State of Maryland
State Labor Relations Board

In the matter of:	)	
	)	
	)	
AFT Healthcare Maryland	)	
AFT, AFL-CIO, Local No. 5197,	)	
	)	
Complainant/Petitioner,	)	
	)	
	)	**SLRB Case No. 03-U-01**
v.	)	**Opinion No. 1**
	)	
	)	
State of Maryland, et al.,	)	
	)	
Respondents.	)	
	)	
	)	

DECISION AND ORDER

I. Procedural History

On April 7, 2003, AFT Healthcare Maryland, AFT, AFL-CIO, Local 5197(AFT or Petitioner), filed with the State Labor Relations Board ("SLRB" or "the Board") an Unfair Labor Practice ("ULP") Petition alleging that the State of Maryland (State or Respondents), through the officers and agents of the Governor, committed an unfair labor practice by failing to define unfair labor practices as required under the State Personnel and Pensions Article, Title 3 (herein after Collective Bargaining Statute), §3-306(a). AFT further alleged that the State failed to meet its statutory obligation to engage in collective bargain in good faith within the meaning of §§3-501(b), (c) and (d), 3-502(a), and 3-601(a) and (c) of the Collective Bargaining Statute. With respect to this latter claim, AFT alleges that the State: (1) failed to take the necessary steps to fund and implement the terms of the parties' duly

negotiated Memorandum of Understanding (MOU); and (2) expressly repudiating the MOU.[1]/

On April 24, 2003, the Board delegated to the Office of Administrative Hearings (OAH) the authority to make proposed findings of fact, proposed conclusions of law and issue a proposed order on the alleged violations contained in the ULP Petition. The case was assigned to an administrative law judge and a hearing was held on September 10 and 26, 2003.[2]/ On December 8, 2003, Administrative Law Judge (ALJ) Mary Shock issued a "Proposed Decision."

The ALJ concluded that the Collective Bargaining Statute does not make the State's failure to define unfair labor practices an unfair labor practice. The ALJ observed that § 3-207[3]/ of the Collective Bargaining Statute providing for the authority an executive officer of the Governor, the Secretary of the Department of Budget and Management (DBM), to promulgate regulations defining unfair labor practices expressly makes the exercise of that authority discretionary.[4]/ As such, the ALJ further observed that the failure, heretofore, to exercise such authority does not violate the Collective Bargaining Statute or otherwise constitute an unfair labor practice.[5]/

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[1]/ Section 3-102 of the Collective Bargaining Statute extends the rights and obligation accorded under its provisions to "all employees of: the principal departments within the Executive [Governor] Branch of State government… ." The particular MOU in question would cover employees in Bargaining Unit E, comprising health care professionals.

[2]/ A hearing was also held on June 24, 2003, on the Respondents' Motions to consolidate and to stay proceedings. The ALJ granted the motion to stay based on the parties' agreement to consolidate the instant case for hearing with a related ULP case the Board also delegated to OAH in SLRB Case No. 03-U-02. Respondents also sought a stay of proceedings pending the final resolution of another case then-pending in the Circuit Court of Ann Arundel County that contained asserted similar issues. Citing *Maryland Comm'n on Human Relations v. Mass Transit*, 294 Md. 225, 449 A.2d 385 (1982), the ALJ denied Respondents' Motion to stay proceedings stating that Petitioner MPEC is not a party to the Circuit Court case and have an interest in proceeding timely in the instant case.

[3]/ Section 3-207 of the Collective Bargaining Statute provides as follows:

> The Secretary **may** adopt and enforce regulations, guidelines, and policies to carry out this title which:
>
> (1) define unfair labor practices; … .

[4]/ See, also, *Maryland State Employees Union, American Federation of State County and Municipal Employees, Council 92 v. Governor Robert L. Ehrlich, et al.*, Case No. C-2003-88915DJ (Circuit Court ruled that the authority of the Secretary under § 3-207 of the Collective Bargaining Statute is discretionary).

