United States Government
National Labor Relations Board
OFFICE OF THE GENERAL COUNSEL

Advice Memorandum

DATE: January 29, 2008

TO : Richard L. Ahearn, Regional Director
Region 19

FROM : Barry J. Kearney, Associate General Counsel
Division of Advice

SUBJECT: Empire Health Service 530-6067-4055
Case 19-CA-30974 530-8045-5000
530-8049

This case was submitted for advice as to whether the Employer violated Section 8(a)(5) by unilaterally eliminating a defined benefit retirement plan, or whether the parties' collective-bargaining agreement contains a "clear and unmistakable waiver" of the Union's right to bargain over the matter.

We conclude that complaint should issue, absent settlement, because under the Board's "clear and unmistakable" waiver analysis, as reaffirmed in Provena St. Joseph Medical Center,[1] the parties' collective-bargaining agreement did not privilege the Employer's unilateral elimination of the defined benefit retirement plan.

FACTS

Empire Health Services (the Employer) is a non-profit healthcare system that owns and operates two hospitals located in Spokane, Washington. SEIU, District 1199 NW (the Union) represents about 1500 employees at these hospitals, in six separate bargaining units comprised of three categories of employees: technical employees, service employees, and registered nurses.

For many years, and prior to the parties' first collective-bargaining agreement (which currently is in effect), the Employer offered the following retirement benefits to all of its employees: 1) a defined benefit retirement plan; and 2) a 403(b) retirement defined contribution plan. Under the defined benefit retirement plan, the Employer automatically contributed 1% of an employee's earnings once the employee had worked at least 1,000 hours in a 12-month period. Under the 403(b) plan, a tax deferred retirement plan, the Employer contributed matching funds up to 3.5% for employees who contributed 6% or more of their earnings.

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[1] 350 NLRB No. 64 (August 16, 2007).

In 2002, the Union and the Employer began negotiations for an initial collective-bargaining agreement. Negotiations continued for several years, and in 2004 the parties began discussing health and welfare and retirement benefits. During these discussions, the Union represented that employees wanted to retain their existing benefits, including retirement benefits, as they currently existed. The Union considered this to be a trade-off for what it perceived as the Employer's minimal wage increase proposals. The Employer expressed that it needed to have the ability to make changes to the employees' benefits during the agreement. At no time during these discussions did the parties raise or discuss the elimination or freezing of the retirement benefits.

The parties also had two off-the-record discussions regarding the employees' health and welfare and retirement benefits. At the first meeting on July 22, 2005, the Employer reiterated that it needed to be able to unilaterally change the employees' health and welfare and retirement benefits during the term of the contract. Under the Employer's proposal, unit employees would be eligible for and receive the same benefits as non-bargaining unit members. At the second meeting on August 1, 2005, the parties agreed that in exchange for the Union agreeing to allow the Employer to change bargaining unit health and welfare and retirement benefits as they are changed for non-bargaining unit employees, the Employer would agree to, among other things, the Union's proposal for the equal sharing by the Employer and employees of health and welfare insurance premium increases. There was no mention or discussion of the elimination, termination, or freezing of retirement benefits during either of these off-the-record discussions.

On August 1, 2005, the parties entered into three separate collective-bargaining agreements corresponding to the three categories of employees in the six bargaining units. The agreements are effective from August 1, 2005 to September 30, 2008. All three contracts include Article 9, Section 1, which is the only clause regarding retirement benefits. Article 9, Section 1 reads:

> [the Employer] will offer and maintain the same health and welfare benefits...and retirement benefits for eligible bargaining unit employees as are offered and maintained for other hourly employees of [the Employer], on the terms and conditions on which they are offered to other hourly employees. Such benefits offered to eligible bargaining unit members may be changed

> as they are changed for other hourly employees of [the Employer].

Article 9, Section 2 concerns healthcare premium contributions and reads, "[a]ny increase during the term of this Agreement to the monthly health insurance premiums will be shared equally by the employee and the Employer." This provision is identical in all three contracts.

Sometime in January 2006, after the collective-bargaining agreements were in effect, the Employer unilaterally implemented changes to the monthly premiums for the employees' health insurance. The Union initially wrote the Employer a letter contesting the change, but then did not pursue its objection.

