

**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-16-007
)	
State of Illinois, Department of Central)	
Management Services,)	
)	
Respondent.)	

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

On October 27, 2015, Executive Director Melissa Mlynski dismissed a charge filed by American Federation of State, County and Municipal Employees, Council 31 (Union or Charging Party) on July 27, 2015. The charge alleged that the State of Illinois, Department of Central Management Services (Respondent or Employer) engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Labor Relations Act, 5 ILCS 315 (2014) *as amended* (Act).

The Respondent posted questions and answers online, one of which indicated that “striking employees will be responsible for the full cost of their health insurance, including the amount normally contributed by the State on behalf of the employees. If striking employees miss any day during the pay period due to being on strike, they will be sent a bill for the full cost of their coverage.” In support of its charge that this policy and its communication violated the Act, the Charging Party argued that a policy that treats striking employees less favorably than employees on other types of unpaid leaves in unlawful discrimination in violation of Section

10(a)(2). Through the course of the investigation of the charge, it became clear that the Charging Party was also arguing that the Respondent's conduct violated Section 10(a)(4) by failing to negotiate a unilateral change in policy and Section 10(a)(1) in that the policy and/or its communication might unlawfully discourage potential strikers.

The Executive Director dismissed the charge, finding that the Charging Party's Section 10(a)(2) allegation failed because it could not show that it or its members had engaged in protected activity where, as here, a strike had not yet taken place. Applying the facts to Section 10(a)(4) and Section 10(a)(1), despite the lack of an amended charge explicitly raising the allegations, the Executive Director dismissed these claims as well. The Executive Director found that the Charging Party failed to show any evidence of a unilateral change in violation of Section 10(a)(4), particularly in light of the available evidence that the complained-of policy has been in place since at least 2004. Finally, the Executive Director found that the Respondent's accurate communication of an existing policy that does not otherwise contain a threat of reprisal is insufficient to raise a question of a violation of Section 10(a)(1).

The Charging Party filed a timely appeal of the Executive Director's Dismissal pursuant to Section 1200.135(a) of the Board's Rules and Regulations, 80 Ill. Admin. Code §1200.135(a), and the Respondent timely responded to that appeal. In its appeal, the Charging Party concedes that the alleged Section 10(a)(2) violation is "not now ripe" in that "no 'adverse employment action' has occurred." Therefore, the Executive Director's Dismissal on this point is not before us and is not precedential, but binding on the parties.

After reviewing the record, appeal and response, we uphold the Executive Director's Dismissal of the alleged violations of Section 10(a)(1) and (4) for the reasons stated therein.

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 in Chicago, Illinois on December 15, 2015, written decision issued in Chicago, Illinois on January 22, 2016.

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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-16-007

DISMISSAL

On July 27, 2015, Charging Party, American Federation of State, County and Municipal Employees, Council 31 (AFSCME), filed an unfair labor practice charge with the State Panel of the Illinois Labor Relations Board (Board), in the above-captioned case, alleging that Respondent, State of Illinois, Department of Central Management Services (CMS) violated Section 10(a) of the Illinois Public Labor Relations Act (Act), 5 ILCS 315 (2014), *as amended*. After an investigation conducted in accordance with Section 11 of the Act, I have determined that the charge fails to raise an issue of fact or law sufficient to warrant a hearing and hereby issue this dismissal for the reasons set forth below.

I. INVESTIGATION AND POSITIONS OF THE PARTIES

Respondent is a public employer within the meaning of Section 3(o) of the Act. Charging Party is a labor organization within the meaning of Section 3(i) of the Act, and the exclusive representative of various bargaining units (Units) comprised of tens of thousands of Respondent's employees working for different state agencies. The Respondent and the Charging

Party are parties to a master collective bargaining agreement (CBA) for the Units, with a stated expiration date of June 30, 2015. The CBA contains a grievance procedure that culminates in final and binding arbitration. Appendix A, Section 1, Summary of Benefits, provides that “[t]he State shall maintain a program of benefits that shall include health, dental, vision, and life coverage.” Appendix A sets forth details on various benefit plans, including contribution amounts.

On or about February of 2015, the parties commenced negotiations for a successor to the CBA. The parties are also signatories to three Tolling Agreements for the CBA. In or about June of 2015, the State posted a list of Frequently Asked Questions (FAQs) to the www.illinois.gov website. The posting explained the purpose of the FAQs as follows:

Welcome to the Illinois state employees Frequently Asked Questions website. The state recognizes that its employees may have concerns about a variety of issues. This website provides a forum for employees to raise questions and find answers about a variety of subjects, including labor issues, the state’s finances, and new policies that may have an impact on state employees.

