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

Advice Memorandum

DATE: October 22, 2010

TO : Richard A. Ahearn, Regional Director
Region 19

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

SUBJECT: Providence SoundHomeCare & Hospice
Case 19-CA-32459

530-8054-9000-0000
530-6067-2070-6760
530-8054-7000-0000
530-8045-3700-0000

This case was submitted for advice as to whether the Employer violated Sections 8(a)(5) and 8(d) of the Act by changing its retirement plan when the parties' collective bargaining agreement permits the Employer to amend and modify the plan and to provide alternate retirement plans.

We conclude that the charges should be dismissed, absent withdrawal. The 8(d) claim fails under Bath Iron Works because the collective-bargaining agreement provides a sound arguable basis for the Employer's actions,[1] and the Employer did not violate 8(a)(5) because the Union waived its right to bargain by failing to request bargaining when the Employer provided the Union with nine months notice before it implemented the change.

FACTS

Providence SoundHomeCare & Hospice (the Employer) is a non-profit healthcare provider in Olympia, Washington that operates multiple locations in the Southwest Washington region. SEIU, District 1199 NW (the Union) represents approximately 200 service workers at Providence SoundHomeCare & Hospice. The unit consists of full-time and part-time RNs, therapists, and home health aids. The current collective-bargaining agreement between the parties is valid until February 28, 2011. The Union also represents a unit of 479 service workers at Providence Saint Peter Hospital; Saint Peter Hospital and the Employer have the same parent employer and use the same retirement plan, but each facility maintains a separate administration and negotiates for individual bargaining agreements.

Up until January 1, 2010, the Employer offered to all employees a retirement plan called the Providence Core

[1] Bath Iron Works, 345 NLRB 499 (2005), affd. 475 F.3d 14 (1st Cir. 2007).

Plan. Under the Providence Core Plan, the Employer contributed 5% of an employee's pay into an individual plan account. The Employer also paid a guaranteed amount of interest on the employee's accrued funds in the amount of the rate of inflation plus 3%. In 2008, the Employer paid interest at the rate of 5.35%. The Providence Core Plan also included several special provisions, such as an early retirement option and special benefit accruals.

On April 7, 2009, the Employer sent the Union a letter explaining that it intended to change the employee retirement plan, effective January 1, 2010. The Employer attached a notice to the letter with detailed information about the planned change. The Employer also requested the Union to contact it with any questions or comments regarding the change.

Later that day, the Union asked the Employer to refrain from posting the detailed information about the plan change online, a request with which the Employer complied. The Union also requested that the Employer discuss the changes during a Labor Management Committee meeting scheduled for April 8, 2009. The Committee is advisory in nature; it is not a forum for bargaining or for requesting bargaining. Nevertheless, there is no evidence that the Union actually attempted to bargain about the retirement plan changes on April 8 or anytime in 2009. Instead, the Union claimed that it wanted to await the resolution of a similar negotiation with Saint Peter Hospital.

On December 16, 2009, the Employer sent a second letter to the Union regarding changes to the retirement plan. The letter reiterated the Employer's January 1, 2010 implementation date and invited the Union to contact it with questions. The Employer also informed the Union that it would immediately begin to communicate with employees regarding these changes.

On January 1, 2010,[2] the Employer implemented the changes. First, the Employer discontinued its contributions to the Providence Core Plan and disallowed future employee contributions to the plan. The Employer did not eliminate the (pre-existing) accrued monies in individual employee's accounts; it changed the amount of interest paid on the accrued monies from the "rate of inflation + 3%" to the "Consumer Price Index plus 1%." The Employer also terminated the special provisions previously contained in the Providence Core Plan.

[2] All future dates are 2010, unless otherwise noted.

Also on January 1, the Employer implemented a new retirement plan. In this plan, the Employer contributed money to qualified employees based on the individual's salary and years of service.[3] Qualified employees who worked for the Employer for 0-9 years received a contribution of 3% of their salary, those who worked for 10-14 years received 5% of their salary, and those who worked for 15 years or more received 6% of their salary. The Employer did not guarantee any rate of return on this money. Instead, employees absorbed the risks (and potential rewards) associated with investing the money independently. The Union estimates that the Employer's change would cause employees who have worked for the Employer for at least 10 years to lose between $30,000 and $100,000 before they retire.

