

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 25
SUBREGION 33

GOOD SHEPHERD MANOR, INC.)	
)	
Respondent)	
and)	Case Nos. 25-CA-191404
)	25-CA-194176
AMERICAN FEDERATION OF STATE,)	25-CA-198163
COUNTY, AND MUNICIPAL EMPLOYEES,)	
COUNCIL 31, AFL-CIO)	
)	
Charging Party)	

POST HEARING BRIEF OF CHARGING PARTY

This cause arose from three separate unfair labor practice charges filed by Charging Party, American Federation of State, County, and Municipal Employees Council 31 (AFSCME or Union) consolidated in the above-captioned complaint against Respondent Employer Good Shepherd Manor, Inc. (Good Shepherd or Employer). The consolidated complaint alleges that Good Shepherd violated Section 8(a)(5) and (1) of the Act by unilaterally withholding wage increases from bargaining unit employees beginning with its fiscal year 2017, July 1, 2017; unilaterally changing the duties and pay rate for certain bargaining unit employees; and refusing to meet with the Union for bargaining. A trial was scheduled and completed on September 5, 2017. Based on the evidence of record the Employer did fail to bargain in good faith with the Union in

violation of the Act.

PROPOSED FINDINGS OF FACT

Good Shepherd is a residential training facility for adult males with developmental disabilities. It is located in Momence, Illinois. In total there are 14 group homes which house the residents. (Tr. 16, 33, 41-42).

AFSCME was certified by the Board as the collective bargaining representative of a bargaining unit consisting of all full-time and regular part-time non-professional employees of Good Shepherd at its facilities located in Momence, Illinois on November 30, 2015. (Board Exs. 1(n and r)).

Included in the bargaining unit is the position of care worker also known as direct service provider (DSP) or by the position number 811. (Tr. 26). These positions are supervised by the position of Qualified Intellectual Developmental Professional commonly called a "Q". The Qs report to the Residential Service Director, Kristen Stockle. (Tr. 19, 26, 33-34).

David Dorn is a staff representative of AFSCME. He has been and is assigned as the primary AFSCME representative representing the bargaining unit at Good Shepherd and is the lead negotiator for the Union. (Tr. 44-45, 47).

Prior to the certification of AFSCME Good Shepherd had provided annual wage increases to its employees. The percentage increase was determined by the Board of Directors of Good

Shepherd normally at an annual meeting in June of any given year. Good Shepherd operates on a fiscal year commencing on July 1 and ending on June 30. Since on or about June of 2010 through June of 2015 that increase has been 1% with the exception of June of 2014. Prior to FY 2011 percentage increases of at least 1% were provided since at least FY 2003. Employees were given the percentage increase at the time of their evaluation assuming the evaluation was positive. Evaluations were and continue to be given on or about the anniversary date of the employee. In June of 2014 the Board did not vote to provide for a percentage wage increase due to a lack of funds from the State. In that fiscal year, FY 2015, additional funding was granted by the State after the start of the fiscal year and an across the board increase of 1.5% was approved by the Good Shepherd Board in December of 2014. (Resp. Ex. 9, Tr. 110, 19-20, 141, 56-157).

On February 12, 2016 Bruce Fitzpatrick, President of Good Shepherd, advised David Dorn via an email that the 1% wage increase which had been adopted by the Good Shepherd board in June of 2015 and had been provided to employees since July of 2015 would continue to be paid through fiscal 2016. (GC Ex. 2, Tr. 49).

At its meeting in June of 2016 the Good Shepherd board determined not to provide a percentage pay increase to bargaining unit employees during the fiscal year beginning July 1, 2016 (FY

2017) due to union negotiation. (Tr. 23, Resp. Ex. 12). A 1% increase was approved for non-bargaining unit employees. (Tr. 145). No notice was given to the Union regarding the decision of Good Shepherd to withhold a percentage wage increase to bargaining unit employees during FY 2017. (Tr. 25).

