’s obligation to bargain with the Union pursuant to [5] ILCS 315/10(a) of the Illinois Public Labor Relations Act.

As remedy, AFSCME proposed: “Cease and desist, fulfill bargaining obligations, pay all affected AFSCME bargaining unit losses and make all AFSCME bargaining unit employees whole.”

By comparison, AFSCME’s “Statement of Grievance” (Contract Grievance No. 54940) now pending arbitration reads:

AFSCME Council 31 became aware and grieves on behalf of all affected bargaining unit employees that the Employer violated Article I, II, III, XIII, Appendix A, B, 5 ILCS 315/10(a) et. seq of the Illinois Public Labor Relations Act and any and all other applicable articles and sections when the Employer unilaterally changed health insurance out of pocket maximum levels and other insurance benefits.

As remedy in that proceeding, AFSCME sought: “Cease and desist, fulfill bargaining unit losses and make all AFSCME bargaining unit employees whole.” A hearing on this matter was set to begin December 17, 2014.

In its appeal, AFSCME further explains that it and CMS currently are parties to a collective bargaining agreement, that historically they have bargained over the Employer's Open Access Plan (OAP), that their contract contains no provisions regarding the OAP, and no waiver of a right to bargain over health care benefits generally or over the OAP during the term of the contract. It claims that: (1) CMS sent to it a draft copy of the 2014-2015 Benefit Choice Options Book for review prior to printing; (2) on April 8, 2014 AFSCME indicated to CMS that it had "serious objections to the State's intent to make unilateral changes to the Open Access Plan;" (3) CMS claimed a right to make changes under the federal Affordable Care Act; (4) AFSCME responded that mere legality under the Affordable Care Act does not permit the employer to make unilateral changes; (5) AFSCME requested that the status quo be maintained unless the parties had made a specific agreement to make changes; and (6) CMS nevertheless sent the booklet to the printer and implemented the changes. AFSCME explains one of the changes was to increase out of pocket maximums for the OAP.

The "Benefit Choice Options" booklet referenced by AFSCME was submitted as an exhibit. It confirms the increase in out of pocket maximums for the OAP, but it treats OAP as a category of "Managed Care Plan" (the other category being Health Maintenance Organizations or "HMOs"). We point this out because Article XIII of the parties' contract not only has a section on Health Insurance generally, but also a section on "Managed Care Plans" and Section 3 of its Appendix A on the topic of "Health Plan Coverage" not only has provisions for the Quality Care Health Plan (QCHP), but also provisions for Managed Care Health Plans (MCHP). For MCHP these include provisions for co-payments, coinsurance and prescription drugs. In contrast to QCHP, the MCHP section has no provisions for out of pocket maximums.

The contract's general section on health insurance (Article XIII, Section 1) provides:

During the term of this Agreement, the Employer shall continue in effect, and the employees shall enjoy the benefits, rights and obligations of the Group Insurance Health and Life Plan applicable to all Illinois State employees pursuant to the provisions of the State Employees Group Insurance Act of 1971 as amended by P.A. 90-65 and as amended or superseded [5 ILCS 375]. Employee Health Care Benefits shall be as set forth in Appendix A of this Agreement.

That on managed care plans (Article XIII, Section 2) provides:

In accordance with the provisions of Federal law and the regulations thereunder, if applicable, the Employer shall make available the option of membership in qualified managed care plans to employees and their eligible dependents who reside in the service area of qualified managed care plans. Each year the Employer will send a notice to the mailing address of record of all employees informing them of the benefit choice period which shall extend for at least 30 days from the date of the notice. The letter shall inform employees of the website(s) on which information regarding the alternative plans is available and that any individual who wants a hard copy of the information shall be provided such copy upon request.

### **CMS's response to the appeal**

CMS's response to the appeal twice merely asserts that resolution of the dispute will come as a result of the grievance process. It also claims that, in increasing out of pocket maximums, it was merely following the language of Section XXXIV, §3 of the contract which allows CMS to apply *increased benefits* to union members where offered to other employees, but in a portion not referenced by CMS also prohibits it from making unilateral reductions in such benefits.<sup>3</sup> Affirming AFSCME's assertion that the contract makes no mention of the OAP, it claims AFSCME has waived its right to bargain over changes to the OAP by not negotiating over it during negotiations of the CBA. On this point, it references Article XXXIV, §4 as merely making "clear that the parties had the unlimited right and opportunity to make demands and

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<sup>3</sup> This section provides:

