State of Maryland
State Labor Relations Board

In the matter of:	
Maryland State Employees Union, American Federation of State, County and Municipal Employees, Council 92,	
Petitioner,	
v.	**SLRB ULP Case No. 05-U-01**
	Opinion No. 3
Robert L. Ehrlich, Jr. Governor, State of Maryland, et al.,	
Respondents/Employer.	

DECISION AND ORDER

I. Procedural History

On November 19, 2004, the Maryland State Employees Union, American Federation of State County and Municipal Employees, Council 92 (MSEU or Petitioner), filed a document styled "Complaint for Contested Case Determination, Declaratory Ruling, and Board Ordered Relief" (hereinafter, Complaint) with the State Labor Relations Board (Board). Petitioner alleged that: the State of Maryland; Robert L. Ehrlich, Jr., Governor; and James C. DiPaula, Jr., Secretary of the Department of Budget and Management (hereinafter, Respondents) violated and continue to violate Title 3 of the State Personnel and Pensions Article (Collective Bargaining Statute). Specifically, Petitioner alleged that the Respondents failed to bargain collectively in good faith by: (1) requiring as a condition precedent that MSEU bargain over ground rules before commencing bargaining over mandatory subjects of bargaining; and (2) making unilateral cuts in a mandatory subject of bargaining, i.e., employees health care

benefits, without first bargaining with employees' exclusive bargaining representative, MSEU.

On December 6, 2004, the Board delegated to the Office of Administrative Hearings (OAH) the authority to make final findings of fact, proposed conclusions of law and issue a proposed order on the alleged violations contained in the Complaint. The case was assigned to an administrative law judge and a hearing was held on December 14, 2004.[1]/ On December 23, 2004, Administrative Law Judge Denise Oakes Shaffer (ALJ) issued a "Proposed Decision."

The ALJ made specific (20) findings of fact and, based on those findings, proposed certain conclusions of law as follows: (1) that employee health insurance benefits are a mandatory subject of bargaining under the Collective Bargaining Statute (CBS); (2) the Respondents' unilateral change in health insurance benefits after failing to bargain in good faith with MSEU is a violation of the CBS; and (3) the Respondents failed to bargain in good faith with MSEU when it refused to bargain with MSEU over mandatory subjects of bargaining because MSEU would not agree to its proposed ground rules. As relief, the ALJ proposed that the Respondents maintain the status quo with respect to bargaining unit employees' wages hours and other terms and conditions of employment, including health insurance benefits, until such time that the parties reached an agreement or impasse.

On January 7, 2005, pursuant to Title 10, Subtitle 2 of the State Government Article, §10-216(a)(2), Respondents filed Exceptions to the ALJ's proposed conclusions of law and order. The Petitioner filed an Opposition to Exceptions and Respondents a Reply thereto on January 18 and 28, 2005, respectively. On January 27, 2005, the Petitioner filed a Motion for Recusal or Disqualification, renewing a request first made in its Complaint that the Secretary of the Department of Budget and Management (or his designee), an ex officio member of the Board, be recused or disqualified from participating in the disposition of this case. Respondents' Opposition to the Motion was filed on January 31, 2005.

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[1] / After the timely submission of post-hearing memoranda, the record was closed on December 22, 2004. (ALJ Propsd. Dec. at 2.)

For the reasons that follow: (1) the Motion for Recusal or Disqualification is denied; (2) we conclude that health insurance benefits are a mandatory subject of bargaining under the CBS; and (3) the Respondents did not violate their duty to bargain under the CBS.

II. MOTION FOR RECUSAL OR DISQUALIFICATION

We first turn to Petitioner's Motion for Recusal or Disqualification.[2]/ As a preliminary matter, the Respondents contend that the Petitioner MSEU abandoned this claim, that the Secretary of Budget and Management (or his designee to the Board) be disqualified, when it failed to adjudicate it before the ALJ. The Respondents further argue that by affirmatively deciding not to address this issue the ALJ erred with respect to fully executing the responsibilities accorded her, vis-à-vis, our delegation to OAH.