On January 24, 2007,[2] the Employer informed the employees by letter that it was making changes to the retirement benefits. The letter stated that the defined benefit plan would be frozen effective March 31, and that the 403(b) plan would be enhanced as of April 1. The new 403(b) plan would provide for a non-discretionary 2% Employer contribution in addition to Employer matching contributions of up to 4% for employees who contributed 4% or more of their earnings.

On January 27, the Union received telephone calls from several employees complaining about the Employer's proposed changes to the retirement benefits. On January 29, the Employer for the first time notified the Union about the change to retirement benefits. By letter dated February 2, the Union demanded that the Employer refrain from making changes to the retirement benefits and requested bargaining over the subject. The Employer responded by letter dated February 9, stating that it was within its right under the collective-bargaining agreement to make changes to the retirement plan, and refused to bargain with the Union.

The defined retirement benefit plan was frozen on March 31. Prior to that date, an employee did not need to contribute any portion of his or her earnings to receive the automatic 1% Employer contribution under the defined benefit retirement plan. After March 31, an employee's benefit amount under the plan was capped and no additional benefits or funds could accrue. Because eligibility for the defined benefit retirement plan requires that an employee work at least 1,000 hours within a 12-month period, an effect of freezing the plan was that any employees hired after December 31, 2006 could not participate in the plan.

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[2] All dates hereafter are in 2007 unless otherwise noted.

The Employer implemented its new 403(b) plan on April 1. Under the new plan, once an employee worked at least 1,000 hours in a 12-month period the Employer would make a contribution equal to 2% of an employee's earnings into a retirement fund, regardless of whether the employee contributed to the plan. If the employee contributed a portion of his or her earnings, the Employer would provide matching contributions up to 4% in addition to the 2% base contribution.

The Union claims the unilateral elimination of the defined benefit retirement plan was unlawful, while the Employer claims its action was privileged under the parties' collective-bargaining agreement.[3] Both parties rely on the same contractual language, bargaining history, and past practice to support their respective positions.

ACTION

We conclude that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(5) by failing to bargain with the Union over the elimination of the defined benefit retirement plan, as the Union did not "clearly and unmistakably" waive its right to bargain over the matter in the parties' collective-bargaining agreement.

Retirement benefits are a mandatory subject of bargaining that an employer may not unilaterally change during the term of a contract without giving the union notice and an opportunity to bargain, unless the union has waived its right to bargain over the matter.[4] The Board recently reaffirmed its long-held position that the purported waiver of a union's bargaining rights is effective if and only if the relinquishment was "clear and unmistakable."[5] In Metropolitan Edison Co. v. NLRB,[6] the

[3] The Union does not allege that the Employer's changes to the 403(b) plan are unlawful.

[4] See, e.g., Inland Steel Co., 77 NLRB 1, enfd. 170 F.2d 246 (7th Cir. 1948); Triangle PWC, 231 NLRB 492, 493 (1977).

[5] Provena St. Joseph Medical Center, 350 NLRB No. 64, slip op. at 8. See also, e.g., Johnson-Bateman Co., 295 NLRB 180, 184 (1989) ("[i]t is well settled that the waiver of a statutory right will not be inferred from general contractual provisions; rather, such waivers must be clear and unmistakable").

[6] 460 U.S. 693, 708 (1983).

Supreme Court, agreeing with the Board, stated that it would "not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated'."[7] The requirement that a waiver of bargaining rights be "explicitly stated" does not, however, require that the action be authorized *in haec verba* in the contract. As the Board noted in Provena, a waiver may be found if the contract either "expressly or by necessary implication" confers on management a right unilaterally to take the action in question.[8]

The Board's analysis in Provena illustrates the above principles. There, the Board first considered the employer's unilateral implementation of a monetary incentive policy to encourage nurses to volunteer to work extra shifts during a holiday period. The Board found that no contractual provision expressly addressed incentive pay, and concluded that a contractual authorization to pay "extraordinary pay" for extra hours worked when the employer determined that extra hours were needed did not encompass the incentive policy. The latter, the Board noted, involved a plan to cover "ongoing, periodic and predictable" staffing requirements such as holiday staffing needs, not "extraordinary" conditions.[9] Further, in the absence of any evidence that the parties had consciously explored, or that the union intentionally relinquished its right to bargain about this topic, the Board held that the union had not waived bargaining over the policy.