In the event the Director of Central Management Services unilaterally grants an increase in fringe benefits to every and all non-AFSCME bargaining unit employees subject to the Personnel Code, such increase shall be made applicable to the employees covered by this Agreement. *Reduction in benefits, however, shall not be made applicable, and the provisions of this Agreement shall apply.*

(emphasis added).

proposals,” when the full text of that section includes a provision requiring bargaining prior to any changes in fringe benefits:

The parties acknowledge that during the negotiation which resulted in this Agreement, each had the unlimited right and opportunity to make demands and proposals with respect to any subject or matter within the area of collective bargaining as defined in P.A. 83-1012 [the Illinois Public Labor Relations Act] and that the understandings and agreements arrived at by the parties after the exercise of that right and opportunity are set forth in this Agreement.

However, the Employer agrees that during the period of this Agreement it shall not unilaterally change any bona fide past practices and policies with respect to salaries, hours, and conditions of employment, and fringe benefits enjoyed by members of the bargaining units without prior consultation and negotiations with the Union. Where past practice conflicts with terms of the contract, the contract shall prevail. In order to qualify as a bona fide past practice, such practice must be (1) unequivocal, (2) clearly enunciated and acted upon, and (3) readily ascertainable over a period of time as a fixed and established practice accepted by both parties.

### **Analysis**

As noted by the Executive Director, the Board generally applies the NLRB’s deferral policies, deferring cases not only pursuant to the NLRB’s decision in Dubo, but also pursuant to the NLRB’s decisions in Spielberg Mfg. Co., 112 NLRB 1080 (1955), and Collyer Insulated Wire, 192 NLRB 837 (1971). Spielberg concerns deferral to an existing arbitration award, Dubo where a union has voluntarily initiated a contract grievance, and Collyer where a union has not yet initiated a contract grievance.<sup>4</sup>

As we have previously noted, AFSCME does not challenge the applicability of the first two elements for Dubo deferral: (1) that the parties have already voluntarily submitted their dispute to the grievance arbitration process; and (2) that the process culminates in final and binding arbitration. The third requirement, that there exists a reasonable chance that the

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<sup>4</sup> The elements for each type of deferral varies, but we recently examined Collyer’s requirement that contract interpretation lies at the center of the dispute in City of Elgin, 30 PERI ¶ 8 (IL LRB-SP 2013), and it is of some relevance to Dubo’s lesser requirement that there exist a reasonable chance that the arbitration process will resolve the dispute, the element AFSCME disputes.

arbitration process will resolve the dispute, is in issue, but our ability to make a determination on that point is complicated by the parties' presentation. Both AFSCME and CMS state that their contract includes nothing about the OAP. If that were true, it would be difficult to find that there exists a reasonable chance that the arbitration process will resolve the dispute. But the assertion is not true. According to the booklet, the Open Access Plan is merely a species of managed care plan, and both Article XIII (Section 2) and Appendix A include provisions for managed care plans. In its grievance, Charging Party explicitly seeks the arbitrator's interpretation of both these portions of the collective bargaining agreement (along with Articles I, II and III, Appendix B, and "and all other applicable articles and sections").

It *is* true that the contract does not explicitly impose a limit on out of pocket expenses for managed care plans or otherwise explicitly address that topic, but we cannot say with certainty that an arbitrator would not find it addressed implicitly, or that the contract contains provisions requiring additional bargaining. In applying his or her expertise to interpretation of the parties' collective bargaining agreement, an arbitrator could, for example, find that in setting out of pocket expense limits for quality care health plans but not for managed care plans, the contract implicitly provides that there is no limit for managed care plans like OAP. Alternatively, an arbitrator could, by reference to the parties' past practice, find that the contract implicitly provides that a change in such a matter be addressed through additional bargaining, or could find that the contract explicitly provides for such bargaining by inclusion of the second paragraph of Article XXXIV, Section 4.<sup>5</sup> Under a number of hypothetical situations it would be possible for