In our delegation to OAH, we made the following observation concerning Petitioner's recusal request: "In view of our Order delegating this case to the Office of Administrative Hearings, we find no occasion at this time to address this request by the Complainant [Petitioner]." (Pre-Hrg Order at n.1) Notwithstanding our intent that all issues contained in Petitioner's Complaint be delegated to OAH for initial adjuducation, based on the language contained in our pre-hearing order, we cannot find the Petitioner's understanding –that the Board had deferred its determination of this issue until after OAH had completed its delegation– to be totally without reason.[3]/ In any event, it would be unreasonable to conclude from this record that the Petitioner manifested a clear intent to abandon this claim.

With respect to the Motion itself, for the reasons discussed below, we find the Petitioner has presented no

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[2]/ In its opposition, the Respondents asserted that two documents the Petitioner attached to its Motion should be stricken since they are not part of the record established before the ALJ. One of the documents is the letter designating Member Januszkiewicz to this Board and the other is a March 11, 2004 memorandum from the Respondents' counsel to Member Januszkiewicz "on whether the General Assembly may amend the Budget Bill to add a requirement that the State maintain certain levels of health benefit coverage for State employees through calendar year 2005." We can take administrative notice of these documents and in fact have done so.

[3]/ We were also somewhat troubled by the ALJ's role in all this by completing our delegation to OAH without any findings or conclusions on the merits of this issue or on the Respondents' contention that Petitioner had waived the issue. (See, ALJ Propsd. Dec. at n. 1)

grounds requiring the Secretary of Budget and Management or his designee to the Board, i.e., Member Januszkiewicz, to be recused or disqualified from participating in the disposition of Respondents' Exceptions to the ALJ's Proposed Decision.

A decision maker, who exercises judicial or quasi-judicial powers, has a duty to be fair and make impartial decisions based on the facts and law. *See, e.g.,* *Department of Human Resources v. Bo Peep*, 317 Md 573, 565 A.2d 1015 (1989), *cert. denied*, 469 U.S. 1067, 110 S.Ct. 1784, 108 L.Ed.2d 786 (1990)("actual bias" standard determines whether a hearing officer should recuse himself) *and* *Board of Medical Examiners v. Steward*, 203 Md. 574, 102 A.2d 248 (1953). The actual presence of personal bias, financial interest or an appearance of impropriety, are the established standards for determining if recusal is warranted. *Regan v. State Board of Chiropractic Examiners*, 355 Md. 397, 735 A.2d 1991(1999), *Pruitt v. Howard County Sheriff*, 96 Md.App. 60, *cert. denied*, 332 Md. 143 (1993) and *Hoyt v. Police Commissioner*, 279 Md. 74 (1977).

By way of background, Title 3 of the State Personnel and Pensions Article (SPP), §3-202(a), makes the Secretary of the Department of Budget and Management (DBM), or a designee of the Secretary, a permanent ex-officio member of the State Labor Relations Board. Currently, and at all times material to this case, the Secretary's designee, Member Januszkiewicz, has sat on the Board. Member Januszkiewicz also holds the position of Deputy Secretary of DBM. As the principal budget and personnel department for the Executive branch, DBM has the responsibility of carrying out the Governor's collective bargaining obligations under the CBS. The Petitioner contends that as an attorney and the Secretary's highest ranking subordinate, Ms. Januszkiewicz was instrumental in the State's strategy to reduce employees' health care benefits which, in turn, gave rise to Petitioner's Complaint. (Mot. at p.3-4)

When determining whether or not actual personal bias exists, we begin with a presumption of impartiality. *Regan v. State Board of Chiropractic Examiners, supra*. Assuming, arguendo, the truth of Petitioner's assertions, they do not reflect a personal or financial stake in the Board's decision or that Member Januszkiewicz, as Deputy Secretary of DBM, possesses actual personal bias against the