The Board then considered the employer's unilateral implementation of an attendance and tardiness policy. In contrast to the incentive policy, the Board concluded that the contract did "explicitly authorize[]" the employer's implementation of a disciplinary policy on attendance and tardiness even though it did not include the words "time and attendance," or "tardiness." The Board found that several provisions of the management rights clause — granting the employer the right to "change reporting practices and procedures and/or introduce new or improved ones," to "make and enforce rules of conduct," and to "suspend, discipline, and discharge employees" — when taken together, amounted to an explicit authorization of the

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[7] Id.

[8] 350 NLRB No. 64, slip op. at 5, n.19, citing New York Mirror, 151 NLRB 834, 839-840 (1965).

[9] Id., slip op. at 8, n.34.

employer's unilateral action,[10] notwithstanding the absence of the words "time and attendance" in the contract.

As Provena illustrates, when a contract does not specifically mention the action at issue, the Board will interpret the parties' agreement to determine whether there has been a clear and unmistakable waiver. In interpreting the parties' agreement, the relevant factors to consider include: (1) the wording of the proffered sections of the agreement(s) at issue; (2) the parties' past practices; (3) the relevant bargaining history; and (4) any other provisions of the collective-bargaining agreement or other bilateral arrangements that may shed light on the parties' intent concerning bargaining over the change at issue.[11]

Applying those factors here, we conclude first that the wording of the relevant contract clause at issue here is not a waiver of the Union's right to bargain over the Employer's decision to eliminate the defined benefit retirement plan. The Employer relies on Article 9, Section 1, to privilege its unilateral action. Article 9, Section 1, states that the Employer will "offer and maintain the same....retirement benefits for [unit employees] as are offered...for [nonunit employees]" and that "such benefits offered to [unit members] may be changed as they are changed for [nonunit] employees." Nothing in this provision grants the Employer the right to unilaterally eliminate a significant segment of the retirement benefit.

The first part, providing that the Employer will maintain benefits on the same basis for unit as for nonunit employees, is not such a waiver. The Board has consistently held that similar language -- tying unit employees' terms and conditions of employment to those of nonunit employees -- is not a waiver of the Union's right to bargain over changes to those terms and conditions of employment.[12] The second part of Article 9, Section 1,

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[10] Id., slip op. at 8-9.

[11] The first three of these factors are generally considered by the Board in making "clear and unmistakable" waiver determinations. See generally Johnson Bateman, 295 NLRB at 184-187; American Diamond Tool, 306 NLRB 570, 570 (1992). Provena also makes clear, slip op. at 8-9, that it is appropriate to consider any other relevant contract provisions or bilateral arrangements that shed light on the contractual intent of the parties in this regard.

[12] See e.g., Trojan Yacht, 319 NLRB 741, 742-743 (1995) (provision stating pension plan "will be maintained in the

allowing the Employer to "change" unit employees' benefits as it does nonunit employees' benefits, also does not privilege the unilateral action here. The Employer did not merely change but, rather, essentially eliminated the retirement benefit. By "freezing" the plan, the Employer effectively eliminated the benefit because no additional benefits will accrue or otherwise grow after March 31, and any new employee that began working after December 31, 2006 is not eligible to participate in the plan at all. Therefore, although a plain reading of Article 9, Section 1 allows the Employer to make "changes" to retirement benefits, it does not "expressly or by necessary implication" allow the Employer to eliminate an existing benefit.[13]

Second, the parties' past practice does not support the conclusion that the Employer was privileged under the collective-bargaining agreement to eliminate the defined retirement benefit plan. Sometime in January 2006, after the collective-bargaining agreement was in effect, the Employer unilaterally made changes to employees' monthly health insurance premiums. The Union initially objected to the change but then did not further pursue its objection. The Employer relies on the Union's acquiescence to the January 2006 change to support its claim that the Union had

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same manner and to the same extent such plans are generally made available and administered on a corporate basis" did not authorize employer's cessation of pension benefit plan accruals or constitute a waiver of union's right to bargain over such change), citing Rockford Manor Care Facility, 279 NLRB 1170, 1172-1173 (1986).