[5]/ The ALJ's disposition of this claim turns on whether or not the Respondent's failure to define unfair labor practices is a statutory violation under the Collective Bargaining Statute. (see n. 3) We note, however, that the Petitioner's also alleges the DBM Secretary's failure to define unfair labor practices as a unfair labor practice violation pursuant to § 3-306(a). Section 3-306(a) proscribes the commission of unfair labor practices by the State as follows: "[t]he State and its officers and agents, or representatives are

With respect to AFT's second claim, the ALJ concluded that the MOU in dispute was not effective until ratified by the Governor. The ALJ found that AFT failed to prove that the MOU was duly ratified by the Governor and, therefore, the Respondent's refusal to fund, implement or comply with its terms did not constitute a violation of the State's statutory obligation to engage in collective bargain in good faith.

On January 12, 2004, pursuant to Title 10, Subtitle 2 of the State Government Article, § 10-216(a)(2), AFT filed Exceptions limited to the ALJ's proposed findings of fact, conclusions of law and decision that the Respondent did not violate its statutory obligations to engage in collective bargaining in good faith with respect to the disputed MOU. The Respondent filed an Opposition to Exceptions on February 18, 2004. Upon review of the Proposed Decision, the Petition's Exceptions and Respondent's Opposition thereto, and the record as a whole, the Board hereby adopts the proposed findings of fact, conclusions of law and decision of the ALJ with respect to both alleged unfair labor practice violations. For the reasons discussed below the Board finds no merit to Petition's Exceptions and they are hereby denied.

II. Exceptions

AFT asserts that the ALJ's conclusion that the Governor did not ratify the disputed MOU in accordance with § 3-601(c) misconstrues the facts as applied to the requirements under the Collective Bargaining Statute. In support of its assertion, AFT argues that: (1) under common law principles of agency and ratification, a valid ratification by a principal, e.g., Governor, can occur without knowledge of all the material facts about the matter to be ratified, e.g., MOU; (2) the ALJ's conclusion that "Governor Glendening did not have 'full knowledge of the terms of the agreements'" ignores uncontested facts in the record to the contrary; and (3) the ALJ's interpretation of "objective" evidence of ratification effectively imposes criteria not required under the Collective Bargaining Statute that: (a) ratification be in writing and (b) the MOU be signed again after the MOU is

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prohibited from engaging in any unfair labor practice, as defined by the Secretary." If, *ab initio*, the Petitioner acknowledged that the Secretary had yet to define unfair labor practices, Petitioner's claim that the DBM Secretary engaged in such prohibited conduct fails to state a viable cause of action.

ratified by employees in the covered bargaining unit. (Except. at 3 and 5.)

III. Analysis

Any proper assessment of the contentions AFT makes in support of its Exceptions must first begin with the Collective Bargaining Statute itself and, when warranted and available, related and applicable Maryland law. In consummating the terms of a memorandum of understanding, the Collective Bargaining Statute expressly and specifically provides that a memorandum of understanding may be negotiated and signed on behalf of the State by the Governor or the Governor's designee.[6]/ There is no dispute over the ALJ's finding that the Governor's bargaining agent designee acted properly and consistent with the Collective Bargaining Statute for purposes of negotiating and executing the written MOU. (ALJ Dec. at 14.)

However, under the Collective Bargaining Statute " a memorandum of understanding is not effective until ratified by the Governor and a majority of the votes case by the employees in the bargaining unit." See Section 3-601(c). With respect to ratification, the Statute does not similarly extend such authority to the Governor's designee

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[6]/ Section 3-601 of the Collective Bargaining Agreement provides, in pertinent part, the following:

(a) Contents; signatures.—
  (1) A memorandum of understanding shall contain all matters of agreement reached in the collective bargaining process.
  (2) The memorandum shall be in writing and signed by the exclusive representative involved in the collective bargaining negotiations and;
    (i) for a memorandum of understanding relating to the State, the Governor or the Governor's designee;

* * * *

(c) Ratification. —
  (1) Except as provided in paragraph (2) of this subsection, a memorandum of understanding is not effective until it is ratified by the Governor and a majority of the votes cast by the employees in the bargaining unit.