Petitioner. Impartiality does not necessarily require the absence of a point of view with respect to the issues being adjudicated. *In re Linaham*, 138 F.ed 650 (2d Cir. 1943). A quasi-judicial decision maker is not involuntarily disqualified from participating in a proceeding simply because he or she maintains certain predispositions concerning stated policy or question of law at issue in the adjudication.[4]/ Especially where, as here, there is clear intent by the Legislature to have the natural predisposition of the Secretary of DBM be part of the decision-making process of the Board with respect to issues of policy and law concerning the CBS. Given the scope of our delegation to OAH in this matter, we are not confronted with the task of adjudicating facts;[5]/ Respondents' Exceptions present only issues of policy and questions of law as applied to final findings of fact made by the ALJ.

While Ms. Januszkiewicz's position as the Deputy Secretary of DBM and as a member of this Board may ostensibly reflect an appearance of impropriety when deciding matters before the Board where DBM is a party, that appearance is rebutted by the fact the role of the Secretary or Secretary's designee on the Board is expressly established by statute. SPP §3-202(a) clearly manifests the Maryland Legislature's deliberate intent to confer upon the Secretary of DBM the authority to participate as a decision-maker in Executive Branch collective bargaining adjudications where typically DBM would be a party. We note that the Secretary (or designee) represents one vote on a 5-member Board with a minimum quorum of three. Finally, we note that the Maryland Court of Appeals rejected a similar argument alleging the likely ineffectiveness of the State Labor Relations Board to fairly adjudicate bargaining unit employees' rights under their memorandum of understanding since the Board is a unit within DBM. See, *Walker v. Department of Human Resources*, 379 Md. 407, 842 A.2d 53

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[4]/ *See, American Cyanamid Co. v. FTC*, 363 F.2d 757 (6th Cir. 1966)(the Court observed that "a strong conviction or a crystallized point of view on questions of law and policy are not grounds for disqualification.)

[5]/ An ancillary factor in determining if recusal may be warranted is when the decision maker has personal knowledge of disputed evidentiary facts concerning the proceedings. *Maryland State Board of Pharmacy v. Spencer,* 150 Md.App. 138, 819 A.2d 383 (2003). However, this is not a factor in the instant proceeding. Notwithstanding any personal knowledge Member Januszkiewicz may have of the facts underlying the Complaint allegations, our delegation to OAH included the authority to make final findings of fact. Indeed the Respondents acknowledge and accepts the finality of the findings of fact. (Reply at p. 17) As such, there are no facts at issue subject to pre-judgment and, moreover, any attempt by the parties to except to the final findings of fact made in this proceeding would not be properly before the Board.

(2004). In view of the above, we deny Petitioner's Motion for Recusal or Disqualification of Member Januszkiewicz.

III. EXCEPTIONS

Upon review of the Proposed Decision, evidence and the record as a whole, the Board hereby adopts the ALJ's final findings of fact. Turning to Respondents' Exceptions, after review of the record, findings of facts and applicable authority, the Board rejects, in part, and adopts, in part, the ALJ's proposed conclusions of law. For the reasons discussed below, we conclude that employee health insurance benefits are a mandatory subject of bargaining under the CBS; however, we reject the ALJ's conclusion that the Respondents violated their statutory duty under the CBS to bargain.

Whether the ALJ Erred in Concluding that Case Law decided under the National Labor Relations Act Should be Followed in this Case.

Noting some of the significant differences in collective bargaining under the CBS, the Respondents take issue with the ALJ's adherence to case law decided under the National Labor Relations Act (NLRA).[6]/ From the outset, we note that SPP, Title 3, differs in many significant ways from other public and private sector collective bargaining statutes, including NLRA. However, we do not decide these cases by rule but rather through adjudication. The adjudicatory process, by its nature, calls for such decisions and determination to be made on a case-by-case basis which allow decision-makers to look for guidance in other jurisdictions where identical, similar or even analogous rights and obligations have been interpreted. Seeking such guidance would be especially prudent and reasonable where, as here, the statute, i.e., CBS, is relatively new.