Two months after implementation, on March 2, the Union requested an opportunity to bargain about the retirement plan changes. On March 11, the Employer asserted that it had no obligation to bargain. It contended that the parties' current collective-bargaining agreement contains language that waives the Union's right to bargain over this type of plan modification. The Employer also contended that it met any notification requirement because its April 2009 letter provided the Union with nine months of notice.

The parties agree that the operative contract language is contained in Sections 13.3 and 13.5 of their collective-bargaining agreement. The provisions state:

> **13.3 Retirement Plan**
> Employees will participate in the Employer's retirement plan as that plan may be amended from time to time for all other plan participants. The union and employees will be given at least 30 days notice of any change in the plan before the change is implemented.
>
> **13.5 Plan Changes**
> In the event the Employer modifies its current plans or provides an alternative plan(s); the Employer will review the plan changes with the Union prior to implementation. The Employer shall notify the Union at least thirty (30) days prior to the intended implementation date.

[3] Employees in active employment with the Employer before January 1, 2010 were automatically eligible for the new retirement plan. Employees hired after January 1, 2010 did not qualify to participate in the plan until January 1 of the year after they accrued at least 1,000 work hours.

Both provisions are contained in Article 13, a section of the collective-bargaining agreement titled "Medical and Insurance Benefits."[4]

In May of 2010, the Union and Saint Peter Hospital reached an agreement regarding the employee's retirement plan. Saint Peter Hospital implemented the changes retroactively to January 1, 2010, but the Employer did not follow suit.

Here, the Union claims unlawful unilateral elimination or modification of the Employer's retirement plan, while the Employer claims that its actions are privileged under the parties' collective-bargaining agreement. Both parties rely exclusively on the contract language in Sections 13.3 and 13.5 to support their respective positions. The Union has not filed a grievance over this change, and the Employer is not willing to waive the time limits.

ACTION

We conclude that the charges should be dismissed, absent withdrawal. The 8(d) claim fails under Bath Iron Works because the collective-bargaining agreement provides a sound arguable basis for the Employer's actions,[5] and the Employer did not violate 8(a)(5) because the Union waived its right to bargain by failing to request bargaining when the Employer provided the Union with nine months notice before it implemented the change.

I. EMPLOYER DID NOT UNLAWFULLY MODIFY THE PARTIES' COLLECTIVE-BARGAINING AGREEMENT.

When the Board analyzes an alleged Section 8(d) contract modification, it will not find a violation if an employer has a "sound arguable basis" for its interpretation and is not motivated by animus, acting in bad faith, or in any way seeking to undermine a union's status as collective bargaining representative.[6] It will

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[4] Article 13 also includes provisions about health, life, and long-term disability insurance, worker's compensation, unemployment insurance, and the Employer's tax deferred annuity plan.

[5] Bath Iron Works, 345 NLRB at 502.

[6] Bath Iron Works, 345 NLRB at 502. Here, there is no allegation of union animus or bad faith, and therefore, our 8(d) analysis focuses solely on whether the Employer had a

not find a violation of the Act where there are "two equally plausible interpretations of the contract[,]"[7] nor will it enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.[8] The Board will find an 8(d) violation where an employer's interpretation is so off base or unreasonable that it amounts to a unilateral modification of a contract.[9] In light of these principles, the issue here is whether the Employer had a sound arguable basis for its interpretation of the contractual retirement provision.

The Board assesses whether a party's contract interpretation has a sound arguable basis by applying traditional principles of contract interpretation.[10] The parties' actual intent underlying the contractual language is paramount,[11] and is determined by reviewing the plain language of the contract.[12] The Board will also review extrinsic evidence, such as the past practice of the parties in implementing the provision in question or the bargaining history of the provision itself, if applicable.[13] The Board does not interpret collective-bargaining

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"sound arguable basis" for its conclusion that it could change its employees' retirement plan.

