

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

DATE: July 7, 2017

TO: Paula Sawyer, Regional Director
Region 27

FROM: Jayme L. Sophir, Associate General Counsel
Division of Advice

SUBJECT: SMG
Case 27-CA-192094

530-6067-4000
530-6067-4001-6700
530-6067-4033
530-6067-4033-2500
530-6067-4033-2700
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This case was submitted for advice as to whether the Employer's unilateral reduction in wages of newly-represented employees following a decrease in the city's prevailing wage violated Section 8(a)(5). We conclude that this detrimental change was unlawful because the Employer had no established practice of reducing wages due to a decrease in the city's prevailing wage, as opposed to raising wages in response to an increase.

FACTS

SMG ("Employer") manages and operates the Colorado Convention Center, among other arts and theater venues, pursuant to a contract with the City and County of Denver. In late September 2016, the International Union of Operating Engineers, Local 1 ("Union") filed an election petition to represent an 11-person unit of engineering maintenance employees at this facility. In an election held on October 19, 2016, the employees voted in favor of representation by the Union. The Union filed charges alleging, inter alia, that during the organizing campaign the Employer threatened employees with the loss of benefits and other unspecified reprisals. The parties informally settled the charge in December 2016.

Pursuant to municipal law, employees in certain job classifications who work for city contractors must be paid "not less than" the prevailing wage established by

the city.¹ The prevailing wage has two components: a base wage rate and a fringe benefit rate (hereafter referred to together as the “prevailing wage”). A covered employer must at least pay the base wage rate, even if the value of its fringe benefits is higher than the fringe benefit rate. If the actual value of an employee’s benefits is lower than the fringe benefit rate, the employer must, at a minimum, pay that employee wages equal to the base wage rate plus the difference between the fringe benefit rate and the actual value of the employee’s benefits (the “benefit differential”).

The Employer’s contract to manage the Colorado Convention Center is subject to the city’s prevailing wage law. Historically, the Employer has set its engineering maintenance employees’ wages at the minimum level required by law.² It adjusts employees’ wages annually in January, the anniversary of its contract with the city, to reflect the city’s updated prevailing wage.³ Every year between 2007 and 2015, each component of the city’s prevailing wage for engineering maintenance workers has increased or remained the same.⁴ Notwithstanding this gradual rise in minimum rates set by the city, at least three, and perhaps as many as eight, engineering maintenance employees experienced wage reductions when their wages were adjusted in 2012 and 2016.⁵ These wage reductions were attributable to the employees’ receipt

¹ DENVER, COLO., REVISED MUNICIPAL CODE § 20-76(a) (2017), *available at* https://library.municode.com/co/denver/codes/code_of_ordinances.

² Some employees’ total compensation is higher than the overall prevailing wage because their benefits are more costly than the city’s fringe benefit rate. These employees are paid the city’s base wage rate.

³ *See* DENVER, COLO., REVISED MUNICIPAL CODE § 20-76(b) (updated prevailing wage becomes mandatory for multi-year city contracts on the anniversary date of the contract).

⁴ The city’s online archive of prevailing wage determinations goes back to 2007 for the relevant work classification.

⁵ According to summary charts submitted by the Employer, two employees’ wages decreased in 2016 and six employees experienced a wage cut in 2012. Three of these eight employees are engineering maintenance workers who are still employed as of January 2017. The remaining five employees do not match current payroll records for the unit of engineering maintenance employees; accordingly, it is unknown whether these five employees were engineering maintenance employees who have since left employment, or whether these employees were in a different job classification.

of greater benefits (e.g. opting for health insurance or accruing more paid time off), which shrunk the benefit differential that was paid in the form of wages.

On December 5, 2016, the city issued updated prevailing wage levels, which resulted in a reduction in the overall prevailing wage by 59 cents for the classification covering engineering maintenance employees. The city's base wage rate dropped by 94 cents, but the fringe benefit rate rose by 35 cents. The Employer did not inform the Union about the drop in the overall prevailing wage at this time.

The parties met for their first bargaining session on January 9, 2017. The Employer gave the Union its initial contract proposal, which provided, among other things, that wages would be set at the city's prevailing wage. Again, the Employer did not notify the Union of the recent drop in the prevailing wage or that it planned to lower employees' wages accordingly.