This practice was not lost on the Respondents. Respondents have resorted to NLRA case law that, in its assessment, decided issues sufficiently similar to those in the instant case in a manner that Respondents found persuasive. However, we stress that it is for guidance

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[6]/ The NLRA is the premier Federal labor law statute governing collective bargaining in the private sector. It is administered by the National Labor Relations Board (NLRB). See, 29 U.S.C. §151 et seq.

only that we may look to the case law of other jurisdictions; we are not bound by such precedent. To the extent the facts of a case presents issues peculiar to the CBS, arbitrary reliance upon decisions decided under statutes in jurisdictions with different concerns would not be appropriate.

The CBS and the NLRA share a fundamental principle with other collective bargaining statutes, i.e., the principle that employers and their employees' exclusive representative bargain collectively in good faith. Like the NLRA, under the CBS, the duty to bargain in good faith over mandatory subjects of bargaining is statutory. To determine the scope of terms and conditions of employment under the CBS that are mandatorily negotiable, e.g., health insurance benefits, the ALJ turned to NLRA case law for guidance.

We find the ALJ's analogy of the identical language used by the CBS and NLRA to define the scope of bargaining is rational and persuasive. Therefore, we conclude that the ALJ's use of NLRA precedent was appropriate in determining this issue. However, for reasons discussed later in our Decision, we find the ALJ's reliance upon NLRA precedent to determine the Respondents' alleged failure to bargain in good faith under the CBS was delimited and not fully dispositive of the violations found by the ALJ in view of the totality of the evidence and the record as a whole. Therefore, to the extent consistent with our discussion above and the remainder of our Opinion, Respondents' exception is denied, in part, and granted, in part.

Whether the ALJ Erred by Finding Health Insurance Benefits to be a Mandatory Subject of Bargaining

The Respondents refer to Title 2 of the SPP to support its contention that the Secretary's prescribed authority over the State's health and welfare benefits program precludes bargaining over health care insurance benefits. Specifically, SPP §2-101 provides "except as expressly provided by law, this title does not limit any express or implied management prerogative or other authority belonging to an appointing authority and management."[7]/ However, as

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[7]/ The State Personnel Management System (SPMS) is the governing "personnel authority" system for most employees within the Executive Branch of State Government. *See*, SPP, §2-202. The "appointing

the ALJ notes, SPP §3-502 of the CBS is a subsequently enacted law that expressly provides that "collective bargaining shall include all matters relating to wages, hours, and other terms and conditions of employment." We find no conflict between the Secretary's authority under SPP, Title 2 and exercising that authority consistent with the collective bargaining obligation under SPP, Title 3, i.e., the CBS.[8]/ The Secretary merely exercises management authority in accordance with "expressly provided law," e.g., SPP §3-502. All other authority with respect to managerial prerogative over bargaining unit employees' terms and conditions of employment are preserved under SPP §3-302 and §3-403(c) and (e).

The Respondents also cite several cases from various jurisdictions to refute the ALJ's conclusion that health care benefits are a well-established mandatory subject of bargaining.[9]/ However, in the cases cited, bargaining over the matter(s) at issue was restricted or barred because of existing laws and restrictions, not present here, that governed collective bargaining in those jurisdictions.[10]/

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authority or management" for SPMS employees (and all affected bargaining unit employees herein) is the Office of the Secretary of DBM.