[7] NCR Corp., 271 NLRB 1212, 1213 (1984).

[8] Id. (quoting Vickers, Incorporated, 153 NLRB 561, 570 (1965) (when "an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it," the Board will not enter the dispute to determine which interpretation is correct)).

[9] Bath Iron Works, 345 NLRB at 501-02; See Hospital San Carlos Borromeo, 355 NLRB No. 26, slip op. at 1 (2010) (holding that an employer lacked a sound arguable basis to interpret "The Bonus established herein includes and is not in addition to the one established by law" to mean that the employer's reduced statutory obligation entirely eliminated its larger contractual obligation).

[10] Conoco, Inc., 318 NLRB 60, 62 (1995), enf. denied 91 F.3d 1523 (D.C. Cir. 1996).

[11] Mining Specialists, 314 NLRB 268, 268 (1994); Lear Siegler Management Service, 293 NLRB 446, 447 (1989).

[12] Mining Specialists, 314 NLRB at 269.

[13] Ibid.

agreements in a vacuum, or rely on "abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying th[at] context."[14] Rather, the Board interprets contracts in light of the "realities of labor relations and considerations of federal labor policy . . . which make up the background against which such agreements are entered."[15]

Here, our analysis reveals that the provisions are subject to divergent interpretations. Specifically, the phrase "alternative plan(s)" in Section 13.5 could be interpreted broadly or narrowly. To be clear, under either interpretation, the collective-bargaining agreement grants the Employer the authority to provide some type of alternative retirement plan.[16] Section 13.5 states: "In the event the Employer modifies its current plans or provides an alternative plan(s); the Employer will review the plan changes with the Union prior to implementation." This language implies that the Employer maintains the authority to provide an alternative plan. If the Employer lacked that power, the notice requirement in the second half of the sentence would be rendered meaningless because it could never be triggered. Because standard contract interpretation does not permit us to read a clause as meaningless,[17] the first sentence of Section 13.5 must provide the Employer with the right to provide alternative plans.

The real issue presented here, therefore, is what magnitude of changes are encompassed within the phrase "alternative plan(s)." We begin by concluding that there is a sound arguable basis for a broad interpretation, namely, that the phrase permits the Employer to replace the current retirement plan with one that alters the benefits allocated to the employees. It is reasonable to interpret the phrase "alternative plan(s)" as requiring the Employer to offer some type of retirement plan, while empowering it

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[14] NLRB v. C & C Plywood Corp., 385 U.S. 421, 430 (1967).

[15] Electrical Workers IBEW Local 1395 v. NLRB, 797 F.2d 1027, 1033 (D.C. Cir. 1986).

[16] See ACS, LLC, 345 NLRB 1080, 1082 fn. 15 (2005) (finding that the employer had a sound arguable basis for its position that the grievances concerned contract interpretation).

[17] See Conoco, Inc., 318 NLRB at 63 (finding that it is "axiomatic that parties to a collective-bargaining agreement do not intend to agree to a nullity").

to offer essentially any type of plan, including a wholly different retirement plan.

The Employer's action manifests that broader interpretation. Under the old plan, the Employer contributed 5% of each qualified individual's salary to his or her cash balance account and paid a set amount of interest on that amount. Under this new plan, the Employer contributes 3% to 6% of each individual's salary to his or her account and no longer pays any interest, leaving employees to invest the money at their own risk. Thus, the new plan changes the amount of the Employer's contributions, and it shifts the risk of investment from the Employer to the employee. These changes are significant, and they are also permitted under the rubric of an alternative plan if we interpret the phrase as permitting the Employer to implement a substitute plan. Thus, under a broad interpretation, the Employer's actions have a sound arguable basis based on the contract language because the language permits the Employer to offer alternate plans and because the Employer's actions can be construed as falling within those parameters.