AFSCME and Good Shepherd had a bargaining meeting scheduled for September 14, 2016. Just prior to that meeting David Dorn was advised by a bargaining unit member on the negotiating team that there was a rumor that bargaining unit members were not getting pay increase because of the Union. Before beginning the negotiations Mr. Dorn inquired of Good Shepherd representatives John Combs, Richard Wessels, and Mike Butler whether annual rate increases were not being provided to bargaining unit members because of the Union and advised that if so that should cease as the Union would not prevent bargaining unit employees from receiving an annual increase. John Combs, Human Resource Director at the time, stated that he did not know what Mr. Dorn was talking about and had no knowledge where the rumors came from. (Tr. 52-54).

Bargaining unit employees were being given evaluations during FY 2017 and not receiving a percentage increase despite having a positive evaluation. On some evaluation the 0% increase was followed not applicable. On others the reason provided was due to union negotiations or similar language. (GC Ex. 4 (a-1)).

After the September 14th meeting David Dorn was again advised by bargaining unit members that raises were not being given and he investigated those allegations. In January of 2017 Mr. Dorn wrote to John Combs regarding the continuation of the practice of annual merit increases. John Combs responded stating that for FY 2017 the Board had determined to leave increases up to the collective bargaining process. (GC Ex. 9, 10; Tr. 57-58).

A decertification petition was filed on January 11, 2017 by James Mazzucchi.

AFSCME filed an unfair labor practice charge regarding, among other conduct, the withholding of merit increases for bargaining unit members. (GC Ex. 1a). The decertification proceeding was blocked by the Region.

On February 6, 2017 AFSCME and Good Shepherd attended a bargaining session. Another session was scheduled for February 28, 2017. (Tr. 59). On February 27, 2017 Good Shepherd filed an RM petition. On that same date Good Shepherd notified the Union that they were cancelling the bargaining session for February 28, 2017 due to "good faith doubt" in the majority status of AFSCME. AFSCME responded that it did not want to cancel the session and that the reason advanced, doubt as to majority status until an election was held, was not a valid reason for cancellation. Good Shepherd responded that it had not changed its position on cancellation. (GC Ex. 11, Resp. Ex. 19). AFSCME attended the bargaining session on February 28, 2017 but the Employer did not. (Tr. 61). AFSCME filed another unfair labor practice charge. (GC Ex. 1e). The initial

charge was still pending. The RM proceeding was blocked by the Region. No election was scheduled.

The parties did not meet to bargain again until May 25, 2017. The meeting was scheduled after AFSCME sent a letter on April 24, 2017 stating that Good Shepherd should return to the bargaining table. (GC Ex. 12). On April 27, 2017 the Employer responded and stated that they were willing to schedule a meeting. (GC Ex. 13).

On or about May 1, 2017 AFSCME became aware that the Employer had implemented a new care worker position which added the duties of being a mentor to new employees to the care worker duties. (Tr. 63-64). Certain bargaining unit members had been selected for the position, their desire to accept the position was discussed with them and inquiry was made as to an increase in pay, and the selected employees were advised that they would receive a twenty-five cent an hour increase upon accepting the position. (Tr. 37-38). The selection and rate increase occurred in November of 2016. (GC Ex. 7, Tr. 27-29).

Good Shepherd did not notify AFCME of the potential new care worker position, the selection or employees for the position, or the rate increase at any time. (Tr. 30-31, 64).

ARGUMENT

AFSCME became the certified representative of the bargaining unit of non-professional employees of Good Shepherd in November of 2015. Good Shepherd then became obligated to bargain with AFSCME over the wages, hours, and working conditions of bargaining unit employees. The evidence supports a finding that Good Shepherd violated Section

8(a) (1) and (5) of the Act by unilaterally withholding wage increases, creating a new bargaining unit position, dealing directly with bargaining unit employees regarding placement in the position and establishing a wage rate for the position, and refusing to meet for the purpose of bargaining an agreement with the Union.