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<sup>5</sup> Section 4 provides: "However, the Employer agrees that during the period of this Agreement it shall not unilaterally change any bona fide past practices and policies with respect to salaries, hours, and conditions of employment, and fringe benefits enjoyed by members of the bargaining units without prior consultation and negotiations with the Union." Article XXXIV was not specifically referred to the

an arbitrator to determine that the contract addressed the issue. It is possible that the arbitrator could conclude that the parties had, in fact, bargained over the topic, and if that is the case, the Board's task of determining whether there had been a statutory violation of the duty to bargain would be perfunctory and would not result in a remedy for Charging Party. Alternatively, the arbitrator could conclude that CMS's conduct violated substantive provisions of the contract, making the Board's determination that there had been a unilateral change perfunctory, and possibly making any substantive remedy the Board might provide no more than redundant to the arbitration award. A third alternative would be for the arbitrator to find that, though CMS's conduct did not violate any substantive provision of the contract, it did violate Article XXXIV Section 4's obligation to bargain prior to making changes to employee benefits, again potentially rendering the Board's determination of a statutory violation of the duty to bargain perfunctory and possibly rendering any substantive remedy the Board might fashion redundant to the grievance award.

In summary, by focusing on the allegations in both the unfair labor practice charge and in the grievance as well as on the contractual provisions, it is apparent that there is a possibility that an arbitration award would eliminate the Board's need to issue any remedy. Therefore, as in PACE Northwest Div., 10 PERI ¶ 2023 (IL SLRB 1994), there exists a reasonable chance that the arbitration process will resolve the dispute. In fact, the potential efficiencies of deferral are in this case is particularly keen in that the arbitration hearing has already been scheduled to begin, while revoking the deferral for issuance of a complaint would not lead to a Board hearing for quite some time.

For these reasons, we affirm the Executive Director's Order of Deferral.

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arbitrator for interpretation in the grievance, but is obviously included in the grievance's reference to "all other applicable articles and sections."

BY THE STATE PANEL OF THE ILLINOIS LABOR RELATIONS BOARD

/s/ John J. Hartnett

John J. Hartnett, Chairman

/s/ Paul S. Besson

Paul S. Besson, Member

/s/ James Q. Brennwald

James Q. Brennwald, Member

/s/ Michael G. Coli

Michael G. Coli, Member

/s/ Albert Washington

Albert Washington, Member

Decision made at the State Panel's public meeting held in Chicago, Illinois, on December 16, 2014; written decision issued in Chicago, Illinois, January 26, 2015.

**STATE OF ILLINOIS  
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STATE PANEL**

American Federation of State, County and  
Municipal Employees, Council 31,

Charging Party

and

State of Illinois, Department of Central  
Management Services,

Respondent

Case No. S-CA-14-142

**EXECUTIVE DIRECTOR'S DEFERRAL TO ARBITRATION**

On May 27, 2014, American Federation of State, County and Municipal Employees, Council 31 (AFSCME or Charging Party) filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board), in Case No. S-CA-14-142, alleging that the State of Illinois, Department of Central Management Services (Employer or Respondent) violated Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2012), *as amended*. 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 procedure.

**I. INVESTIGATORY FACTS**

The Respondent is a public employer within the meaning of Section 3(o) of the Act. The Charging Party is a labor organization within the meaning of Section 3(i) of the Act and the exclusive representative for multiple bargaining units consisting of state employees. Charging

Party and Respondent are parties to a master collective bargaining agreement (CBA), which includes a grievance procedure culminating in final and binding arbitration. The CBA has a term of July 1, 2012 through June 30, 2015.<sup>1</sup>

In this charge, AFSCME asserts that, effective July 1, 2014, Respondent unilaterally implemented changes to the health insurance for bargaining unit members, including changes to out of pocket maximum levels and other insurance benefits. AFSCME asserts that the “changes are being made in violation of the collective bargaining agreement” and without Respondent fulfilling its obligation under the Act to bargain with the Union. The changes at issue pertain to the Respondent’s Open Access Plan (OAP).

In early April of 2014, AFSCME notified Respondent of its objection to any unilateral changes to the OAP. On May 27, 2014, the same date that AFSCME filed this unfair labor practice charge, it also filed a grievance challenging the Respondent’s actions. The grievance cites a violation of multiple articles in the CBA including Article I (Recognition), Article II (Management Rights), Article III (Non-Discrimination) Article XIII (which includes a section on Insurance) and Appendix A and B, which include information on employee and retiree insurance benefits.<sup>2</sup>

It is the Respondent’s position that this matter should be deferred to the parties’ grievance procedure as there is a pending grievance that is being scheduled for arbitration.<sup>3</sup> AFSCME objects to a deferral. AFSCME asserts that the parties have historically bargained over the OAP but that there are no provisions in the CBA regarding OAP. AFSCME further asserts that the CBA does not contain a waiver of the right to bargain these changes. AFSCME argues that

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<sup>1</sup> The Charging Party and the Respondent are also parties to a collective bargaining agreement for the CU-500 bargaining unit, which has a grievance procedure culminating in final and binding arbitration. This agreement also has a term of July 1, 2012 through June 30, 2015.

