

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

THE AMERICAN NATIONAL RED CROSS,
GREAT LAKES BLOOD SERVICES REGION
and MID-MICHIGAN CHAPTER,

Respondents,

and

LOCAL 459, OFFICE AND PROFESSIONAL
EMPLOYEES INTERNATIONAL UNION, AFL-CIO

CASES	7-CA-52033
	7-CA-52288
	7-CA-52544
	7-CA-52811
	7-CA-53018

Charging Party OPEIU,

and

LOCAL 580, INTERNATIONAL BROTHERHOOD
OF TEAMSTERS

CASES	7-CA-52282
	7-CA-52308
	7-CA-52487

Charging Party IBT.

**EXCEPTIONS OF OFFICE AND PROFESSIONAL EMPLOYEES
LOCAL 459 TO THE MAY 5, 2011 DECISION AND ORDER
OF THE ADMINISTRATIVE LAW JUDGE (JD-27-11)**

Charging Party Office and Professional Employees Local 459 (“OPEIU Local 459”, “Local 459”), by its attorney Tinamarie Pappas, pursuant to Section 102.46 of the Board’s Rules and Regulations, as amended, excepts to portions of the Decision and recommended Order issued in the above-captioned matters by Administrative Law Judge Jeffrey Wedekind (“ALJ”) on May 5, 2011 (JD-27-11), as amended by the Erratum issued by the ALJ on May 31, 2011.

The ALJ erred as a matter of either fact, law, or both fact and law, by the findings, conclusions, and/or legal analysis identified in those portions of his Decision and Order set forth in the Exceptions below:

EXCEPTIONS 1- 9.

THE ALJ’S ERRED AS A MATTER OF BOTH FACT AND LAW IN HIS DISMISSAL OF THOSE PORTIONS OF THE COMPLAINT ALLEGING THAT EFFECTIVE JULY 1, 2009, RESPONDENT ANRC-CHAPTER VIOLATED SECTION 8(A)(5) BY UNILATERALLY CHANGING/ELIMINATING THE DEFINED BENEFIT PENSION PLAN FOR ALL EMPLOYEES HIRED ON OR AFTER THAT DATE.

Exception 1. The ALJ erred as a matter of law in finding merit in Respondent American Red Cross, Mid-Michigan Chapter’s (“ANRC Chapter”) defense that the July 1, 2009 unilateral changes to the defined benefit pension plan (“retirement system”) were lawful “because they continued the status quo as defined by the provisions of the expired contract and/or ANRC Chapter’s past practice of unilateral changes”. ALJD p. 23, lines 39-41.¹

Exception 2. The ALJ erred as a matter of law in his inference that the “status quo” ante for purposes of evaluating the legality of changes made post-contract expiration, included changes made solely during the effective dates of collective bargaining agreements which contained a “waiver” clause privileging such changes by Respondent. ALJD p. 24, lines 1-6.

Exception 3. The ALJ erred as a matter of fact and law in his reliance on past changes made to the retirement system (defined benefit pension) during the terms of successive collective bargaining agreements to support the conclusion and finding of a “dynamic status quo” with respect to the July 1, 2009 changes to the pension plan. ALJD p. 24, lines 30-45, p. 24.

Exception 4. The ALJ erred as a matter of fact and law in his conclusion that ANRC Chapter’s July 1, 2009 elimination of the defined benefit pension plan (retirement system) for all employees hired on or after that date, “[was] consistent with, and continued, the dynamic status quo”. ALJD p. 25, lines 8-10 (referring back to lines 4-8).

Exception 5. The ALJ erred as a matter of fact and law in his conclusion that the Chapter agreement providing that the Chapter “shall continue to participate in the retirement

¹ Exceptions which cite to specific lines of the ALJD are inclusive of all legal case citations and record citations.

program of the [ANRC] on the same basis as present or as it hereafter may be amended by the [ANRC](GC Exh. 2)” supported a finding of a dynamic status quo. ALJD p. 25, lines 8-14.

Exception 6. The ALJ erred as a matter of fact and law in finding that “the Chapter was simply continuing the status quo, and did not violate Section 8(a)(5) by implementing the July 2009 changes to the pension plan in the OPEIU clerical/warehouse unit.” ALJD p. 25, lines 14-16.

Exception 7. The ALJ erred as a matter of law in his dismissal of allegations, and failure to include in his “Conclusions of Law”, that ANRC Chapter violated Section 8(a)(5) by unilaterally changing/eliminating the defined pension plan (retirement system) on July 1, 2009 for all employees hired on or after that date. ALJD p. 43, lines 16-44 .

Exception 8. The ALJ erred in his failure to include in his Remedy and Recommended Order that Respondent ANRC Chapter:

- Rescind the July 1, 2009 changes made to the defined pension plan (retirement system), and restore the status quo ante with respect to such term of employment;
- Make whole all unit employees affected by such unilateral change, including reimbursement for any loss of benefits, earnings or expenses incurred or suffered, plus interest;
- Make contributions to the defined benefit plan sufficient to restore the plan to the level it would have attained had Respondent Chapter not made the July 1, 2009 change;
- Bargain in good faith with respect to proposed changes such term of employment until such time as the parties have reached either an agreement or a bona fide impasse, and;
- Post appropriate Notices to Employees conspicuous places and distribute them electronically to employees.