[8]/ See, *Walker v. Department of Human Resources*, 379 Md. 407, 842 A.2d 53 (2004). The Court of Appeals, in interpreting Title 3 and Title 12 of the SPP Article, observed that the statutory titles are part of a comprehensive law, i.e., the State Personnel and Pensions Article, on State personnel policy and have a clear interconnection. The Court further observed that one "must therefore try to read them together, harmoniously, and not construe them either to render one nugatory or to create unnecessary conflict among them." *Id, at p.421.*

[9]/ Before concluding that health insurance benefits is a mandatory subject of bargaining under the CBS, the ALJ prudently cautioned against such determinations being made in a vacuum. SPP, §3-502(a) provides: "Collective bargaining shall include all matters relating to wages, hours, and other terms and conditions of employment." Notwithstanding identical language used by the CBS and NLRA to define scope of bargaining, the ALJ discussed the appropriateness of relying upon NLRA case law that interprets the scope of bargaining in the private sector. The ALJ proceeded to examine two other public sector collective bargaining statutes, i.e., California and Iowa. The ALJ noted that the California's statute also has a scope-of-bargaining provision identical to the NLRA and that the California courts have often looked to NLRA case law to determine scope of bargaining issues. Iowa, on the other hand, specifically enumerates the matters that are subject to mandatory bargaining. Based on this significant distinction, the ALJ noted how Iowa has rejected NLRA precedent on such matters. Consequently, Iowa has taken a circumscribed approach, consistent with its statute, finding matters outside the scope of bargaining unless expressly enumerated in the statute. It was only after this cogent analysis that the ALJ concluded that NLRA case law was useful precedent for interpreting similar provisions under the CBS, e.g., scope of bargaining.

[10]/ The case law the Respondents cited from other jurisdictions presented factual scenarios and statutory requirements not present under the CBS and related statutes with respect to health insurance benefits. The distinctions presented by these cases essentially fall under four categories: (1) State law expressly and specifically removed or excluded the matter from determination through collective bargaining; (2) the proposal violated limits established by State law with respect to the subject matter; (3) the collective bargaining statute of the cited jurisdiction limited collective bargaining to matters expressly enumerated; or (4) the cited jurisdiction excluded the subject class of employees from determining the subject matter in issue through collective bargaining.

Respondents assert that the State's share of the costs of employee health benefits has a significant impact on the State budget, which by law must be balanced. In view of this mandate, Respondents argue that DBM's budget-preparation expertise should not be compromised by collective bargaining with employee exclusive representatives that lack such expertise. However, as the ALJ correctly concluded, the CBS does not require that the parties reach agreement with respect to any mandatory subject matter or any aspect of any mandatory subject matter. Therefore, Respondents are not required to agree or accept a proposal that would cause the State budget to be unbalanced or engender any other unconstitutional or unlawful result or impact. Based on our discussion above, we deny Respondents' exception to the ALJ's conclusion that employee health insurance benefits are a mandatory subject of bargaining under the CBS.

Whether the ALJ Erred in Finding that the State Committed Unfair Labor Practices.[11]/

Count 1- Unilateral Change in Health Insurance Benefits

We find for the reasons that follow that the Petitioner tacitly relinquished its right to bargain over employee health insurance benefits and that the Petitioner's opportunity to negotiate over Respondents' proposed changes was overtaken by time and events. Under the circumstances of this case, we conclude that the Petitioner waived its right to bargain over changes in health benefits by failing to request bargaining, following the Respondents' announced proposed changes in February 2004, until after the Board of Public Works (BPW) acted on September 8, 2004, to approve the Governor's health insurance contracts reflecting the disputed unilateral changes, reductions, in health benefits.

The ALJ found that in February 2004, DBM held an informational meeting with employees on health insurance

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[11]/ The ALJ described this and other claims against Respondents as "unfair labor practices." We note that unlike most collective bargaining statutes, e.g., NLRA, unfair labor practices under the CBS are not statutorily defined; rather unfair labor practices under the SLRB's jurisdiction are defined pursuant to regulations the Secretary of DBM may adopt pursuant to SPP, §3-207. Currently, no unfair labor practices regulations have been so defined or adopted. The Petitioner's cause of action in the instant case arises from alleged violations of statutory rights and obligations secured by the CBS, e.g., to engage in collective bargain in good faith. See SPP, §3-501(b).

issues. (FFF #16) Representatives of Petitioner were present at the meeting. (FFF #16 and Resp. Exh. 9.) At the meeting, the record evidence establishes that Respondents, vis-à-vis DBM, identified several potential options, i.e., proposed changes, to health insurance benefits. Id. However, the record reflects that the Petitioner made no effort or request to bargain over the proposed changes until September 13, 2004. (FFF #19.)

