

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

Advice Memorandum

DATE: September 11, 2006

TO : Victoria E. Aguayo, Regional Director
Region 21

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

SUBJECT: Children's Law Center of Los Angeles 530-6001-5025
Case 21-CA-37314 530-6050-1612-7500
530-6067-4001-3300
530-6067-4033-4100

This case was submitted for advice, in light of the Board's recent decision in Neighborhood House Assn.,¹ as to whether the Employer unlawfully withheld a cost of living increase for bargaining unit employees while the parties were negotiating their first collective-bargaining agreement.

We conclude that the Employer violated Section 8(a)(5) because the parties had not reached impasse in their overall collective bargaining negotiations, and the cost of living increase was not a discrete and recurring event that creates an exception to normal bargaining obligations and would privilege a unilateral change under the Board's recent decision in Neighborhood House Assn. Rather, the Employer withheld the increase after it had received funding approval, established the amount of the 2006 COLA, and created among employees the expectation that they would receive the increase.

FACTS

Children's Law Center of Los Angeles (the Employer) is a California nonprofit corporation providing legal services and advocacy on behalf of abused and neglected children. The Administrative Office of the Courts (AOC), a staff agency of the California state judicial system, historically provided the majority of the Employer's funding pursuant to annual contracts. According to the Employer, it traditionally did not provide regular salary increases for any employee; rather, salary increases only occurred when an employee left the workforce, freeing monies that could then be distributed to other employees.

In 2005, the Employer for the first time successfully negotiated a three-year contract with AOC providing

¹ 347 NLRB No. 52 (June 30, 2006).

sufficient funds for a three-percent cost of living (COLA) increase for all employees in the fiscal year beginning July 1, 2005. The contract also guaranteed funding identical COLA increases for fiscal years 2006 and 2007. On May 30, 2005, the Employer's executive director sent an email to all employees announcing that the Employer had negotiated the COLA increases for all employees for the next three years. On July 1, 2005, the Employer implemented the first of these increases.

On July 21, 2005, SEIU Local 660 (Union) filed a petition seeking to represent certain employees of the Employer. After winning an election on August 31, the Union was certified on September 9, 2005. The parties commenced bargaining sometime later that year.

According to the Employer, the parties agreed to resolve all non-economic issues prior to bargaining over economics. Nevertheless, because it was receiving questions from employees, the Union asked the Employer during an April 11, 2006,² bargaining session whether it was intending to grant the next COLA increase on July 1. The Employer responded that it would grant the three-percent COLA increase if the Union agreed that the increase would resolve all economic issues for 2006, while leaving bargaining open for future years. The Union rejected this proposal.

On May 9, the Employer wrote non-bargaining unit employees to assure them they would receive the COLA on July 1. The parties did not meet in May, but in correspondence the Union expressed its view that bargaining unit employees should also receive the scheduled COLA.

During a June 1 bargaining session, the parties again discussed the COLA. The Union asked the Employer to put its economic proposals in writing. The Employer proposed a three-percent COLA for the upcoming year and that all other economic benefits would remain unchanged. The Union's counter-proposal requested a seven-percent COLA.

In a June 14 bargaining session, the Employer declared impasse on all economic issues for the upcoming fiscal year and stated that the three-percent COLA for 2006 was its firm and final offer. The Employer never implemented the COLA for the bargaining unit employees and the parties have continued to meet and discuss other issues.

ACTION

² All dates hereafter are in 2006.

We conclude that the Employer violated Section 8(a)(5) because the parties had not reached impasse in their overall collective bargaining negotiations, and the cost of living increase was not a discrete and recurring event that creates an exception to normal bargaining obligations and would privilege a unilateral change under the Board's recent decision in Neighborhood House Assn. Rather, the Employer withheld the increase after it had received funding approval, established the amount of the 2006 COLA, and created among employees the expectation that they would receive the increase.

An employer must bargain with the exclusive representative of its employees before changing existing terms and conditions of employment.³ Existing terms and conditions of employment include customary wage increases and benefits, as well as announcements of future wage increases or benefits that create a reasonable expectation among employees that those increases will occur.⁴ Where parties are in negotiations for a collective-bargaining agreement, an employer's obligation to refrain from unilateral changes in existing terms and conditions extends beyond the mere duty to provide the union with notice and an opportunity to bargain; it encompasses the duty to refrain from implementing such changes at all, absent impasse in bargaining for an entire agreement.⁵

³ NLRB v. Katz, 369 U.S. 736, 743, 747 (1962).