We note that subsection (c)'s reference to an exception "provided in paragraph (2) of this subsection" refers to ratification of MOUs relating to State institutions of higher education and is thereby inapplicable to the instant Respondent and the provisions of the Collective Bargaining Statute administered and enforced by this Board.

but accords it only to the Governor.[7]/ In view of the above, the Petitioner's Exceptions narrowly turn on whether or not the disputed MOU was properly ratified by the State's principal, i.e., the Governor, as required under the Collective Bargaining Statute and in accordance with Maryland law.

Consistent with Maryland law, the ALJ observed that "a principal [, e.g., Governor,] may ratify the acts of an agent through express or implied acts that indicate the principal's intent to be bound by the agent's transactions." Id. See, *Huppman v. Tighe*, 100 Md.App. 655, 642 A.2d 309 (1994). In determining whether or not the Governor had ratified the MOU, the ALJ accurately observed that the Collective Bargaining Statute does not specify how the Governor's ratification shall be manifested. The ALJ then reasonably adjudged that proof of the Governor's ratification must be based on objective evidence establishing such intent. However, turning again to Maryland law, the ALJ observed that the intent to ratify could not be formed without knowledge of all material facts of the matter to be ratified. See, *Integrated Consulting Services v. LDDS Communications*, 996 F.Supp. 470 (D. Md. 1988)(under Maryland law, court found that reliance upon the agent is not an element of ratification; the controlling element is whether the principal, <u>with knowledge of all material facts, intended to ratify agent's actions)</u>.

The ALJ concluded there was insufficient evidence to establish that the Governor ratified the MOU. The ALJ found no evidence that established that the Governor was sufficiently apprised either before or after the MOU was signed (by his designee) with respect to substantial portions of an MOU incorporating all the matters of agreement reached by the parties.[8]/ The ALJ concluded

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[7]/ It is a settled principal of statutory construction that where a statute authorizes or permits the taking of action in a certain expressed and particular manner, the manner is a mandatory limitation on the action and must be performed as prescribed. See, e.g., *Office & Professional Employees International Union v. Mass Transit Administration*, 295 Md. 88 (1982).

[8]/ The ALJ made a finding that once negotiations on the MOU had been completed, the Governor's chief negotiator (bargaining agent) reported this fact to him and was told by the Governor words to the effect of "go ahead and pull the contract together" or "go ahead and wrap it up, which means do the final drafts and sign it." (ALJ Dec. at 15; Tr. at pp. 10, 13 and 28-29). Although the testimony clearly establishes (and Section 3-601(a) specifically permits) that the Governor accorded his designee with the authority to reduce the MOU to writing and to sign it, notwithstanding AFT's suggestion to the contrary, the signing of the MOU by the Governor's designee is not the equivalent of ratification by the Governor. Although § 3-601(a) of the Statute expressly prescribes the signing, i.e., execution, of the completed MOU by the Governor or his designee, to effectuate the MOU, § 3-601(c) limits the required ratification to the

thereby that the evidence did not establish that at any time material to this case the Governor had a manifest "knowledge of all material facts" of the MOU sufficient to prove that he intended or could form an intent to ratify the complete MOU.

We find nothing in the Petitioner's Exceptions or in the record that refutes the ALJ's evidentiary findings; nor do we find that the ALJ has misstated the state of the law in Maryland with respect to ratification. In view of the above, we find no merit to AFT's contention that a valid ratification can be made by a principal, e.g., Governor, without the knowledge of all material facts possessed by the agent concerning the matter to be ratified.[9]/

Next, AFT asserts that the ALJ's finding that the Governor did not have full knowledge of the terms of the MOU ignores uncontested facts in the record to the contrary. Notwithstanding AFT's assertions, the record establishes only that the Governor was briefed with respect to only three articles of the disputed MOU, a 2% COLA provision, agency shop and a grievance arbitration procedure. AFT points to no evidence in the record, and we find none, establishing the extent, if any, the Governor was informed of the other 34 articles that were part of the negotiated MOU. Although a memorandum of understanding consists of many components, i.e., articles, that address various matters, it is a single integrated document for purposes of ratification. Without proof that the Governor was informed or briefed about substantial parts of the MOU once negotia-tions were complete, no foundation exists in the record for inferring or drawing the presumptions AFT advances that the Governor had the required breadth of knowledge with respect to <u>all</u> material facts of "all matters of agreement reached by the parties" to ratify the MOU. See § 3-601(a).