ALJD p. 44, lines 12-51, p. 45, lines 1-12.

Exception 9. In addition to the matters set forth in Exception 8, above, the ALJ erred in his failure to include in his Recommended Order that Respondent ANRC-Chapter:

- Cease and desist from unilaterally implementing changes to the retirement system (pension plan) without providing OPEIU Local 459 advance notice and an

- opportunity to bargain over the changes and the effects of such changes on bargaining unit employees;
- Cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
 - Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, in both paper and electronic form, all payroll records, social security payment records, timecards, personnel records and reports, pension/retirement system records for bargaining unit employees, actuarial reports, and all other records necessary to analyze and compute the amount of pension benefit restoration, back pay and other amounts due as a result of ANRC Chapter's unilateral change to the retirement system (pension plan).

ALJD pp. 45-48.

EXCEPTIONS 10-18 .

THE ALJ ERRED AS A MATTER OF BOTH FACT AND LAW IN HIS DISMISSAL OF THOSE PORTIONS OF THE COMPLAINT ALLEGING THAT BEGINNING ON OR ABOUT OCTOBER 26, 2009, RESPONDENT ANRC-REGION VIOLATED SECTION 8(A)(5) BY UNILATERALLY REDUCING THE CHOICES AMONG LOCAL HEALTH INSURANCE OPTIONS FOR EMPLOYEES.

Exception 10. The ALJ erred as a matter of fact and law in his conclusion that General Counsel failed to prove by a preponderance of the evidence that Respondent American Red Cross, Great Lakes Blood Services Region ("ANRC Region") violated Section 8(a)(5) by unilaterally reducing the choices among local health insurance options under the Benefits Advantage plan for unit employees beginning October 26, 2009 during the open enrollment period for the 2010 benefit year. ALJD p. 27, lines 3-8.

Exception 11. The ALJ erred in his factual finding that it "[was] not clear which units the General Counsel contends were unlawfully affected by the unilateral change." ALJD p. 27, lines 11-21, and fn. 42.

Exception 12. The ALJ erred as a matter of fact and law in finding that “the lack of documentary evidence cannot be blamed on the [ANRC] Region’s failure to produce information in response to a General Counsel subpoena”. ALJD p. 27, lines 42-44.

Exception 13. The ALJ erred as a matter of fact and law in his decision to credit the testimony of ANRC-Region agent Smelser and American National Red Cross (“ANRC”) agent Shearer regarding the elimination of local health insurance options, the annual enrollment process, and the open-enrollment and BenefitsAdvantage materials. ALJD p. 27, line 47, p. 28, lines 1-4.

Exception 14. The ALJ erred as a matter of fact and law in his conclusion that “an adverse inference that the absent documentation would support the complaint allegation is unwarranted”. ALJD p. 28, lines 4-8.

Exception 15. The ALJ erred factually in finding that “the available record otherwise supports the Region’s contention that it did not eliminate any of the three local BCN plans from the 2010 offering.” ALJD p. 28, lines 10-11.

Exception 16. The ALJ erred in his dismissal of, and failure to include in his “Conclusions of Law”, the allegation that ANRC Region violated Section 8(a)(5) by unilaterally eliminating and/or reducing choices among local health plans offered to employees beginning on or about October 26, 2009. ALJD p. 28, lines 21-22, p. 42, lines 15-33, p. 43, lines 1-14.

Exception 17. The ALJ erred in his failure to include in his Remedy and Recommended Order that Respondent ANRC Region:

- Rescind the October 2009 changes made to the local health plan choices, and restore the status quo ante with respect to such term of employment;
- Make whole all unit employees affected by such unilateral change, including reimbursement for any loss of benefits, earnings or expenses incurred or suffered, plus interest;

- Bargain in good faith with respect to such issue until such time as the parties have reached either an agreement or a bona fide impasse, and;
- Post appropriate Notices to Employees conspicuous places and distribute them electronically to employees.

ALJD p. 44, lines 12-51, p. 45, lines 1-12.

Exception 18. In addition to the matters set forth in Exception 17, above, the ALJ erred in his failure to include in his Recommended Order that Respondent ANRC-Region:

- Cease and desist from unilaterally implementing changes to local health insurance plan options without providing OPEIU Local 459 advance notice and an opportunity to bargain over the changes and the effects of such changes on bargaining unit employees;
- Cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, in both paper and electronic form, all payroll records, social security payment records, timecards, personnel records and reports, health insurance records for bargaining unit employees, actuarial reports, and all other records necessary to analyze and compute the amount of back pay and other amounts due as a result of ANRC Chapter's unilateral change to the local health insurance plan options.

ALJD p. 45-47.

EXCEPTIONS 19-28.

