STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Labor Organizations Comprising the Springfield Building Trades,	)	
Charging Party	)	
and	)	Case No. S-CA-15-097
Illinois Secretary of State,	)	
Respondent	)	

DECISION AND ORDER OF THE ILLINOIS LABOR RELATIONS BOARD STATE PANEL

On January 16, 2015, Charging Party, Labor Organizations Comprising the Springfield Building Trades, filed an unfair labor practice charge with the Illinois Labor Relations Board, State Panel, alleging that Respondent, Illinois Secretary of State, violated an Order of Deferral issued in an earlier case by the Board's Executive Director, and in doing so also violated Section 10(a)(4) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2012).[1] On February 6, 2015, Executive Director, Melissa Mlynski, dismissed the charge. Charging Party filed a timely appeal of the dismissal pursuant to Section 1200.135(a) of the Illinois Labor Relations Board's Rules and Regulations, 80 Ill. Admin. Code § 1200.135(a), and also asked to present oral argument. The Secretary of State did not file a response. Based on our review of the dismissal, the exceptions, the record, and the earlier Order of Deferral, we deny the request for oral argument because it would not benefit our understanding of the case, and based on that understanding we affirm the Dismissal.

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[1] Section 10(a)(4) makes it a violation of the Act for an employer or its agents "to refuse to bargain collectively in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit, including, but not limited to, the discussing of grievances with the exclusive representative[.]"

In the earlier case, Case No. S-CA-14-082, the Executive Director granted this same Charging Party's motion to defer its own unfair labor practice charge to grievance arbitration proceedings already initiated under the parties' collective bargaining agreement. Pursuant to the Board's decision in City of Mt. Vernon, 4 PERI ¶ 2006 (IL SLRB 1988), the Executive Director applied precedent developed by the National Labor Relations Board, specifically that set out in Dubo Mfg. Corp., 142 NLRB 431 (1963), applicable where parties have begun the contractual grievance procedure, but have not yet obtained an arbitration award. The Order of Deferral indicated that it was binding on the parties, but in doing so erroneously used the phrase "final and binding." That the order was not, in fact, final, is clearly evident by its inclusion of the following provision allowing the potential to reopen the charge:

> 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.

In contrast to deferral practice where parties have not yet begun the grievance resolution process, i.e., that pursuant to Collyer Insulated Wire, 192 NLRB 837 (1971), the Executive Director did not explicitly require the parties to waive any procedural objection they might have to grievance arbitration. No party sought the Board's review of the Order of Deferral; however, according to the allegations of the charge presently before us, soon after the Order of Deferral was issued, the Secretary of State objected to the arbitration proceeding on the basis that the grievance had not been timely filed. It was this action which Charging Party presently alleges constitutes a violation of the Order of Deferral, and of Section 10(a)(4). The Executive Director dismissed this charge, rejecting Charging Party's contention that an order of deferral under Dubo

necessarily entails waiver of all procedural objections to grievance arbitration. She also noted that the earlier case involved the unusual situation where a charging party had asked to defer its own charge.

In its appeal, Charging Party cites three cases for the proposition that the Illinois Labor Relations Board "has specifically reiterated the precept that 'procedural arbitrability' arguments are waived upon a 'deferral' order being issued." We note that any such precept would constitute an exception to the general rule that waiver of contractual or statutory rights must be explicit, Am. Fed'n of State, Cnty. & Mun. Employees v. State Labor Relations Bd., 190 Ill. App. 3d 259, 269 (1st Dist. 1989), but in any event none of the cases cited supports this proposition or even the more plausible proposition that the Executive Director should have included a waiver requirement in her Order of Deferral.

From the first case cited, Charging Party sets out a block quotation, but the quote is from a recommended decision and order of a Hearing Officer that was never adopted by the Board. City of Quincy, 7 PERI ¶ 2035 (IL SLRB H.O. 1991). No party filed exceptions to the recommended decision and order, and the Board declined to take it up on its own initiative. As is the practice in such situations, the decision explicitly states that the order is non-precedential. It was improper for the Charging Party to cite to it, much less quote it as if it were a Board decision.

In the second case, exceptions had been filed and the Board explicitly affirmed the hearing officer's application of deferral. However, it found deferral appropriate under both Dubo *and* Collyer. City of Chicago (Chicago Fire Department), 6 PERI ¶ 3018 (IL LLRB 1990). Moreover, the Board did *not* adopt the hearing officer's recommended decision and order which Charging Party references. It provided a separate more succinct rationale that does not include

anything that could support the Charging Party's assertion that "'procedural arbitrability' arguments are waived upon a 'deferral'".