All questions submitted by employees through this website will remain anonymous. In fact, employees can and should submit questions without providing their names. Thank you for your interest in the state.

The posting went on to set forth a series of questions and answers. A number of the questions dealt with the possibility of state employees going on strike.¹ In that section, the following question and answer was posed:

Q: Will striking employees still receive health insurance?

A. Yes, but striking employees will be responsible for the full cost of their health insurance, including the amount normally contributed by the State on behalf of the employee. If striking employees miss any day during the pay period due to being on strike, they will be sent a bill for the full cost of their coverage.

¹ Employees in the Units were not on strike at the time of the posting, nor have they gone on strike to date.

The average full cost of state health insurance is \$801/mo for an individual, \$1508/month for a couple and \$1960/month for a family, but varies slightly depending on which plan employees have selected...

On July 27, 2015, AFSCME filed this unfair labor practice charge, alleging that the policy set forth above “discriminates against individuals for engaging in a protected activity” and violates Section 10(a)(2) of the Act. AFSCME asserts that this new policy for strikers differs from the policy for employees on other types of unpaid absences and is therefore discriminatory. AFSCME further asserts that CMS is obligated to bargain over this change in insurance policy, and cites state and federal cases that found a duty to bargain over a new work rule applied to strikers. Finally, AFSCME argues that the FAQs posting was coercive and/or threatening to employees in the Units.

In response to this charge, CMS asserts that an employer is not obligated to subsidize a strike. CMS further asserts that the FAQs post was protected speech under Section 10(c) of the Act.² CMS also asserts that its benefit system contains over fifty different leave of absence pay codes which are used when an employee is in a non-pay status, and that a “strike” has been coded as employees’ paying 100% of the cost of the premium for many years. According to CMS, it used this strike code in 2004 when employees at Northeastern Illinois University engaged in a strike.³ CMS further asserts that regardless of whether an employee goes on strike for one day or the entire pay period, the code applies to the entire pay period and that it would be “practically impossible” for CMS to pro-rate health insurance premiums based on the amount of days an employee actually works.⁴ CMS also asserts that other absences that are coded as

² Pursuant to Section 10(c), “[t]he expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form, shall not constitute or be evidence of an unfair labor practice under any of the provisions of this Act, if such expression contains no threat of reprisal or force or promise of benefit.”

³ The Northeastern Illinois University employees are also covered under the CMS health benefit plans, but are not included in any of the Units and were not represented by AFSCME at the time of the strike.

⁴ There are two pay periods per month.

requiring 100% employee contribution are applied in this same way in that they are not pro-rated for the pay period.

II. DISCUSSION AND ANALYSIS

As noted above, AFSCME's unfair labor practice charge asserts that CMS violated Section 10(a)(2) of the Act. Section 10(a)(2) provides that it is an unfair labor practice for an employer to discriminate in regard to hire or tenure of employment or any term or condition thereof in order to encourage or discourage membership in or support for any labor organization. In order to establish a prima facie case that an employer has violated Section 10(a)(2), a charging party must prove that: (1) employee(s) engaged in union or other protected concerted activity; (2) the employer was aware of that activity; and (3) the employer took adverse action against the involved employee(s) for engaging in that activity in order to encourage or discourage union membership or support. New Lenox Fire Protection District, 24 PERI ¶ 78 (IL LRB-SP 2008) (citing City of Burbank v. Illinois State Labor Relations Board, 128 Ill. 2d 335 (1989)).

I find that this charge fails to raise an issue for hearing under Section 10(a)(2) of the Act. Employees in the Units have not yet engaged in the protected activity (striking) that will allegedly trigger an adverse employment action. Furthermore, to the extent that application of the policy requiring striking employees to pay 100% of their health insurance is the alleged adverse employment action, the policy has yet to be applied to any of the employees in the Units. Without any evidence of protected activity or an adverse employment action, the Charging Party's 10(a)(2) allegation must be dismissed.

Section 10(a)(2) is the only specific provision that the Charging Party cited when filing this unfair labor practice charge. However, during the course of the investigation, Charging Party made it clear to the Board agent investigating this charge that it was also arguing that the FAQs were coercive and/or threatening in manner and that Respondent violated the Act by

failing to bargain with AFSCME regarding the policy. Such arguments raise the potential of an independent Section 10(a)(1) violation and a violation of Section 10(a)(4) of the Act, respectively. However, the charge was never amended to reflect an alleged independent 10(a)(1) or a 10(a)(4) violation.⁵