On January 11, 2017, the Employer informed employees by letter that the city had approved adjustments to the prevailing wage and that the updated rate would be reflected in their pay stub on January 20, 2017. The Employer did not alert its engineering maintenance employees that the new prevailing wage was lower than the 2016 rate for their classification. As a result, unit employees did not learn that their wages had been cut until they received their pay on January 20. Around this same time, health insurance premiums also increased for at least one unit employee by about \$2.50 per weekly pay period.

The Employer has not submitted any evidence that it maintained a written policy on wages, nor has it established that unit employees were on notice that their wages would be lowered if the prevailing wage declined.⁶ At the time of hire, the Employer merely told engineering maintenance employees that the job was a prevailing wage job or that the wage would be set by the city. The Employer asserts that it informed employees through bulletin board notices, mailings, and emails that the prevailing wage could increase, decrease, or stay the same. However, the Employer has not submitted evidence establishing that these notices were, indeed, posted or sent to unit employees.

The Employer employs at least some other workers besides engineering maintenance workers who are covered by the city's prevailing wage law, but it is not

⁶ In fact, one employee reported that a finance manager told unit employees during a preelection meeting that their wages would not go down but would increase or stay the same. This statement likely reflects the manager's assumption that prevailing wages would not decline given the historical upward trend.

known whether any of those employees ever experienced a reduction in wages in response to a decline in the prevailing wage.⁷

ACTION

We conclude that the Employer's failure to provide the Union with notice and an opportunity to bargain about the January 2017 reduction in wages was unlawful because the decline in the prevailing wage was an unprecedented event and the Employer had no established practice for dealing with it.

An employer violates Section 8(a)(5) if it changes terms and conditions of employment without giving the union notice and an opportunity to bargain.⁸ Thus, an employer is obligated to "maintain the status quo" with respect to mandatory subjects of bargaining once its employees are represented by a union.⁹ In this context, the status quo consists of not only the terms of employment in effect on the date of voluntary recognition or the date of the election, but also past practices that occur with "such regularity and frequency that employees could reasonably expect the 'practice' to continue or reoccur on a regular and consistent basis."¹⁰ An employer is permitted to act unilaterally pursuant to an established past practice "only if the

⁷ Electricians are the only other class of worker covered by the prevailing wage law known to be employed by the Employer. The prevailing wage has increased or stayed the same each year from 2007 to 2017 for electricians. (The Employer's electricians were paid according to the city's prevailing wage schedule for building construction projects, based on calculation notices submitted by the Employer.)

⁸ *NLRB v. Katz*, 369 U.S. 736, 746-47 (1962) (employer obligated to bargain over procedures and criteria concerning merit raises that "were in no sense automatic, but were informed by a large measure of discretion").

⁹ *E.I. Du Pont de Nemours*, 364 NLRB No. 113, slip op. at 4 (Aug. 26, 2016) (returning to the rule that unilateral, post-expiration discretionary changes are unlawful, notwithstanding an expired management-rights clause or an ostensible past practice of discretionary change developed under that clause). See also *Litton Fin. Printing Div. v. NLRB*, 501 U.S. 190, 198, 206 (1991) ("Under *Katz*, terms and conditions continue in effect by operation of the NLRA. . . . [T]hey are terms imposed by law, at least so far as there is no unilateral right to change them.").

¹⁰ *Du Pont*, 364 NLRB No. 113, slip op. at 4-5 & n.14 (quoting *Sunoco, Inc.*, 349 NLRB 240, 244 (2007)). See also *Katz*, 369 U.S. at 745-47 (merit raises unlawful unless they were "in line with the company's long-standing practice" of periodic reviews and, "in effect, were a mere continuation of the status quo").

changes do not involve the exercise of significant managerial discretion”¹¹—that is, only in the narrow circumstance where the changes are “automatic,”¹² based on a fixed formula,¹³ or reasonably certain “as to timing and criteria.”¹⁴ Where an employer has exercised, and continues to exercise, discretion in implementing its practice, it must first bargain with the union over the discretionary aspect before taking action.¹⁵ The burden is on the employer to establish the existence of a past practice when it is raised as a defense to a unilateral change allegation.¹⁶

¹¹ *Du Pont*, 364 NLRB No. 113, slip op. at 7.