⁴ Liberty Telephone, 204 NLRB 317, 317-318 (1973) (employer announcing a wage increase, subject to IRS approval, created a reasonable expectation of the increase to take place upon a contingency); More Truck Lines, 336 NLRB 772, 772 (2001) (promised, future nondiscretionary wage increases are existing terms and conditions of employment); Armstrong Cork Co. v. NLRB, 211 F.2d 843, 847 (5th Cir. 1954) (employer unlawfully cancelled its announced wage increase without consulting with the union, since conditions of employment include not only what the employer has already granted but also what it promised to grant); see also Durez Corporation, Case 3-CA 25193, Advice Memorandum dated July 18, 2005 (employer unlawfully refused to grant scheduled wage increases and benefits after announcing to employees that those terms and conditions would be put in place).

⁵ Bottom Line Enterprises, 302 NLRB 373, 374 (1991), enfd. mem. sub nom. Master Window Cleaning, Inc. v. NLRB, 15 F.3d 1087 (9th Cir. 1994). See also RBE Electronics of S.D., 320 NLRB 80, 81 (1995).

Here, there is no contention that the parties had reached an impasse in their overall contract negotiations. And, under More Truck Lines⁶ and other cases cited above at fn. 4, the COLA was an established term and condition of employment that could not be changed absent bargaining with the Union. The Employer effectively implemented the COLA when it announced to employees in May 2005 that funding had been approved, and they would be receiving a three-percent COLA in each of the next three fiscal years. Therefore, absent application of an exception to the rule enunciated in Bottom Line Enterprises, supra, the Employer was obligated to refrain from making any unilateral changes in terms and conditions of employment and it violated Section 8(a)(5) by withholding the July 1 COLA.

The Employer's unilateral decision to withhold the COLA is not privileged by the Board's recent decision in Neighborhood House Assn. In that case, the Board re-articulated an exception to the Bottom Line rule.⁷ The Board clarified that if a term or condition of employment concerns a discrete recurring event, and that event is scheduled to occur during negotiations for a contract, the employer may lawfully implement a change in that term or condition if it provides the union with reasonable advance notice and an opportunity to bargain about the intended change in past practice.⁸

That exception to the general rule prohibiting unilateral changes during contract negotiations does not apply here. The COLA was not a discrete recurring event as contemplated by Neighborhood House and the cases on which it relies. In Neighborhood House, the employer applied for and received a federally funded grant every three years to operate a Head Start program. The federal grant included funding for a COLA increase, but the employer would determine each year how much of the funding would constitute the increase given to employees after receiving federal approval.⁹ In Stone Container, the employer would

⁶ 336 NLRB at 772.

⁷ The Board also delineated two limited exceptions in Bottom Line itself: economic exigency and union delay in bargaining. 302 NLRB at 374 and nn. 10, 11. The Employer is not claiming that either of those exceptions privilege the conduct at issue here.

⁸ Neighborhood House Assn., 347 NLRB No. 52, slip op. at 2, citing TXU Electric Co., 343 NLRB No. 132 (2004), and Stone Container Corp., 313 NLRB 336 (1993).

⁹ 347 NLRB No. 52, slip op. at 1.

decide whether to grant an increase in wages and benefits each year based on an annual survey it conducted.¹⁰ In TXU Electric, the employer had a past practice of annually reviewing its salary plan to determine if adjustments were necessary.¹¹

In each of these cases, there was a past practice of a discrete event occurring at a certain time each year that triggered a decision by the employer as to how, if at all, it would respond in granting a wage increase. Thus, each employer had a practice of annually exercising some discretion as to the size of a wage increase in response to a recurring event, and that event happened to occur while it was engaged in initial contract negotiations. Here, in contrast, the Employer had no past practice requiring it to make a decision about whether or how much of a COLA to grant on July 1, 2006. Indeed, the Employer had eliminated its past practice of granting increases only after employees left the workforce by securing the three-year funding contract from AOC. The timing and amount of the COLA here was pre-determined: the Employer had already received funding for the increase, had announced it to employees, and had effectively implemented the COLA in 2005 when it announced to employees that they would be receiving three-percent increases for the next three years.¹² The Employer therefore was not responding to a discrete recurring event and was not privileged to unilaterally withhold the increase absent impasse in the parties' overall contract negotiations.

In sum, we conclude the Employer violated Section 8(a)(5) by unilaterally withholding the COLA. Accordingly, absent settlement, the Region should issue complaint.

B.J.K.

¹⁰ 313 NLRB at 336.

¹¹ 343 NLRB No. 132, slip op. at 1.

¹² More Truck Lines, supra, 336 NLRB at 772, citing Liberty Telephone, supra, 204 NLRB at 318 (citing, in turn, Armstrong Cork Co. v. NLRB, supra, 211 F.2d at 847).