Governor alone for a MOU relating to the State. While ratification of the MOU does not necessarily have to take a particular form, pursuant to § 3-601(a) and (c), ratification can only occur once an MOU "that incorporates all matters of agreement reached by the parties" has been completed, reduced to writing and signed, i.e., executed. See, also, § 3-501(d). As discussed in the text, there was insufficient evidence to prove that the Governor, himself, ever ratified (or could effectively ratify) the completed MOU that had been reduced to writing and signed by the Governor's designee.

[9]/ We note that AFT did not cite or resort to Maryland authority to support its proposition to the contrary. See, *Wolfe v. Shell Petroleum Corp.*, 83 F2d. 438 (10th Cir. 1936) and *Askew v. Joachim Memorial Home,* 234 N.W.2d 226 (N.D. 1975).

In view of the above, no basis exists for deciding AFT's remaining contentions, i.e., that the ALJ's interpretation of objective evidence effectively imposed non-statutory conditions requiring written ratification or a second signing of the MOU after its been ratified by employees in the covered collective bargaining unit. We note, however, that we view the ALJ's expounding on what kind of objective evidence could serve to establish the Governor's intent to ratify an MOU (including by signing the MOU after it has been ratified by bargaining unit employees) was intended as illustrative only and was neither exhaustive nor definitive of evidence of ratification under the Collective Bargaining Statute.

The Board is aware that we reserved the authority in our delegation to OAH to review both findings of fact and conclusions of law. However, AFT does not identify evidence or findings made by the ALJ establishing the critical element of ratification consistent with the requirements of Maryland law to refute the ALJ's findings and conclusions to the contrary. Based on requirements of the Collective Bargaining Statute, the evidence presented and applicable related law, the Board finds AFT's exceptions do not identify grounds for finding that the ALJ's findings of fact are not supported by the record or that her conclusions of law were reached in error.

AFT's exception to this finding and conclusion merely disagree with the ALJ's assessment of the record evidence. The contentions AFT makes concerning the significance that should have been accorded evidence presented at hearing were advanced before the ALJ and rejected. We do not find AFT's challenges to the ALJ's findings of fact give rise to a proper exception where, as here, the ALJ based her findings on a lack of critical evidence supported by the record. [10]/

Therefore, we find no basis for disturbing the ALJ's findings and conclusions that AFT did not meet its burden of establishing that the Respondent's refusal to effect the MOU in question constituted an unfair labor practice or otherwise a violation of its statutory obligation to engage

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[10] / There is no omni-standard for review governing Maryland agencies reviewing exceptions to proposed findings of fact made by their ALJs or hearing examiners. *See, e.g.*, Berkshire Life Insurance Co. v. Md. Ins. Admin., 142 Md. App. 628, 791 A.2d 942 (2002).

in collective bargaining in good faith. Based on the foregoing, we also adopt the ALJ's proposed findings and conclusions in this regard.

ORDER

IT IS HEREBY ORDERED THAT:

The Petitioner's Exceptions are denied; the Unfair Labor Practice Petition is dismissed.

BY ORDER OF THE STATE LABOR RELATIONS BOARD
Annapolis, MD

March 26, 2004

Appeal Rights

Any party aggrieved by this action of the Board may seek judicial review in accordance with Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222 and MD R CIR CT Rule 7-201 et seq.

Siegel, Member (Concurring)
SLRB Case No. 03-U-01
Opinion No. 1

In light of all the circumstances, I generally concur with the ALJ's recommended disposition and the Board's Opinion and Order on Petitioner's Exceptions. However, it is also my belief that this decision does not offer the parties guidance for their future conduct.