¹² *Katz*, 369 U.S. at 746; *State Farm Mutual Auto Insurance Co.*, 195 NLRB 871, 889-90 (1972) (unilateral grant of cost-of-living wage increases to newly-represented employees lawful where “automatic increases” were based on Bureau of Labor Statistics data), *cited with approval in Du Pont*, 364 NLRB No. 113, slip op. at 7.

¹³ *Compare, e.g., Post-Tribune Co.*, 337 NLRB 1279, 1279-81 (2002) (no violation where employer passed portion of insurance premium increase onto employees based on fixed ratio), *and House of the Good Samaritan*, 268 NLRB 236, 237 (1983) (no violation where employer allocated entirety of premium increase to employees where it followed written policy setting maximum amount to be paid by employer), *with Dynatron/Bondo Corp.*, 323 NLRB 1263, 1265 (1997) (violation where increases in employee contributions were not based on a “fixed percentage” and employer retained “total discretion” over employees’ share of the premium), *enforced in relevant part*, 176 F.3d 1310 (11th Cir. 1999), *cited with approval in Du Pont*, 364 NLRB No. 113, slip op. at 8 & n.22.

¹⁴ *Eugene Iovine, Inc.*, 328 NLRB 294, 294 (1999) (unlawful unilateral reduction in hours where decision involved management discretion), *enforced*, 1 F. App’x 8 (2d Cir. 2001), *cited with approval in Du Pont*, 364 NLRB No. 113, slip op. at 7.

¹⁵ *See Oneita Knitting Mills, Inc.*, 205 NLRB 500, 500 n.1 (1973) (merit wage increase unlawful notwithstanding past history of such increases because employer obligated to continue the “general outline of the program” and bargain over discretionary matters, such as amounts or timing), *cited with approval in Du Pont*, 364 NLRB No. 113, slip op. at 7. *Cf. Mission Foods*, 350 NLRB 336, 337 (2007) (unilateral decision not to grant wage increases unlawful because employer was required to maintain the fixed elements of its structural wage scale program and bargain over the amount, which was discretionary).

¹⁶ *Du Pont*, 364 NLRB No. 113, slip op. at 10 n.27; *Caterpillar, Inc.*, 355 NLRB 521, 522 & n.9 (2010), *enforced per curiam*, Nos. 10-1269, 10-1292, 2011 WL 2555757 (D.C. Cir. May 31, 2011). *See also Fresno Bee*, 339 NLRB 1214, 1214 (2003) (after

When assessing whether a change represents a mere continuation of a “dynamic status quo,”¹⁷ the Board scrutinizes whether the change is comparable in nature and scope to prior changes comprising the employer’s past practice. For example, in *American National Red Cross*,¹⁸ the Board found that an employer’s unilateral post-expiration suspension of 401(k) plan matching contributions and exclusion of new hires from the pension plan were unlawful, notwithstanding a history of annual amendments to the employer’s retirement plans during the life of the collective-bargaining agreement. The Board first concluded that mid-contract changes made pursuant to clauses that were equivalent to a management-right clause did not create a past practice privileging post-expiration unilateral changes.¹⁹ In the alternative, the Board determined that the changes at issue varied from the prior practice because the employer had only implemented equally significant changes on one occasion during the contract term.²⁰ In particular, the Board observed that the sole significant mid-contract change in the 401(k) plan was a “beneficial change,” whereas the post-contract change in that plan was detrimental to employees.²¹ In these circumstances, the Board found that the post-contract changes to the 401(k) plan and the pension plan went “well beyond the nature and scope of changes” the employer made annually during the life of the contract.²²

General Counsel establishes prima facie Section 8(a)(5) violation, burden shifts to employer to demonstrate that unilateral change was privileged).

¹⁷ *Du Pont*, 364 NLRB No. 113, slip op. at 7.

¹⁸ 364 NLRB No. 98, slip op. at 2 (Aug. 26, 2016).

¹⁹ *Id.*, slip op. at 3-4.

²⁰ *Id.*, slip op. at 4-5.