[13] See, e.g. Loral Defense Systems-Akron, 320 NLRB 755, 756 (1996) (provision granting employer right to "amend" or "modify" a health plan did not grant right to replace the plan with an entirely new system); Owens-Brockway Plastics Products, 311 NLRB 519, 525 (1993) (plant closure and transfer of work was not privileged by management rights clause which stated the employer had the "right to increase or decrease operations" and to "remove or install machinery"; it is not sufficient that the right can be inferred from the management rights clause, but rather whether the interpretation is supported by clear and unmistakable language). Compare Mary Thompson Hosp., 296 NLRB 1245, 1249 (1989), enfd. 943 F.2d 741 (7th Cir. 1991) (union waived its right to bargain over the termination of life insurance plan where the contractual language specifically reserved to the employer the right to "terminate the [plan] at any time by resolution of the Board of Directors").

waived its right to bargain over any change in employees' benefits so long as such change was made on the same basis for unit and nonunit employees. However, the Board has held that a union's prior acquiescence to unilateral changes does not operate as a waiver of its right to bargain over such changes for all time.[14]

Moreover, the Union's decision to drop its objection to the change suggests that it recognized that this type of change was privileged under Article 9. The parties had agreed that any changes in healthcare premiums would be shared equally by the Employer and employees and this agreement was expressly embodied in Article 9, Section 2 of the parties' collective-bargaining agreement. Accordingly, the January 2006 change is the type of change the Employer is authorized to make under Article 9, Section 2. Finally, the January 2006 change was substantially different from the change at issue here because the former involved a change to an existing benefit, while the latter involved the elimination of a benefit. Thus, we conclude that the January 2006 change in employee premiums does not provide evidence of a "past practice" of the Union's waiver over the elimination of the defined benefit retirement plan.

Third, while the parties' bargaining history is a factor in interpreting the parties' intent to constitute a waiver, an employer must show that the issue was "fully discussed and consciously explored" and that the union "consciously yielded" its interest in the matter.[15] The parties' mutual recollection of their negotiations over employee health and welfare and retirement benefits shows neither "full discussion" of the Employer's ability to eliminate the plan, nor "conscious yielding" of the Union's right to bargain over the elimination of a plan. For many years prior to the execution of the parties' initial agreement, the Employer had provided all of its employees with the defined benefit retirement plan and the 403(b) plan. It is clear that, during bargaining, the Union's general position on employees' health and retirement benefits was that it wanted such benefits to remain the same. The Employer wanted the right to make unilateral changes to employees' benefits during the life of the contract. There is also no dispute that on July 22 and August 1, 2005, the Employer reiterated its position that

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[14] Owens-Corning Fiberglas, 282 NLRB 609 (1987).

[15] Charles S. Wilson Memorial Hospital, 331 NLRB 1529, 1530 (2000) (quotations omitted), citing Metropolitan Edison, 460 U.S. at 708, and Georgia Power Co., 325 NLRB 420, 420-421 (1998), enfd. mem. 176 F.3d 494 (11th Cir. 1999).

it wanted the right to unilaterally change benefits during the term of the contract and that its changes would be made to unit and nonunit employees' benefits alike. In exchange, the Employer agreed to the Union's proposal which included, among other things, that the Employer and employees would share the costs of health insurance premium increases on a 50/50 basis. More significantly, the evidence demonstrates, and neither party disputes, that at no time during any of these discussions was there any mention or discussion by either party of the elimination or freezing of retirement benefits. Since the issue of the elimination or freezing of benefits was never raised, it could not have been "fully discussed" and "consciously explored." Therefore, the Union could not have "consciously yielded" its interest in the matter and there was no waiver.[16]

Finally, neither party points to any other provisions in the contract which would shed any light on their intention to allow the Employer to unilaterally eliminate or freeze the defined benefit retirement plan.

Thus, we agree with the Region that nothing in the parties' contractual language, past practice, or bargaining history evidences a clear and unmistakable waiver and, accordingly, complaint should issue, absent settlement, alleging the Employer violated Section 8(a)(5) by unilaterally eliminating the defined benefit retirement plan.

B.J.K.

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[16] See Johnson Bateman, 295 NLRB at 185-187 (union did not waive its right to bargain about a drug/alcohol testing policy by agreeing to a management rights clause authorizing the employer to unilaterally issue, enforce, and change company rules, noting that the clause was couched in general terms and made no reference to any particular subject areas, and that there was nothing in the bargaining history suggesting that the parties even discussed drug/alcohol testing during negotiations).