During negotiations for a collective bargaining agreement including a first contract an Employer is required to maintain the status quo with regard to mandatory subjects of bargaining. An employer is not only obligated to provide notice of any changes but generally may not implement changes absent overall impasse in negotiations. *NLRB v. Katz*, 369 US 736 (1962), *Connecticut Institute for the Blind*, 360 NLRB No. 55 (2014), *Red Cross*, 364 NLRB No. 98 (2016).

An employer may not withhold or modify a wage increase program unilaterally. A wage increase program or policy is a term and condition of employment when it is an established practice regularly expected by employees. Relevant factors as to the regularity of the wage increase program include the number of years the program has been in place, the regularity of the wage increases, and whether there is a fixed criteria for receipt of the raise and the amount of the increase. *Daily News of Los Angeles*, 315 NLRB 1236 (1994), *Rurall Metro Medical Services*, 327 NLRB 49 (1998), *Gruma Corporation*, 350 NLRB 336 (2007).

In this proceeding the evidence overwhelming shows that Good

Shepherd has a wage increase program which is a term and condition of employment. The program has been in place for at least 10 years with only one deviation due to a potential funding loss, the increases are normally determined just prior to the start of a fiscal year and are a fixed percentage, and the employees receive the increase on their anniversary date assuming a satisfactory evaluation.

Similarly it cannot be disputed that the Employer provided no notice to AFSCME that is intended to cease providing the annual wage increases to bargaining unit employees. In February of 2016 the Employer notified AFSCME that it would continue to provide the wage increase to bargaining unit employees as determined by the Board prior to the certification of the Union for that fiscal year. The Employer did not notify AFSCME that it desired to stop that process for the upcoming fiscal year as it President, Bruce Fitzpatrick, testified. (Tr. 25). When the AFSCME lead negotiator inquired of the Employer at a negotiation session in September of 2016 about a rumor that no increase were being provide due to the union Employer representative John Combs denied any knowledge of the change. When AFSCME wrote to the Employer in January of 2017 the Employer finally advised the Union that it had determined to leave increases up to the collective bargaining process. The Employer has maintained that position into the current fiscal year and notified the Union of

the same. (Resp. Ex. 11). In both fiscal years a 1% increase has been approved by the Employer for non-bargaining unit employees.

The Employer argued at the hearing that for the current fiscal year the status quo of a percentage wage increase would not apply since there has been an intervening event of a State funded direct wage increase and when the same event occurred almost 15 years ago the Employer did not provide a wage increase. First, what the Employer did that many years ago should not determine the current policy. Further, the Employer did not provide that notice to AFSCME - the Employer said the withholding of increases was for the same reason as the prior year which in this communication said due to low funding. This alleged reason is not in accordance with all prior statements of the Employer regarding the reason for withholding the increase in the prior year which the minutes from the board meeting and the January 9th letter both state was due to collective bargaining. This was also the reason provided to employees in their evaluations. (GC Ex. 4). Finally, as noted above, the Employer established a percentage wage increase for non-bargaining unit employees who also are eligible for the State funded wage increase. (Tr. 145-148).

The Employer also raised as a defense that notice had been given and the charge was not timely filed. The time period for

filing a charge does not begin until a party has clear and unequivocal notice of a violation of the Act. *Desks, Inc.*, 295 NLRB 1 (1989). The employer has the burden of establishing such clear and unequivocal notice. *A & L Underground*, 302 NLRB 467 (1991). Given that the Employer did not provide the Union with any notice of its decision to cease providing annual wage increases beginning in July of 2016 the charge on this issue is timely. *M & M Automotive Group*, 342 NLRB 1244 (2004).

Another unilateral change the Employer made was the establishment of a new bargaining unit position. Essentially the Employer enhanced the duties of six of the direct service provider positions to serve as mentors to new employees. The Employer did not notify the Union of the new position. Each of the bargaining unit employees was approached directly by the Residential Service Director to determine if they were interested in the position. The Employer unilaterally assigned a twenty-five cent increase to the position when the employees asked about an increase and directly advised the selected employees of the increase. The Employer did not notify the Union of the intention to increase wages for certain employees performing additional duties. Essentially the Employer ignored the Union as a representative of the bargaining unit employees in this process. The Employer violated the Act by doing so in two respects.