²¹ *Id.*, slip op. at 5.

²² *Id.* See also *FirstEnergy Generation Corp.*, 358 NLRB 842, 842, 850-51 (2012) (*Noel Canning* Board) (imposition of “unprecedented” durational cap on retiree health care subsidies not justified by prior practice of “minor programmatic changes” that were of a “disparate nature”), *adopted by* 362 NLRB No. 66 (Apr. 14, 2015); *Caterpillar*, 355 NLRB at 523 (even assuming prior changes to prescription drug plan—including institution of preauthorization requirements, drug-quantity limits, and step therapies—constituted cognizable past practice, implementation of “generic first” program was a “material departure” from that practice because it was not limited in scope like prior changes).

Likewise, in *Palm Beach Metro Transportation, LLC*,²³ the Board rejected the employer's claim that a purported past practice of curtailing work schedules in response to fluctuations in available work justified a substantial reduction in employees' hours. The Board determined that the claimed practice was unsubstantiated where the employer had failed to establish that it had ever imposed a "comparable" reduction in hours on the few occasions where there were fluctuations in available work.²⁴ Accordingly, the Board determined that the substantial reduction in available work was a "first-time event, with no established past company practice for dealing with it."²⁵

Here, the wage reduction experienced by unit employees was significantly different in nature from the Employer's prior practice. Although the Employer has an annual practice of adjusting wages in January to account for updates in the prevailing wage, the Employer has failed to demonstrate that it had ever *decreased* unit employees' wages due to a decline in the prevailing wage. Rather, employees most commonly experienced a wage *increase* at this time in order to keep up with rising prevailing wages, as required by law. As in *American National Red Cross*, the *unfavorable* change to unit employees' wages in 2017 was of a totally different nature than the *favorable* raises in the past. The fact that at least a few engineering maintenance employees' wages were reduced in prior years after opting for, or becoming entitled to, additional benefits fails to establish a practice sufficient to justify the change at issue here. In those prior instances, the engineering maintenance employees experienced no net loss in overall wages and benefits, since their drop in wages was offset by enhancements to benefits. Conversely, in 2017, employees suffered not only a reduction in wages, but also a net loss due to the decline in the overall prevailing wage. Stated differently, the decrease in the prevailing wage for engineering maintenance employees was an unprecedented event that the Employer has no demonstrated past practice for dealing with, just as in *Palm Beach Metro Transportation*. Since the Employer's discretion in responding to this novel situation was not constrained by an established, comparable past practice, it has failed to carry its burden of demonstrating that its unilateral decision to cut wages in 2017 was defensible.

²³ 357 NLRB 180, 180 (2011), *enforced*, 459 F. App'x 874 (11th Cir. 2012).

²⁴ *Id.*

²⁵ *Id.* Cf. *North Star Steel Co.*, 347 NLRB 1364, 1364 n.5, 1389, 1397 (2006) (unilateral decision not to grant wage increases in 2001 lawful notwithstanding nearly 12-year history of annual wage increases because status quo must account for wage practices during 1980s, "the period of most compatibility" with the employer's declining business situation in 2001).

We so conclude, notwithstanding that the Board in *Holmes & Narver*²⁶ summarily affirmed the dismissal of a unilateral change allegation in circumstances somewhat similar to the instant case. There the employer was obligated under the federal Service Contract Act to pay minimum wages and benefits as determined by the U.S. Department of Labor (“DOL”), and it had always paid the exact minimum required.²⁷ Unlike the instant Denver prevailing wage law, where the benefit differential must be paid in the form of wages, in *Holmes & Narver*, the differential was paid into a benefit fund for each employee.²⁸ Employees were explicitly advised that contributions to this benefit fund would vary based on: (1) fluctuations in the annual DOL wage determinations, and (2) the costs of other health and welfare benefits.²⁹ Accordingly, employees in *Holmes & Narver* expected and experienced numerous changes, both up and down, in the monthly contributions to their benefit funds.³⁰ After a regulatory change caused a much more significant reduction in the benefit levels required under the Service Contract Act, the employer unilaterally reduced its payments into employees’ benefit funds pursuant to the new DOL formula.³¹ The ALJ concluded that this change was lawful because the employer had an established past practice of adjusting contributions in response to external changes, as well as setting contribution levels at, but not exceeding, the exact benchmark set by DOL.³² The ALJ reasoned that adherence to these practices following the unfavorable regulatory change was “not offensive to principles of good-faith bargaining.”³³

The Region should argue that *Holmes & Narver* is not dispositive here. As an initial matter, the case is of questionable precedential value. It is inconsistent with subsequent Board law, described above, establishing that an employer may not rely on a past practice to justify making new kinds of changes to terms of employment,

²⁶ 309 NLRB 146 (1992).