But there is also a sound arguable basis for the assertion that the collective-bargaining agreement forbids the Employer's change. Construing the phrase "alternative plan(s)" more narrowly, Section 13.5 could be read to limit the Employer to offering additional alternative plans only to the extent that the plans increase employee choice. In other words, the language could permit the Employer to offer alternative plans in addition to but not instead of the Providence Core Plan. Further, the Employer's actions could be viewed as eliminating the current plan, and not just providing an alternative plan, because the Employer froze all contributions to the Providence Core Plan, essentially eliminating it.[18] Thus, under a narrow interpretation, the Employer's actions would be precluded by the contract language because the language does not permit the Employer to eliminate a currently-existing retirement plan and because the Employer's actions can be construed as eliminating the Providence Core Plan.

Both interpretations of the phrase "alternative plan(s)" are reasonable and it cannot be established that one interpretation is the correct or even the only

[18] See Empire Health, Case 19-CA-30974, Advice Memorandum dated January 29, 2008 (finding that an employer's decision to freeze employee and employer contributions to a pension plan effectively eliminated the plan).

reasonable interpretation of the contract.[19] In such cases, the Board does not pass on which interpretation is superior, and instead leaves that determination to the arbitration process or to the courts.[20] Thus, the Region should dismiss the Union's 8(d) allegation of the charge, absent withdrawal.

II. THE EMPLOYER DID NOT VIOLATE 8(a)(5) BECAUSE THE UNION WAIVED ITS RIGHT TO BARGAIN BY FAILING TO EXERCISE DUE DILIGENCE.

The Union's unilateral change claim pursuant to 8(a)(5) fails under the doctrine of waiver-by-inaction. We reach this conclusion without addressing whether the Union "clearly and unmistakably" waived its right to bargain over the changes due to the alleged contract waiver in the parties' collective-bargaining agreement.[21]

The legal principles governing waiver by inaction are well established.[22] Before implementing a change involving

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[19] See Plasterers Local 627 (Jack Hart Concrete), 274 NLRB 1286, 1288 (1985)(holding that employer did not violate the Act where the General Counsel failed to prove that its interpretation was the only reasonable interpretation of the contract, or that the respondent's interpretation was unreasonable), see also Plain Dealer Publishing Company, 8-CA-38315, Advice Memorandum dated Oct. 27, 2009 (finding that employer did not unlawfully modify the contract because its interpretation was reasonable).

[20] Bath Iron Works, 345 NLRB at 502.

[21] See Provena St. Joseph Medical Center, 350 NLRB 808 (2007). The Union's unilateral change claim is likely not barred by 10(b). See Leach Corp., 312 NLRB 990, 991 (1993), enfd. 54 F.3d 802 (D.C. Cir. 1995) ("A statement of intent or threat to commit an unfair labor practice does not start the statutory six months running. The running of the limitations period can begin only when the unfair labor practice occurs."); see also Bryant & Stratton Business Institute, 321 NLRB 1007 (1996) (10(b) triggered by date of implementation); Howard Electrical & Mechanical, 293 NLRB 472, enfd. 931 F.2d 63 (10th Cir. 1991); American Distributing Company, 264 NLRB 1413, enfd. 715 F.2d 446 (9th Cir. 1983).

[22] See KGTV, 355 NLRB No. 213, slip op. at 3 (2010) (holding that the union waived its right to bargain over the employer's decision to lay off employees because the employer provided three weeks advance notice and the employer's notice was not a fait accompli); Bell Atlantic

a mandatory bargaining subject, an employer is required to give timely notice to the union and a meaningful opportunity to bargain. Once notice is received, the union must act with "due diligence" to request bargaining, or risk a finding that it has waived its bargaining right.[23] A union may be excused from making a request to bargain if an employer provided too little time prior to implementation or if an employer has otherwise made it clear that the change will definitely occur. In these circumstances, a bargaining request would be futile, because an employer's notice would inform a union of nothing more than a "fait accompli."[24]

Here, it is clear that retirement benefits are a mandatory subject of bargaining,[25] and that the Employer provided the Union with notice on April 7, 2009, nine months before implementing the changes and 11 months before the Union demanded to bargain. There is no allegation or suggestion that the Employer's change in this case was a fait accompli, and further, the Employer's nine months of pre-implementation notice provides objective evidence that it was not. The only remaining issue is whether the Union acted with due diligence.