Curiously, the ALJ in reaching her proposed decision, felt it necessary to rely, at least in part, on the venerable decision in *Marbury v. Madison,*[11]/ a case familiar to first year law students, that was decided in 1803, two hundred years ago. This reliance is emblematic proof that the current default process is neither contemporary nor practical.

The fault probably lies with the Collective Bargaining Statute itself, in that it fails to include provisions addressing the fundamental matter of *defining* the term "unfair labor practice." This is not unlike the failure of a basic medical school text to address the matter of human anatomy. In a word, there simply is no guidance available to the parties that can be used by them to measure the legality *vel non* or propriety of their conduct. Any scheme of law enforcement that does not inform the parties of what is expected of them is necessarily inadequate.

The parties should not be required to operate at their own peril, without any prior ability to judge the propriety of their conduct. In criminal law, there can be no finding of guilt if the statute allegedly being violated offers no clear definition of what is "legal" and what is not "legal." Many such statutes, and convictions under them, have been voided because of such "vagueness."

Therefore, but solely as an interim matter, it is my view that the Board should now proceed, without further delay, to promulgate all the required and essential regulations necessary to implement and give vitality to the Collective Bargaining Statute and the SLRB process. A key

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[11]/ *Marbury v. Madison,* 5 U.S. 137, 2 L.Ed. 60 (1803).

failing of the current state of affairs is, as I have observed, the total absence of even a basic definition of what conduct constitutes an "unfair labor practice".

Fortunately, we are not without some reliable and time-tested guidelines. The National Labor Relations Board (NLRB) has dealt with similar issues for generations. Through a laborious and well-considered process, the NLRB has defined and refined the definition of "unfair labor practices" since the adoption of the Taft-Hartley Act in 1947,[12]/ and even prior to that time, under the Wagner Act adopted in 1934.

The NLRB has issued thousands of published cases interpreting the meaning of Section 8, the unfair labor practice provisions of the current Taft-Hartley Act, and continues to refine that definition virtually on a day-to-day basis.

Accordingly, while I would uphold and adopt, as a decision of the Board, the proposed decision of ALJ Mary Shook in this case, it is my view that our fellow Board Member, the Secretary of DBM, should immediately adopt by reference, but purely as an interim measure, the definitions of "unfair labor practices" as interpreted and applied by the NLRB under Section 8 of the National Labor Relations Act, insofar as they are compatible with the purposes and objectives of our statute. The matter of suitability can be considered by the Board on a case-by-case basis until final regulations are adopted.

Such an approach will obviate the difficulty made manifest by the instant cases. The parties cannot know what is expected of them, and what conduct is legally acceptable, unless they are first afforded reliable and well-reasoned guidance. An interim adoption of the NLRB standards in future SLRB unfair labor practice cases will afford such guidance, and serve to minimize future controversies, at least until final regulations are adopted by the Secretary.

The State Higher Education Labor Relations Board (SHELRB) has been confronted with a nearly identical problem. See, In the matter of the *American Federation of State, County and Municipal Employees and Donald R. Pryor*

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[12] / "Labor Management Relations Act. 1947."

v. Salisbury University, Slip Op. No. 7, SHELRB ULP Case No. 2001-03 and 2002-01. In that case the SHELRB held that it had the statutory authority, wholly aside from any reference to administrative regulations defining unfair labor practices to act upon unfair labor practices encompassed by the Collective Bargaining Statute and lawfully adjudicate them. *Collective Bargaining Statute, §3-2A-05(b)(2).* Thus, there is no question but that the SLRB has the statutory authority, even in the absence of administrative regulations, to adjudicate the instant cases, and we have properly done so.

Nevertheless, it would be useful to the parties to any future proceedings under our Statute to have a more definitive set of guideline, even on an interim basis. Accordingly, I urge the Secretary to authorize the recommended interim regimen, and take prompt steps to develop and promulgate specific definitions of "unfair labor practices" so that potential parties can have reliable guidance.

Certificate of Service

It is hereby certified that the attached Decision and Order in SLRB Case No. 03-U-01 was sent (via FAX and/or U.S. Mail) to the following parties on this 26, of March 2004.

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