We conclude by this inaction, that the Petitioner manifested a clear intent to forgo bargaining over the proposed changes during this period. The ALJ found that during this period the Petitioner "believed that it had a valid MOU negotiated by the Glendening Administration." On August 24, 2004, the Court of Appeals issued its decision affirming that the "Glendening Administration" MOU was not valid. For the reasons below, we conclude that the effect the ALJ attached to this finding –that the pending Court of Appeals decision suspended any requirement the Petitioner otherwise had to timely exercise its right to negotiate over the proposed health benefits changes until August 24, 2004– was in error.

The effect the ALJ attached to her findings ignores the fact that the Circuit Court had already ruled the Glendening MOU invalid in October 2003.[12]/ The Court of Appeals decision was an appeal of the unfavorable Circuit Court decision that was clearly known to the Petitioner at the time of Respondents' February 2004 proposed changes in employee health benefits. The Petitioner knowingly and without outside compulsion risked its bargaining rights when it decided to rely solely on its appeal of the unfavorable Circuit Court decision.[13]/ We conclude by this decision that the Petitioner freely chose not to exercise its right to bargain over health insurance benefits after the announced changes Respondents proposed in February 2004.[14]/ Any opportunity that may have remained after the

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[12] / The Circuit Court decision was not made part of the instant record but it is a matter of public record and we have taken administrative notice of it. *MD State Employees Union, AFSCME Council 92 v Robert L. Ehrlich, Jr., State of Maryland, et al.*, Case No.: C-2003-88915 (October 17, 2003)

[13]/ If the Petitioner believed it had a valid agreement in the "Glendening Administration" MOU, we note that there is nothing in the record indicating that the Petitioner took any action, e.g., attempt to file a grievance under the MOU, lodge a protest with DBM, or file a complaint with the Board, to protect its perceived rights under the MOU on health benefits when DBM announced in February 2004, the proposed changes to health benefits covered under the MOU.

[14]/ The Petitioner was under no obligation whatsoever to give up its right of appeal of the Circuit Court decision if it had chosen to exercise its right to request bargaining after the February 2004 meeting.

Court of Appeals issued its decision in August 2004, was lost by the time the BPW acted on September 8, 2004.

The record establishes that the Petitioner: (1) had actual notice of the proposed change to employee health insurance benefits in February 2004; (2) had a reasonable opportunity to negotiate over it; and (3) chose not to exercise its right to bargain, relying instead upon the outcome of its appeal of an existing unfavorable court ruling. In view of the above we conclude that the Petitioner waived its right to bargain over the subject health insurance benefits. *See*, e.g., *NLRB v. Spun-Jee Corp.*, 385 F.2d 379 (2d Cir. 1967); *Board of County Commissioners of Jackson County v. International Union of operating Engineers, Local 653*, 620 So.2d 1062 (1993)("waiver is the intentional or voluntary relinquishment of a known right, or conduct which warrants an inference of the relinquishment of a known right); *Pensacola Junior College Faculty Assoc. v. Board of Trustees of Pensacola*, 593 So.2d 254 (1992); *Bureau of Engraving and Printing and International Association of Machinist and Aerospace Workers, Lodge 2135,AFL-CIO*, 44 FLRA 575 (1992); and *School Committee of Newton v. Labor Relations Commission et al.*, 388 Mass. 557, 447 N.E.2d 1201 (1983). We therefore grant the Respondents' exception and reject the ALJ's conclusion that the Respondents violated the CBS by its unilateral changes to employee health insurance benefits.