The absence of a specific 10(a)(4) allegation in this charge became an issue during the investigation of this case. On or about September 15, 2015, Respondent filed a Motion to Deconsolidate the charge AFSCME filed in this case from the charge AFSCME filed in Case No. S-CA-16-006.⁶ In its Motion to Deconsolidate, Respondent asserted that the two charges differed in that S-RC-15-006 involved an alleged violation of Sections 10(a)(1) and (4) but S-CA-16-007 (the instant charge) involved an interpretation of Section 10(c). In its response to the Motion to Deconsolidate, AFSCME stated:

The charge in Case No. S-CA-16-007 *does* contain an element which relates to the State's obligation under Section 10(a)(4) of the Act. The Charging Party alleges that the State has unilaterally adopted a new rule regarding the obligation of State employees to pay insurance premiums while they are on strike. This rule was promulgated without notice to and bargaining with the Union. Moreover, the rule was promulgated in the midst of bargaining for a new contract. (Emphasis in original.)

Through this correspondence, CMS was put on notice of AFSCME's position that the charge raises a potential 10(a)(4) violation, even though the charge itself was never amended. To the extent that it can be said that AFSCME raised a 10(a)(4) claim, and to a lesser extent, an

⁵ Even though the charge did not reflect an independent 10(a)(1) and a 10(a)(4) claim, a review of the correspondence between the Board agent investigating this charge and the Respondent indicates that Respondent was informed of AFSCME's arguments that CMS had a duty to bargain the policy and that the FAQs were "an illegal threat."

⁶ AFSCME filed S-CA-16-006 on July 24, 2015. Both of the unfair labor practice charges were assigned to the same Board agent for investigation, and the charges were investigated simultaneously. In communications with one or both of the parties, the Board agent mistakenly referred to the two charges as being "consolidated" for purposes of any potential hearing. Presumably, this is what prompted the Respondent's Motion to Deconsolidate. On October 16, 2015, I issued a Complaint for Hearing in S-CA-16-006, but I declined to consolidate the two charges.

independent 10(a)(1) claim during the course of the investigation, I will consider both of those allegations at this time.

Section 10(a)(4) of the Act provides that it shall be an unfair labor practice for a public employer or its agents “to refuse to bargain in good faith with a labor organization which is the exclusive representative of public employees in an appropriate unit.” A public employer violates this provision when it makes a unilateral change in a mandatory subject of bargaining without granting notice and an opportunity to bargain, to the employees’ exclusive bargaining representative. County of Cook (Cermak Health Services), 10 PERI ¶ 3009 (IL LLRB 1994), affirmed, 284 Ill. App. 3d 145, 671 N.E.2d 787, 12 PERI ¶ 4017 (1st Dist. 1996).

In this case, the Charging Party has provided insufficient evidence that the Respondent engaged in a unilateral change when it explained its policy on health insurance for striking employees in the FAQs. There is no evidence that a strike has ever occurred between these parties, so there is insufficient evidence that the CMS policy is a departure from a past practice. If anything, the available evidence indicates that the policy as set forth in the FAQs reflects the way CMS has coded and in fact implemented health insurance for striking employees since as early as 2004. I recognize that the 2004 strike of Northeastern Illinois University employees did not involve AFSCME and did not involve any of the Units at issue in this case. However, it is relevant in that it certainly belies any suggestion that CMS created a “new” policy or made a unilateral change in health insurance for any striking employees, much less the employees in the AFSCME Units.

In support of its case, AFSCME submits excerpts from the CMS Benefits Handbook (Handbook), a document the Respondent distributes to Unit employees and/or makes available on CMS websites. The Handbook specifically lists the types of “approved leaves” in which

CMS will continue to contribute to the cost of health insurance.⁷ Strikes are not on the list. The Handbook also lists the types of leaves where the employee is responsible for all health insurance contributions.⁸ Again, strikes are not on the list. Ultimately, the Handbook is not helpful as evidence of a unilateral change in that it appears to be silent as to striking employees. In the end, it is incumbent upon AFSCME to show some evidence of a unilateral change in order to obtain a complaint for hearing under Section 10(a)(4). AFSCME has been unable to do so.

The final aspect of this charge that must be addressed is AFSCME's allegation of an independent Section 10(a)(1) violation. Section 10(a)(1) of the Act provides that it shall be an unfair labor practice for an employer or its agents to interfere with, restrain or coerce public employees in the exercise of the rights guaranteed in the Act. A violation of Section 10(a)(1) is generally found where it is shown by a preponderance of the evidence that a public employer has engaged in conduct which reasonably tends to interfere with, restrain or coerce employees in the free exercise of rights guaranteed in the Act. Illinois Department of Central Management Services, 16 PERI ¶2018 (IL SLRB G.C. 2000). The applicable test in determining whether a violation has occurred is whether the employer's conduct, when viewed objectively from the standpoint of an employee, had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by the Act. County of Woodford, 14 PERI ¶ 2017 (IL SLRB 1998). There is no requirement of proof that the employees were actually coerced or that the employer intended to coerce the employees. Village of Calumet Park, 23 PERI ¶ 108 (ILRB-SP 2007).

