

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

Advice Memorandum

DATE: August 7, 2009

TO : Michael W. Josserand, Regional Director
Region 27

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

SUBJECT: Billings Clinic 530-8045-5000
Case 27-CA-21211

This case was submitted for advice on whether the Union waived its right under Provena¹ to bargain over amendments to the 403(b) pension plan (Plan) provided to employees by the Employer and whether the Employer bargained in bad faith by failing to discuss the possible cessation of its matching contributions under the Plan. We agree with the Region that the Union waived its right to bargain about this issue and that the Employer did not engage in bad faith bargaining.

FACTS

Billings Clinic (the Employer) owns a hospital in Billings Montana and employs nurses who have been represented by the Union for several decades. The most recent collective bargaining agreement between the parties, effective from July 1, 2007, through June 30, 2009, contains a provision entitled Health and Welfare:

B. All employees are eligible and must participate in the retirement plan provided by the Hospital once the employee meets the criteria to participate in the retirement plan. Nothing in this Agreement will alter, amend or extend the provisions of the plan, and the administration thereof is excluded from the grievance/arbitration provisions of the Agreement.

This provision has been carried over from successive contracts since the 1970s.

Before 1997, the Employer provided a defined benefit plan to its employees. In November 1997, the Employer announced that it had changed from a defined benefit plan to a 403(b) plan. The Union did not request to bargain

¹ Provena St. Joseph Medical Hospital, 350 NLRB 808 (2007).

over the change, nor did it file an unfair labor practice charge.

In 2003, the Employer amended the retirement plan by reducing the Employer match under the 403(b) plan from 3% to 2.5%. The Union initially complained about the reduction but did not request to bargain and ultimately agreed to the change without filing an unfair labor practice charge.

In January 2006, the Employer excluded flex credit amounts from annual compensation for the purpose of calculating the amount of the Employer's 403(b) match. While the Union was notified of the change, it neither requested to bargain over the change nor protested the unilateral nature of the change.

The parties commenced bargaining for a new collective bargaining agreement in February 2009. At the beginning of negotiations, the Employer provided the Union with a spreadsheet that purported to show all the money that the Employer spends on nurses' wages and benefits and told the Union that the Employer had to cut its nursing budget. The Employer asked the Union where it might cut costs. During the course of negotiations, the Union agreed to cut costs in a number of areas; however, the parties did not discuss the actual amounts of the cuts until the final two days of negotiations. While the parties negotiated over terms related to both wages and benefits, the parties never discussed the retirement plan or the 403(b) match.

Around March 25, the Employer notified the Union that, as of March 22, it had suspended the Employer match under the Plan until January 2010.

The Billings Clinic 403(b) Plan 2009 Restatement provides that the sponsor has the right to amend the plan:

6.1 Sponsor's Right to Amend. The Sponsor shall have the right to amend this Plan at any time. Such amendments shall be restricted to those necessary to conform this Plan to provisions of Federal or State law, regulations, or rulings, and to those which add, delete or modify such elective provisions as may be deemed necessary.

Another provision of the 2009 Restatement provides for Employer matching:

Employer shall make a Matching Contribution on behalf of each Participant who is eligible to participate in Matching Contributions, equal to fifty percent (50%) of the first five percent (5%) of Section 414(s) Compensation contributed to the Plan as an Elective Contribution with respect to such Participant for such pay period.

The Employer explains that this provision means that the Employer will match half of 5%, or 2.5%. The Employer only puts out a Restatement of the Plan once a year, so the March 2009 suspension of the match is not yet reflected in the Restatement.

ACTION

We conclude that the Employer did not violate Section 8(a)(5) by refusing to bargain with the Union regarding amendments to the 403(b) Plan and that the Employer did not fail to bargain in good faith by failing to discuss the matching contributions in recent bargaining because the Union had clearly and unmistakably waived its right to bargain over the issue.

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."² In Metropolitan Edison Co. v. NLRB,³ the 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'."⁴ 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.⁵

² Id., at 811.

³ 460 U.S. 693, 708 (1983).

⁴ Id.

⁵ 350 NLRB at 812 fn.19, citing New York Mirror, 151 NLRB 834, 839-840 (1965).