Initially, the Employer changed the wages and working

conditions, namely duties, of six bargaining unit members without notice to or bargaining with the Union. As discussed above, once a Union has been selected by its employees the Employer is not privileged to make unilateral changes in wages or working conditions without notice to the Union. *NLRB v. Katz*. 369 US 736 (1962). There is no question that the Employer did not provide such notice.

Further, the Employer dealt directly with bargaining unit members in offering the new job duties and the wage increase. The testimony at the hearing was that some employees asked about a wage increase for accepting additional duties and the Employer went back to the selected employees offering a twenty-five cent increase. (Tr. 27-29, 36-38) This is direct dealing which violated the Act. The Employer communicated directly with bargaining unit employees with the intent to change their working conditions and establishing a wage increment for that change and made those communications excluding the Union. *Permanente Medical Group*, 332 NLRB 1143 (2000).

The remaining allegation of the Complaint concerns the Employer's cancellation of a bargaining session scheduled for February 28, 2017 and the subsequent hiatus in bargaining which occurred thereafter until May 25, 2017. AFSCME filed a charge stating that Good Shepherd had unlawfully withdrawn recognition. Good Shepherd takes the position that it only postponed

bargaining to force an election on its RM petition but it did not withdraw recognition. That position cannot be sustained and the Employer violated the Act by refusing to meet with the Union from February 27, 2017 to May 25, 2017.

An employer may only withdraw recognition from an incumbent union if there is an actual loss of support of the majority of the employees in the unit. An employer will be required to prove the loss of such majority support if a case is filed. *Levitz Furniture*, 333 NLRB 717 (2001). The Employer here did not make any such showing.

An employer withdraws recognition when it refuses to meet to bargain even if the employer continues to recognize the Union for other purposes. *T-Mobile USA*, 365 NLRB No. 23 (2017). In that case the Board determined that the employer was not privileged to pick and choose which parts of the bargaining relationship it would continue to honor. In so stating the Board found that the employer in that case violated Section 8(a)(1) and (5) of the Act by its refusal to meet and bargain a successor agreement despite its continuing to meet and bargain over other matters. The same result should occur in this case.

CONCLUSIONS OF LAW

1. Good Shepherd Manor is an employer within the meaning of the Act. AFSCME is a labor organization within the meaning of

the Act.

2. Good Shepherd violated Section 8(a)(5) and (1) of the Act by unilaterally and without consent of the Union:

(a) ceased providing percentage wage increases to bargaining unit employees from July 1, 2016 and continuing;

(b) changed the terms and conditions of employment of certain bargaining unit employees by adding duties to the job description of direct service provider;

(c) increased the wages of the same bargaining unit employees by 25 cents per hour;

(d) negotiated directly with six employees (engaged in direct dealing) over the increase in duties of their position and a wage increase for those additional duties;

(e) withdrew recognition of AFSCME by the cancellation of negotiations sessions for a three month period.

REMEDY

Charging Party seeks the remedies sought by the General Counsel inclusive of a cease and desist order, a return to the status quo for the percentage wage increase inclusive of payment of all back wages with interest, notice and an opportunity to bargain regarding the newly established mentor position and the wage increase, and an order that Good Shepherd bargain in good

faith with the Union. Given the unilateral withdrawal of the wage increase program during the certification year and the unlawful withdrawal of recognition which delayed bargaining for an agreement for three months the Union further seeks an extension of the certification year for at least 9 months after the Employer restores the status quo on the wage increase program.

CONCLUSION

For the reasons argued herein in addition to the evidence of the allegations of the Complaint must be sustained and a finding made that the Employer violations Section 8(a)(5) and (1) of the Act.

Respectfully submitted,
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BY /s/ Gail E. Mrozowski
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October 10, 2017
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CERTIFICATE OF SERVICE

I, Gail E. Mrozowski, and attorney, hereby certify that I served the **POST HEARING BRIEF OF THE CHARGING PARTY** via electronic mail on October 10, 2017 as follows:

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