Count 2- Failure to Bargain In Good Faith Over Other Mandatory Subjects of Bargaining In Response to the Petitioner's September 13th Request to Negotiate

There is no dispute that the Petitioner made a general request to bargain over wages, hours and other mandatory subjects of bargaining on September 13, 2004. The ALJ found, and we agree, that the Respondents had an obligation to bargain upon the Petitioner's request over such matters. However, a proper assessment of what transpired after that requires a careful review of the facts. After agreeing to negotiate and accepting for review the Petitioner's proposals on terms and conditions of employment, the parties began with an attempt to establish ground rules

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Indeed, the Petitioner was free to negotiate provisos or contingencies depending on the outcome of its appeal. Indeed, it is quite common for collateral and/or related litigation to become part of the negotiations when such proceedings occur concurrently.

that would govern their negotiation efforts. (FFF #5 & 6 and Pet. Exhs. 7, 8, 9 & 10.) The parties successfully reached agreement on all provisions of the ground rules agreement except for a provision calling for the parties to refrain from discussing the bargaining sessions with the media without the mutual consent of the parties. (FFF #9)[15]/

Although occurring in the context of ground-rule negotiations, the findings of fact support that the single issue that divided the parties was not a non-mandatory ground rule matter. (FFF #9, 11 & 12) The parties had actually reached agreement on all ground rule provisions of a non-mandatory nature. (FFF #9) Rather, the ALJ's findings of fact reflect that what kept the Respondents from continuing to move forward with negotiations over mandatory subjects was the Petitioner's position insisting on retaining the "right to discuss the status of the parties' bargaining as [it] s[aw] fit" with the public, vis-à-vis, the media.[16]/ (Pet. Exh. 11.) For it was only when the Petitioner had made these reasons known to the Respondents that the Respondents suspended their established willingness to negotiate further until the Petitioner agreed not to engage in such conduct, i.e., the ground rule provision on the issue. (FFF #9-12; Pet. Exh. 12.) To characterize the issue dividing the parties as a non-mandatory ground-rule matter because it occurred during the course of ground rule negotiations elevates form over substance.

We agree with the ALJ's conclusion that, ordinarily, an employer cannot condition its obligation to bargain on reaching an agreement on non-mandatory subject matters such as procedural ground rules; however, that is not what we conclude occurred under these facts. Respondents initially agreed to bargain upon request with the Petitioner over mandatory terms and conditions of employment; Respondents' decision to suspend going forward with scheduled bargaining session dates with the Petitioners was made only after

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[15]/ The provision provided as follows: "During the period of negotiations, from the initial bargaining session through the final session, the parties agree not to discuss the proceedings with the media. The parties further agree that neither side shall unilaterally issue news releases regarding what transpires at a bargaining session."

[16]/ The Petitioner further stated that it did "not believe (sic) either party is meeting its respective commitments to the public by eliminating the possibility of public discussions of the bargaining process." We note that Petitioner's belief is inconsistent with the Generally Assembly's determination to make collective bargaining sessions an exception to the requirements of the State's Open-Meeting Act and allow bargaining sessions to be closed to the public.

Petitioner made known to the Respondents the reasons it would not agree to the ground rule media provision. (FFF #4-12) Now, we do not adjudge that the Petitioner had to agree to the subject ground rule provision to maintain or re-evoke the Respondents' obligation and its right to resume bargaining. However, once the Petitioner made it known to the Respondents that it had a commitment to the public to report bargaining proceedings to the media and insisted on maintaining the ability to do so as it saw fit,[17]/ we conclude that the Petitioner's unqualified intent to engage in such conduct was indicia of bad faith bargaining.[18]/

Under the CBS, negotiating in good faith requires each party to negotiate bilaterally with the other party's authorized representative as prescribed under SPP §3-502. See, e.g., *Ohio Assoc. of Public School Employees, Local 530 v. State Employee Relations Board*, 138 Ohio App. 3d 832, 742 N.E. 2d 696 (2000). Negotiating in the media is a form of negotiating directly with the public rather than bilaterally with Respondents' statutory bargaining representative, i.e., the Governor.[19]/ The clear design and objective of negotiating in this manner is to bring public pressure to bear to obtain from the Respondents, vis-à-vis, the public, whatever the Petitioner is unable to achieve