²⁷ *Id.* at 150.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.* at 150-51.

³² *Id.* at 151-52.

³³ *Id.* at 152.

especially when the employer is faced with novel circumstances. The ALJ's reasoning does not take this principle into account, and the Board summarily affirmed the ALJ's findings. Finally, *Holmes & Narver* has not been cited approvingly in any subsequent cases for the proposition that an employer can make an *unfavorable* change in employees' terms of employment when it only had a practice of making *favorable* changes in the past. Therefore, *Holmes & Narver* should not dictate the outcome here.

Furthermore, the case is factually distinguishable in two respects. First, the regulatory change in *Holmes & Narver* "threatened [the employer] with a severe financial burden" since its federal contract was a firm fixed price contract that only allowed for adjustments to offset wage and benefit cost increases mandated by DOL.³⁴ Thus, there was no guarantee the employer in that case would be reimbursed by the government for wage and benefit levels higher than those set by DOL.³⁵ Here, the Employer does not claim that it would have suffered any great financial hardship if it had maintained unit employees' wages at the 2016 rates. Second, the employees in *Holmes & Narver* were advised "at the outset" that their benefit contributions would vary and "numerous" changes did, in fact, take place.³⁶ In contrast, here there is insufficient evidence that the Employer informed bargaining unit employees that their wages might drop,³⁷ and only a limited number of engineering maintenance workers (only three of whom were still employed in January 2017) actually experienced wage reductions in the past due to their receipt of greater benefits, and only on two such occasions. In these circumstances, we cannot conclude that unit employees would reasonably expect that their wages might go down in 2017.³⁸

³⁴ *Id.* at 151.

³⁵ *Id.*

³⁶ *Id.* at 150.

³⁷ Even if the Employer posted or sent notices to unit employees stating that the prevailing wage rate could increase, decrease, or stay the same, it did not notify employees as to how the Employer would respond to such changes.

³⁸ Nor can it be said that the city's prevailing wage law required the Employer to reduce wages, since the law sets a wage and benefit floor, not a ceiling. *See, e.g., Trojan Yacht*, 319 NLRB 741, 743 (1995) (rejecting employer's defense that a unilateral freeze of pension benefit accruals was required by revised tax statute, as the employer "had some choices over which the parties could have bargained").

Accordingly, the Region should issue complaint, absent settlement, alleging that the Employer violated Section 8(a)(5)³⁹ and (1) by unilaterally decreasing unit employees' wages.⁴⁰

/s/
J.L.S.

ADV.27-CA-192094.Response.SMG (b) (6), (b) (7)

³⁹ With respect to the related charge alleging that the wage reduction violated Section 8(a)(3), which was not submitted for advice, we merely note that a defense based on past practice would fail if the Employer followed a similar past practice with respect to nonunit prevailing wage employees and never decreased those employees' wages in comparable circumstances.

⁴⁰ The Region should further investigate whether the Employer unilaterally increased unit employees' health insurance premiums in January 2017, and if so, whether such increases would be justified by an established past practice based on the Employer following a fixed formula or amount with respect to cost-sharing. *See generally Du Pont*, 364 NLRB No. 113, slip op. at 7-8 & n.22 (collecting cases). We note that the increase in weekly premiums amounted to an annual loss of over \$130 for the affected employee. That increase, especially in tandem with a significant reduction in wages, constitutes a material, substantial, and significant change. *See Union Child Day Care Center*, 304 NLRB 517, 517 n.2, 522-23 (1991) (change in method of calculating payroll deductions not de minimis where most employees' net pay changed by several dollars per biweekly pay period).