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 dealings; (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.⁶

Applying the above factors here, we conclude that the Union clearly and unmistakably waived its right to bargain over the cessation of matching contributions under the Plan.

With respect to the first factor, the wording of the Health and Welfare provision, coupled with the language of the Plan itself, strongly suggest that the Union waived its right to bargain about retirement benefits. The Health & Welfare provision provides that "nothing in the Agreement will alter, amend or extend the provisions of the [retirement] plan, and the administration thereof is excluded from the grievance/arbitration provisions of the Agreement." This provision thus excludes the 403(b) Plan from the Agreement and from the grievance/arbitration process. While it does not explicitly provide that the Employer has the unilateral right to change plan terms, the Plan itself provides that the Sponsor has the right to modify elective provisions, which includes the Employer matching provision. Moreover, the Plan itself specifies the amount of the Employer match. Thus, the contractual and Plan provisions read together strongly suggest that the Union has waived its right to bargain over amendments to the Plan and that the sponsor has the sole authority to make such changes.

As to the second factor, the parties' past dealings suggest that the parties believed that the Employer had the

⁶ 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 180, 184-187 (1989); American Diamond Tool, 306 NLRB 570, 570 (1992). Provena also makes clear 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.

unilateral right to alter the Plan. The Employer had made three significant changes to the Plan since 1997: changing from a defined benefit plan to a 403(b) in 1997; reducing the match from 3% to 2.5% in 2003; and excluding flex credit amounts from annual compensation in 2006. The Union did not seek to bargain or file charges with regard to any of those changes. While such past acquiescence does not, alone, establish a waiver of the right to bargain over an issue in the future,⁷ the Employer and Union's conduct, coupled with the contractual and Plan language cited above, together show that the parties intended the Plan to be excluded from the Agreement and to permit the Employer to make discretionary changes.

As to the third factor, the Health & Welfare Plan provision was negotiated in the 1970s and, thus, bargaining history was not available. However, the provision refers rather generically to "the retirement plan." Thus, it appears that this provision would have controlled the Employer's prior defined benefit plan. The Employer thus appears to have unilaterally changed from a defined benefit plan to a 403(b) plan when this same language was in effect. The fact that this language has carried over from successive contracts, and that the Employer has relied the language before to make unilaterally changes, suggests waiver. As to the fourth factor, no other contractual provisions are relevant here.⁸ In total, we conclude that the factors together demonstrate that the Union clearly and unmistakably waived its right to bargain over the Employer match to the 403(b) plan.

The Union also alleges that the Employer failed to bargain in good faith during negotiations by failing to mention the possible cession of the 403(b) match. Specifically, the Union argues that the Employer's inclusion of the 403(b) contribution on the Employer's spreadsheet led the Union to believe that the Plan contribution was part of the negotiations for wage and benefits concessions. We agree with the Region that the

⁷ Register-Guard, 339 NLRB 353, 356 (2003) (union acquiescence on one occasion does not constitute waiver of right to bargain).

⁸ We agree with the Region that this case is controlled by Provena, not Bath Iron Works, 345 NLRB 499 (2005). Further, because we find Provena controlling, we need not decide whether Manitowoc Ice, 344 NLRB 1222, 1223 (2005) (finding no Section 8(a)(5) violation where a party, "by its conduct, led the other party to believe that it could deal unilaterally with a subject") is controlling.

Union's assumption was not warranted. The spreadsheet simply identified all costs associated with the RNs, including other costs, such as FICA and workers' compensation insurance, that were clearly not the subject of bargaining. The parties' discussions do not show that pension contributions were ever made a part of bargaining. Thus, while the Union may have assumed that topics that were not discussed would remain unchanged, the parties had not discussed or agreed to 403(b) Plan contributions. In view of the Union's waiver, we agree that the Union had no basis to assume that the Employer's contributions would remain the same.

For these reasons, we conclude that the Union clearly and unmistakably waived its right to bargain over the 403(b) match and did not bargain in bad faith by failing to discuss the possible cessation of matching contributions. Accordingly, the Region should dismiss the charge, absent withdrawal.

B.J.K.