⁷ This list is as follows: Disability Leaves (Nonoccupational and Occupational); Medical or Bonding Family Leave; Military Caregiver or Qualifying Exigency Family Leave; Educational/Sabbatical Leave; Seasonal Leave; Military leave (activation); University Annual Break; Dock or Suspension Status (limited to the first 30 calendar days.)

⁸ This list is as follows: Family Leave Nonmedical; Personal/General Leave; Dock or Suspension Status (after the first 30 calendar days); Military Family Leave (when employee is the spouse, civil union partner or parent of a military person); Military leave (deactivation).

The Board has also found that a public employer violates Section 10(a)(1) when it makes a threat of reprisal for employees engaging in union or protected activity. Village of Calumet Park, 22 PERI ¶ 23 (ILRB-SP 2005); City of Highland Park, 18 PERI ¶ 2012 (ILRB-SP 2002); City of Chicago (Mulligan), 11 PERI ¶ 3008 (IL LLRB 1995); City of Chicago (Chicago Police Department), 3 PERI ¶ 3028 (IL LLRB 1987).

Employees engaging in a lawful strike under Section 17 of the Act are engaged in protected activity. The question is whether the FAQs cited above can be deemed a threat under Section 10(a)(1) for engaging in protected activity (striking) or a threat to dissuade employees from engaging in that protected activity. More precisely, the question before me is whether the evidence presented during the investigation raises a question for hearing under the theory that quoting the CMS policy was actually a threat to employees in the Units. I find insufficient evidence that CMS made a threat of reprisal. The available evidence is that the “answer” set forth in the FAQs regarding health insurance for employees on strike was accurately reflective of a long standing policy. Although this appears to be the first time that the policy was communicated to employees in the Units and/or AFSCME via a FAQs format, there is simply no evidence that the policy was “new” or that it was designed to threaten employees in the Units contemplating a strike. In fact, the available evidence indicates that the policy predates the parties’ negotiations for a successor CBA.

The fact that there is no evidence of a threat of reprisal does not end the inquiry. As noted above, an employer can also violate Section 10(a)(1) when the employer’s conduct, when viewed objectively from the standpoint of an employee, had a reasonable tendency to interfere with, restrain or coerce employees in the exercise of the rights guaranteed by the Act. County of Woodford. It is certainly arguable that employees in the Units may have read the FAQs and

been dissuaded from going on strike because of the possibility of having to pay the entire cost of their health insurance premium for the pay period -- even if that strike is only for one day.

Still, I find that the mere communication of a policy that may work as a disincentive to strike is not enough to raise a question for hearing under Section 10(a)(1). Indeed, in the FAQs, the very communication above the health insurance question reads as follows:

Q. Who will pay me while I'm on strike?

A. Not the State. Striking employees will receive no pay or benefits. Conversely, workers who choose to continue to come to work will be paid.

This communication can similarly be characterized as a disincentive to strike, yet AFSCME apparently does not take issue with it. An employer stating the potential negative impact to pay and benefits (including health insurance) that accompany a strike is not, in and of itself, evidence of coercive conduct.

In addition, the statements Respondent made in the FAQs are protected under Section 10(c) of the Act. As previously noted, Section 10(c) of the Act specifically protects “the expressing of any views, argument, or opinion or the dissemination thereof, whether in written, printed, graphic, or visual form...” as long as the expression contains no threat of reprisal or force or promise of benefit. The FAQs can reasonably be read as putting Unit employees on notice that they would be responsible for their entire health insurance contribution for any pay period in which they go on strike, regardless of the length of the strike. As the evidence supports that this is the established CMS policy, the communication of that policy to Unit employees is protected under Section 10(c).

III. ORDER

Accordingly, the instant charge is hereby dismissed. Charging Party may appeal this dismissal to the Board at any time within 10 calendar days of service hereof. Any such appeal

must be in writing, contain the case caption and number, and be addressed to the General Counsel of the Illinois Labor Relations Board, 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103. Appeals will not be accepted in the Board's Springfield office. In addition, any such appeal must contain detailed reasons in support thereof, and the party filing the appeal must provide a copy of its appeal to all other persons or organizations involved in this case at the same time the appeal 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 a copy of the appeal has been provided to each of them. An appeal filed without such a statement and verification will not be considered. If no appeal is received within the time specified herein, this dismissal will become final.

Issued at Springfield, Illinois, this 27th day of October, 2015.

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



**Melissa Mlynski
Executive Director**