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[17]/ We note that there is no finding or evidence in this record that the Petitioner ever renounced its declared "right" to use such bad faith tactics. Protections afforded to free speech in a labor-management relations context are not absolute. *NLRB v. Gissel Packing Co.*, 395 U.S. 575 (1969). The Supreme Court observed that the standard requires an approach markedly different from the tolerance of "robust debate" required by the First Amendment. In labor law jurisprudence, there is an on-going effort to balance the right of free speech and prohibition of interference, restraint, or coercion of a party's rights in a collective bargaining relationship.

[18]/ Under traditional principles of labor law, motive or whether or not a coercive act succeeds or fails is not a critical element to all determinations that there has been interference, restraint, or coercion of a party's collective bargaining rights. Depending on the circumstances, the test is often whether or not the party engaged in conduct that may reasonably be said, tends to interfere, restrain or coerce a party in the free exercise of its collective bargaining rights. See, e.g., *Teamsters Local 507 (George R. Klein News Co.)*, 306 NLRB 118 (1992). We have so concluded here with respect to the Petitioner's conduct.

[19]/ Under the CBS, the Governor or his designee, is the duly authorized representative of the people of the State of Maryland, i.e., "the public" in public sector collective bargaining with the exclusive representatives of its bargaining unit employees. SPP §3-501(a). It would be no less bargaining in bad faith (and a statutory violation under the CBS) for the Respondents to negotiate or attempt to negotiate directly with its bargaining unit employees. *Cf.*, *SEIU v. Labor Board Commission*, 431 Mass. 710, 729 N.E. 2d 1100 (2000) and *West Hartford Ed. Assoc. v. Davson De Courcy*, 162 Conn. 566, 295 A.2d 526 (1972)(employer bypassing its employees' exclusive bargaining representative to deal directly with its employees is bad faith). In public sector negotiations under the CBS where Governor or designee is the prescribed agent of the State (public) for purposes of collective bargaining, an exclusive representative's dealing directly with the public similarly constitute a form of direct dealing and thereby bad faith bargaining with the State.

through direct bilateral good faith negotiations with the Respondents.

While the Respondents could have elected to have gone forward and negotiate with the Petitioner notwithstanding the Petitioner's indicia of bad faith, we conclude that the Respondents were under no obligation to do so. Under the CBS, a party to negotiations should not be found guilty of bargaining in bad faith if it chooses to suspend bargaining until the other party agrees to comply with their statutory bargaining obligations. Therefore, we conclude that the ALJ erred in her conclusion that Respondents violated its duty to bargain in good faith when it did not go forward and bargain at the time and for the reasons discussed above. The Respondents' exception to the ALJ's conclusion to the contrary is granted.

In view of our rulings on the above Exceptions, we have no occasion to address the Respondents' remaining Exceptions concerning the proposed remedy or other issues rendered moot by our decision. Based on our disposition of the alleged violations, the Complaint is hereby dismissed.

ORDER

IT IS HEREBY ORDERED THAT:

Consistent with our Decision, the Respondents' Exceptions are granted, in part and denied, in part. The Motion for Recusal or Disqualification is denied; the Unfair Labor Practice Complaint is dismissed.

BY ORDER OF THE STATE LABOR RELATIONS BOARD
Annapolis, MD

March 11, 2005

Appeal Rights

Any party aggrieved by this action of the Board may seek judicial review in accordance with Title 10 of the State Government Article, Annotated Code of Maryland, Section 10-222 and Maryland Rule 7-201 et seq.

Certificate of Service

It is hereby certified that the attached Decision and Order in SLRB Case No. 05-U-01 was sent (via FAX and/or U.S. Mail) to the following parties on this 11th, of March 2005.

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