In the final case cited, the Board adopted the ALJ's recommended decision and order, and in a footnote stated that "[a]s in all deferral cases, the Respondent must waive any and all procedural timeliness bars to utilizing the contractual grievance arbitration procedure." Chicago Transit Auth., 17 PERI ¶ 3019 (IL LLRB 2001). As evident from its placement in a footnote, this statement was not necessary to the outcome of the case. In fact, there is no indication that an issue regarding the breadth of the practice of ordering respondents to waive procedural objections had been raised in the case, so the statement appears to be obiter dictum. See *In re F.P.*, 2014 IL App (4th) 140360 ¶ 83. The statement clearly imposes a waiver requirement (as is necessary in Collyer-type deferral and may be appropriate in other specific contexts) and may simply use overly broad language in doing so. In any event, it does *not* state, as Charging Party asserts, that even in the absence of an instruction to waive procedural objections, such waiver implicitly occurs merely "upon a 'deferral' order being issued." Moreover, this footnote certainly cannot trump those Board decisions (and decisions of the NLRB) which set out the requirements for Dubo deferral and (in contrast to those for Collyer deferral) do *not* list waiver of procedural objections to arbitration as a pre-requisite. We reject Charging Party's contention that all orders of deferral implicitly cause respondents to waive all procedural objections to grievance arbitration. The protective practice of directing a moving respondent to waive procedural objections to arbitration should not be transformed into an offensive tool allowing charging parties to obtain inadvertent waivers of procedural defenses by moving to defer their own charges.

Finally, we find no merit to the argument Charging Party constructs from the Deferral Order's use of the term "final and binding." That order clearly was not final, and consequently our decision affirming the dismissal of the present charge does not leave Charging Party without a remedy. The Order of Deferral clearly provides that Charging Party could move to reopen the unfair labor practice charge if Respondent's procedural objections foreclosed the arbitrator from issuing an award, leaving substantial issues unresolved, provided it does so within the specified time period.

For these reasons, we affirm the Executive Director's dismissal.

BY THE ILLINOIS LABOR RELATIONS BOARD, STATE PANEL

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

/s/ Michael G. Coli
Michael G. Coli, Member

/s/ John R. Samolis
John R. Samolis, Member

/s/ Keith A. Snyder
Keith A. Snyder, Member

/s/ Albert Washington
Albert Washington, Member

Decision made at the State Panel's public meeting held in Springfield, Illinois on April 14, 2015; written decision issued in Chicago, Illinois on April 29, 2015.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Labor Organizations comprising the Springfield Building Trades, Charging Party and Illinois Secretary of State, Respondent	Case No. S-CA-15-097

DISMISSAL

On January 16, 2015, the Labor Organizations comprising the Springfield Building Trades (Charging Party), filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board), in Case No. S-CA-15-097, alleging that the Illinois Secretary of State (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 fails to raise an issue of law or fact sufficient to warrant a hearing and hereby issue this dismissal for the reasons stated below.

I. INVESTIGATORY FACTS

The Respondent is a public employer within the meaning of Section 3(o) of the Act. The Charging Party consists of multiple labor organizations, within the meaning of Section 3(i) of the Act, and is the exclusive representative of bargaining units consisting of Respondent's craft/trade

employees. Charging Party and Respondent are parties to a collective bargaining agreement (Agreement), which includes a grievance procedure culminating in final and binding arbitration.

On December 17, 2013, Charging Party filed an unfair labor practice charge with the Board, in Case No. S-CA-14-082, against the same Respondent as this case. As background, in S-CA-14-082, the Charging Party alleged that the Respondent violated the Act by making a unilateral change to employee wages. The Agreement between the parties contains a provision that requires the Respondent pay the prevailing wage portion of the Prevailing Wage Package certified by the Illinois Department of Labor. The Charging Party asserted that on or around July 1, 2013, Respondent unilaterally reduced the wages guaranteed under the prevailing wage portion of the parties' Agreement by increasing the cost of certain benefits (insurance, pension, etc.) without negotiating. The Respondent paid for the increased costs in benefits by moving amounts from the wage portion pay.

During the Board's investigation of S-CA-14-082, Charging Party indicated that a grievance had been filed over the change in wages, that the grievance had gone to arbitration on or about November 13, 2014, and that the parties were in the process of writing post-hearing briefs. The Charging Party requested that the Board defer the case pending the outcome of the arbitration. On November 26, 2014, I issued a Deferral to Arbitration (Deferral) in S-CA-14-082, citing the Dubo deferral doctrine.[1] The Deferral order provided that the parties had 10 calendar days to appeal the Deferral, and that if no appeal was filed during that time period, the Deferral "shall become final and binding upon the parties to this matter." Neither party appealed the Deferral.

[1] Dubo Manufacturing Corp., 142 NLRB 431 (1963).