<sup>2</sup> The grievance also cites a violation of the Act.

<sup>3</sup> On July 24, 2014, the parties agreed to move the grievance to arbitration.

under Board case law, deferral to arbitration is not appropriate where contract interpretation is not at the heart of the dispute. AFSCME asserts that health benefits and insurance are mandatory subjects of bargaining and an employer violates the Act by making unilateral changes on these topics without bargaining with the exclusive representative.

## II. DISCUSSION AND ANALYSIS

AFSCME is correct that health benefits and insurance are mandatory subjects of collective bargaining and that an employer violates the Act by making unilateral changes to health benefits and insurance without bargaining with the exclusive representative. City of Kankakee, 9 PERI ¶2034 (ISLRB 1993). However, Section 11(i) of the Act gives the Board discretion to defer unfair labor practice charges to a grievance and arbitration procedure if the dispute involves the interpretation or application of a collective bargaining agreement.

In City of Mt. Vernon, 4 PERI ¶2006 (IL SLRB 1988), the 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.

The instant matter is a Dubo deferral case, as both parties have provided evidence that the Charging Party has initiated a grievance concerning the specific conduct at issue in the charge. Under the Dubo standard, deferral is appropriate where the following three conditions exist: (1) the dispute has been submitted to the parties' grievance arbitration process; (2) the process

culminates in final and binding arbitration; and (3) there is reasonable chance that the grievance arbitration process will resolve the dispute.

The Dubo criteria are satisfied in this case. AFSCME filed a grievance on or about May 27, 2014 challenging the Respondent's action. On or about July 24, 2014, the parties agreed to move the grievance to arbitration. The subject matter of this charge is also the subject matter of the grievances filed by the Union. In its grievance, AFSCME cites numerous articles of the CBA, including articles with specific language on insurance and health benefits.<sup>4</sup> I find that there is at least a reasonable chance that the grievance arbitration process will resolve this dispute.

In a similar case involving AFSCME and the County of Cook, the former Executive Director deferred a charge where AFSCME alleged that the County violated the Act by making a unilateral change to the group insurance coverage affecting county employees. The Local Board vacated a portion of this deferral based on the fact that three of the bargaining units in question had yet to secure bargaining agreements. County of Cook, 5 PERI ¶3012 (ILLRB 1989). The Local Board found:

[AFSCME's] allegations, if true, could establish a prima facie violation of Section 10(a)(4) and therefore 10(a)(1), of the Act, since they state that the County either has refused to bargain, or has bargained in bad faith, over matters affecting employees' wages and conditions of employment. The Executive Director correctly observes that a possible defense to the violation would exist if the union had agreed to the changes or to contractual language which effectively waived its right to bargain. However, it is uncontested that three of the eight bargaining units of

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<sup>4</sup> For example, Article XIII Section 1, Insurance, of the CBA provides:

During the term of this Agreement, the Employer shall continue in effect, and the employees shall enjoy the benefits, rights and obligations of the Group Insurance health and Life Plan applicable to all Illinois State employees pursuant to the provisions of the State Employees group Insurance Act of 1971 as amended by P.A. 90-65 and as amended or superseded. Employee Health Care benefits shall be as set forth in Appendix A of this Agreement.

County employees represented by AFSCME have yet to secure bargaining agreements.

As to those three units, since there is no contract, it cannot be argued that a contract provision permits the County to do what it is alleged to have done. Moreover, absent a contract, the employees in those units lack a contractual grievance procedure under which the issue can be arbitrated, and there is no contractual mechanism for those units to secure relief from the County's alleged violations.

The Local Board then vacated the deferral with respect to the three units without collective bargaining agreements and ordered a complaint issued for those three units. Id.

In the instant case, the bargaining units do have a CBA that includes a grievance procedure culminating in arbitration, and as noted above, there is at least a reasonable chance that the pending grievance will resolve this dispute. Therefore, I find that deferral of the instant charge is appropriate.

### **III. ORDER**

Accordingly, this charge is deferred to the parties' grievance procedure until they have completed that process regarding the underlying dispute. Within 15 days after the termination of the contractual procedure, 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 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 at Springfield, Illinois, this 26<sup>th</sup> day of September, 2014.**

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



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**Melissa Mlynski, Executive Director**