THE ALJ ERRED AS A MATTER OF BOTH FACT AND LAW IN HIS DISMISSAL OF THOSE PORTIONS OF THE COMPLAINT ALLEGING RESPONDENTS ANRC-REGION AND ANRC-CHAPTER VIOLATED SECTION 8(A)(5) BY BARGAINING IN BAD FAITH WITH A FIXED MIND AND NO INTENTION OF AGREEMENT OVER THE SUBJECTS OF HEALTH INSURANCE, 401(K) BENEFITS, AND PENSION BENEFITS.

Exception 19. The ALJ erred as a matter of fact and law in finding that these allegations were not supported by a preponderance of the evidence. ALJD p. 31, lines 28-29.

Exception 20. The ALJ erred as a matter of fact and law in finding that ANRC bargaining agent Sabin Petersen “provided a reasonable explanation to the Unions why the ANRC and the Respondents wanted the ‘me too’ language.” ALJD p. 33, lines 1-2.

Exception 21. The ALJ erred as a matter of fact and law in his conclusion that “it was certainly reasonable for the Respondents to believe that it was ‘fair and proper’ to stand firm on their position and/or that they had ‘sufficient bargaining strength to force’ the Unions to agree.” ALJD p. 33, lines 18-20.

Exception 22. The ALJ erred as a matter of fact and law in his conclusion that “[t]he similar or related unfair labor practices found in this proceeding are also insufficient to establish that the Respondents-which had executed several contracts with the Unions in the past-were attempting to avoid reaching any new agreements.” ALJD p. 33, lines 25-27.

Exception 23. The ALJ erred as a matter of fact and law in his conclusion that “[t]he Region’s admission that it recently engaged in fixed mind bargaining over the transfer of telerecruiter work from the LCD unit does not establish that the Respondents had approached contract negotiations in all five units in the same manner since February 2009.” ALJD p. 33, lines 27-30.

Exception 24. The ALJ erred in his conclusion that Respondents “asserted defenses to the unilateral change allegations were not entirely frivolous”. ALJD p. 33, lines 32-33.

Exception 25. The ALJ erred as a matter of fact and law in his conclusion that “ it [was] doubtful that the fundamental differences between the parties, especially over the ‘me-too’ health insurance proposal, would have been any less fundamental in the absence of the 8(a)(5) violations”, and his inference that such fact was legally dispositive for purposes of determining Respondents’ bad faith, fixed mind bargaining. ALJD p. 33, lines 34-36.

Exception 26. The ALJ erred as a matter of law in finding that the cases cited by General Counsel were distinguishable. ALJD p. 33, lines 37-51, p. 34, lines 1-11.

Exception 27. The ALJ erred as a matter of law in his dismissal of, and failure to include in his “Conclusions of Law”, the allegation that ANRC Region and ANRC Chapter violated Section 8(a)(5) by engaging in bad faith, fixed mind bargaining, over health insurance benefits, 401(k) benefits, and pension benefits. ALJD p. 34, lines 13-14, pp. 42, lines 15-35, p. 43, lines 1-50.

Exception 28. The ALJ erred in his failure to include in his Remedy and Recommended Order that Respondents ANRC Region and ANRC Chapter:

- Cease and desist from bargaining in bad faith and with a fixed mind and no intention of reaching an agreement with regard to health insurance, 401(k) benefits, and/or pension benefits;
- Cease and desist from in any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.
- Bargain in good faith with respect health insurance, 401(k) benefits, and pension benefits until such time as the parties have reached either an agreement or a bona fide impasse, and;
- Post appropriate Notices to Employees conspicuous places and distribute them electronically to employees.

ALJD p. 44-48.

EXCEPTION 29. The ALJ erred as a matter of law in limiting the make whole remedy for Respondents ANRC Region and ANRC Chapter’s unilateral changes to pension, 401(k), health insurance, and retiree health benefits, to provide that not only could Respondents “litigate in compliance whether it would be unduly burdensome to restore the status quo ante”, but also that “if the Unions choose to retain one or more of the unilaterally implemented changes, then make-whole relief for those changes is inapplicable”. ALJD p. 44, fn. 60.

Based on the above and the arguments set forth in OPEIU's supporting Brief, Charging Party OPEIU Local 459 respectfully requests that the Board grant the above Exceptions to the ALJD, reverse the ALJ's dismissal of the allegations discussed above, and his limitation on remedial "make whole" relief, find that Respondents ANRC Region and ANRC Chapter violated the Act as to all matters alleged in the Consolidated Complaint, and order all appropriate remedial relief under extant Board law.

Dated: June 30, 2011

s/ Tinamarie Pappas
Tinamarie Pappas
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CERTIFICATE OF SERVICE

TINAMARIE PAPPAS states that on June 30, 2011, she e-filed Exceptions of Office and Professional Employees Local 459 to the Decision and Order of the Administrative Law Judge, through the Board's e-filing system, and served all counsel of record via electronic transmission, at the email addresses set forth below:

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The above statements are true and correct to the best of my information, knowledge and belief.

s/ Tinamarie Pappas