The Board consistently finds that a union waives its right to bargain when an employer provides adequate notice of a unilateral change and a union fails to demand bargaining until after that employer implements the change. The Board applied this rule in Medicenter, Mid-South Hospital, where it held that the union waived its right to bargain regarding the employer's implementation of mandatory polygraph examinations when the union waited only

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Corp., 336 NLRB 1076, 1086 (2001) (holding that the union waived its right to bargain over a plant closure and transfer of bargaining unit work when the union failed to demand to bargain for four months after receiving notice of the changes from the employer).

[23] Medicenter, Mid-South Hospital, 221 NLRB 670, 678-79 (1975) (holding that the Union waived its right to bargain regarding employer implementation of mandatory limited polygraph examination when it failed to request bargaining for eight days).

[24] See KGTV, 355 NLRB No. 213, slip op. at 3.

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

eight days.[26] The employer informed the union of the change on July 29, 1974, implemented the program two days later on July 31, 1974, and finished testing on August 6, 1974.[27] The union protested the change, but it never demanded to bargain.[28] When the union later filed an unfair labor practice charge, the Board held that the union waived its right to bargain because it did not act until after the employer finished implementing the change.[29] In its analysis, the Board focused on the union's lack of action, and most importantly, the union's failure to demand bargaining during the period between when it received notification of the change and when the employer implemented the change.[30]

More recently, the Board applied the same rule in Boeing Co.[31] In Boeing Co., the employer provided the union with three months notice before it implemented a unilateral change; there, a change related to health care benefits.[32] Again, the Board held that the union waived its right to bargain due to its lack of due diligence.[33] The Board has also found that three weeks is a sufficient period of notice to trigger a waiver by inaction.[34] In fact, in the Board's most recent decision in this arena, KGTV, it found

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[26] Medicenter, Mid-South Hospital, 221 NLRB at 680. The employer implemented the polygraph examinations to stem a recent spat of vandalism to the hospital premises. Id. at 673.

[27] Ibid.

[28] Id. at 679.

[29] Id. at 670 fn. 2, 680.

[30] Id. at 679.

[31] Boeing Co., 337 NLRB 758 (2002).

[32] Id. at 763.

[33] Ibid., see also Bell Atlantic Corp., 336 NLRB at 1086.

[34] E.g., Associated Milk Producers, Inc., 300 NLRB 561 (1990) (holding that the union waived rights to negotiate the unilateral termination of pension payments because it waited three weeks to take any action); City Hospital of East Liverpool, 234 NLRB 58, 59 (1978) (holding that the union waived right to bargain because it failed to act for three weeks after learning that employer intended to discontinue the head nurse position).

that a union waived its right to bargain because it failed to demand bargaining when the employer notified it three weeks prior to implementation.[35]

Turning to the instant case, we find that the Union waived its right to claim that the Employer's unilateral change was unlawful because it failed to exercise due diligence. The Employer first told the Union about the change in April of 2009, nine months before its proposed date of implementation. In that notice, the Employer invited the Union to bring any questions or concerns to its attention. Nevertheless, the Union did not demand to bargain for the full nine months between when it received notice of the change from the Employer and when the Employer implemented the change. The Union failed to even discuss the proposed change during the Labor Management Committee meeting that was scheduled for April 8, 2009. The Union's proffered reason for its postponement: to learn from the outcome of the negotiation with Saint Peter Hospital, does not justify the lengthy delay. The Board has held that unions have waived their right to bargain after far shorter periods than nine months, periods as short as eight days or three weeks. Accordingly, because the Union enjoyed a more-than adequate period of notice before the Employer implemented the change, and because the Union failed to exercise due diligence, we conclude that the Union waived its right to bring a unilateral change claim.

For all of these reasons, we conclude that the charges should be dismissed, absent withdrawal.

B.J.K.

[35] KGTV, 355 NLRB No. 213, slip op. at 3.