During the arbitration proceedings, and/or in the filing of post-hearing arbitration briefs, the Respondent raised a procedural argument regarding the grievance. Specifically, the Respondent argued that the grievance was untimely and should be denied.[2]

In the current unfair labor practice charge, Charging Party asserts that the Respondent violated the Deferral, as well as Section 10(a)(4) of the Act, when it raised this procedural argument before the arbitrator. Charging Party asserts that the Respondent's request for the arbitrator to rule on the timeliness issue is to "avoid having the arbitrator rule on substantive issues raised by the Charging Party's grievance." Charging Party asserts that, because the Deferral became final and binding, the parties must exhaust the grievance-arbitration procedure and the Respondent is barred from raising a procedural arbitrability argument at arbitration. Charging Party further asserts that the purpose of the Dubo deferral is to allow the arbitrator to rule on the substantive issues, and for the Board to review the arbitration award to determine whether any additional remedies exist under the Act.[3]

II. DISCUSSION AND ANALYSIS

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

[2] It is unclear to the undersigned whether the Respondent raised the timeliness argument at arbitration or whether it was raised for the first time in post-hearing briefs. Regardless, the undersigned was not aware of the timeliness argument at the time the Deferral was issued.

[3] In addition to filing the instant charge, on January 16, 2015, the Charging Party also filed a "Motion to Enforce the 'Executive Director's Deferral to Arbitration' Order and for Issuance of a Rule to Show Cause" in Case No. S-CA-14-082. In that Motion, Charging Party seeks an order barring the Respondent from raising a procedural arbitrability argument in the arbitration over this matter, as well as the award of all costs and fees associated with the filing of the Motion. Charging Party also seeks the issuance of a Rule to Show Cause as to why the Respondent should not be held in contempt for violating the Deferral.

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. As noted above, the undersigned deferred the charge in S-CA-14-082 under the Dubo doctrine.

Charging Party essentially argues that under a Dubo deferral, the parties are bound to proceed to arbitration on the merits, and precluded from raising any procedural arbitrability arguments. The problem with this argument is that parties are not *required* to waive procedural defenses under a Dubo deferral.

Again, in a Dubo deferral, the union has already initiated a grievance over the matter that is the subject of the unfair labor practice charge. However, 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.

In contrast, under a Collyer deferral, the union has not yet initiated a grievance. It is therefore far more likely that any grievance filed will be untimely in a Collyer case. Under the Collyer standard, deferral is appropriate where the following three conditions exists: (1) A question of contract interpretation is at the center of the dispute; (2) The dispute arises within an established collective bargaining relationship where there is no evidence of enmity by the respondent towards the employees' exercise of protected rights; and (3) The respondent has credibly asserted its willingness to arbitrate the dispute. This third element requires the employer to assert a willingness to waive any and all procedural barriers to the filing of a grievance. There is no such affirmative assertion required under a Dubo deferral.

Charging Party provided prior Board cases where employers agreed to waive procedural arguments in a Dubo deferral. While employers in those prior cases may have made such an assertion, I cannot find any authority that such a waiver is required in a Dubo deferral. In any event, the Board never received (or even requested) such a waiver from the Respondent in S-CA-14-082. Indeed, the deferral in that case was the result of the *Charging Party's* request for deferral. Under my reading of the Dubo standard, and the circumstances presented in the instant case, I find that the Respondent was not barred from raising a procedural arbitrability argument at arbitration.[4] I further find that Charging Party has failed to raise an issue for hearing on the 10(a)(4) charge filed in the instant case.[5]

III. ORDER

Accordingly, the instant charge is hereby dismissed. The Charging Party may appeal this dismissal to the Board any time within 10 calendar days of service hereof. Such appeal must be in writing, contain the case caption and numbers and must be 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 the Charging Party must provide it to all other persons or organizations involved in this case at the same time it is served on the Board. The appeal sent to the Board must contain a statement listing the other parties to the case and verifying that the appeal has been provided to them. The appeal will not

[4] Based on this finding, I deny Charging Party's Motion, referenced in footnote 2.

[5] It should be noted that the Deferral issued in S-CA-14-082 provides that "[w]ithin 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." This language gives the Charging Party the right to request a complaint for hearing in S-CA-14-082 if substantive issues are left unresolved after the conclusion of the arbitration hearing. Obviously, if the Respondent pursues a procedural arbitrability argument, it is far more likely that substantive issues will be left unresolved at arbitration that will warrant a hearing before the Board in S-CA-14-082.

be considered without this statement. If no appeal is received within the time specified, this dismissal will be final.

Issued at Springfield, Illinois, this 6th day of February, 2015.

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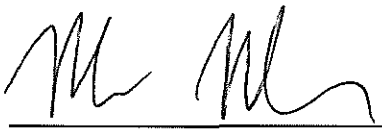

Melissa Mlynski
Executive Director