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DEPARTMENT OF LABOR RELATIONS

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July 10, 2019

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RE: MUPL-19-7059, Local 1617, International Association of Fire Fighters

Dear Attorneys Gordon O'Connell and Van Campen:

The City of Melrose (City) seeks review of the April 22, 2019 dismissal of the above-referenced charge of prohibited practice. After reviewing the investigative record and the parties' arguments on review, the Commonwealth Employment Relations Board (CERB) affirms the dismissal.

Background

On December 21, 2018, the City filed a charge of prohibited practice with the Department of Labor Relations (DLR) in Case No. MUPL-18-7053. The charge alleged that Local 1617, International Association of Fire Fighters (Union) violated Section 10(b)(2) and, derivatively, Section 10(b)(1) of M.G.L. c. 150E (the Law) when it engaged in bad faith bargaining. On January 2, 2019, the City filed a second charge of prohibited practice against the Union in Case No. MUPL 19-7059. That charge alleged that the Union violated Section 10(b)(2) and, derivatively, Section 10(b)(1) of the Law when it refused to continue bargaining over the City's proposed change to promotional procedures. The DLR allowed the Union's unopposed motion to consolidate the cases for investigation and, pursuant to Section 11 of the Law, conducted an in-person investigation of both cases on April 1, 2019. The Investigator dismissed the charges for the reasons outlined in her April 22, 2019

dismissal letter. On May 2, 2019, the City filed a request for review with the CERB pursuant to DLR Rule 456 CMR 15.05(9), and the Union filed a response on May 9, 2019.[1]

On review, the City contends that the Investigator's analysis was premised on the following three incorrect legal conclusions: 1) that Article 25, Section 2, the "zipper clause" in the parties' collective bargaining agreement (CBA), supported the Union's argument that it was not required to engage in mid-term bargaining over promotional procedures; 2) that the decisions cited by the City in support of its charge were inapposite; and 3) that the Union did not waive the zipper clause when it voluntarily bargained over the issue for five months before invoking it. [2] The City also generally contends that the Investigator's analysis was "limited." We find no merit to any of these arguments, which we address in turn.

Zipper Clause

The City argues that the Investigator erred by dismissing this matter because promotion procedures are a mandatory subject of bargaining. The City thus contends that because this topic was neither bargained for nor embodied in the CBA, the Union had a continuing duty to bargain upon request about this topic, notwithstanding the zipper clause. The City also contends that the Investigator erred by failing to even consider whether the promotion procedures were covered by the CBA.

Although we generally agree that promotional procedures are mandatory subjects of bargaining, see, e.g., Town of Danvers, 3 MLC 1559, MUP-2292, MuP-2299 (April 6, 1977) (1977), we also agree with the Investigator that the zipper clause relieved the Union of any obligation to bargain over this topic mid-term. Pursuant to this provision, the City and the Union:

> [E]ach voluntarily and unqualifiedly waive[d] the right, and each agree[d] that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to, or covered by this Agreement, or with respect to any subject or matter not specifically referred to or covered by this Agreement even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time

[1] The City filed its Request for Review only for Case No. MUPL-19-7059. It did not appeal the dismissal of Case No. MUP-18-7053.

[2] On review, the City clarified that it was not its position that the Union waived its right to invoke the zipper clause because it had not done so in thirty years. We therefore do not address this aspect of the dismissal.

that they negotiated or signed this Agreement.

We agree with the Investigator that the above language permitted the Union to refuse to bargain not only over matters that were covered by the CBA, but "any subject **not** specifically referenced or covered by the agreement." (Emphasis added). Contrary to the City's argument, therefore, the Investigator did not err in either her construction of the zipper clause or by failing to analyze whether its promotional procedure proposals were covered by the CBA. Pursuant to the zipper clause's broad and unambiguous language, the Union was not obligated to bargain over this topic whether covered by the CBA or not.

Case Analysis

The City next argues that the Investigator erred when she distinguished the CERB decisions it cited in support of its contention that a zipper clause will not waive bargaining over changes to subjects that are not covered by a collective bargaining agreement.[3] We disagree.

After concluding that the plain language of the zipper clause justified the Union's refusal to bargain, the Investigator addressed the decisions cited in the City's position statement and determined that they were inapposite because they pertained to employer-initiated unilateral changes. In so doing, the Investigator explained that the CERB has traditionally distinguished between an employer's attempt to rely on a zipper clause as a "sword" to justify unilateral changes, as opposed to situations where (as here) a party lawfully uses a zipper clause as a "shield" to justify its refusal to bargain over topics that might otherwise be subject to mandatory bargaining. See City of Westfield, 25 MLC 163, 166, MUP-9697 (April 20, 1999); see also American Benefit Corporation, 354 NLRB 1039, 1049 (2010) (a "broadly and conclusively worded" zipper clause can "serve to shield" from a refusal to bargain charge a party on whom a mid-term bargaining demand is made). We disagree with the City that by citing these decisions, the Investigator was erroneously suggesting that the City was attempting to use the zipper clause as a "sword" to make a unilateral change. To the contrary, she acknowledged that the matter before her did not concern a unilateral change and appropriately dismissed the Section 10(b)(2) allegation based on the Union's justified reliance on the broadly-worded zipper clause contained in the parties' CBA.

Waiver

During the investigation, the City claimed that because the Union had already participated in five bargaining sessions over promotional procedures, it had waived its right to invoke the zipper clause as a basis for its refusal to bargain. The Investigator disagreed. She reasoned that because the zipper clause permitted the Union to refuse to bargain over

[3] The City cited Commonwealth of Massachusetts, 18 MLC 1220, SUP-3426 (November 20,1991), Town of Marblehead, 12 MLC 1667, MUP-5370 (May 28,1986) and Melrose School Committee, MuP-4507 9 MLC 1713 (March 24,1983) in support of its contention that a matter must be covered by a CBA for a zipper clause to have any effect.

new promotion procedures in the first instance, the Union could lawfully stop bargaining whenever it wanted to, regardless of whether the parties had reached impasse or resolution. We agree as a matter of law and because a contrary holding would discourage the parties from voluntarily agreeing to bargain over matters that they are not otherwise required to bargain. Cf. IAFF, Local 1009, 2 MLC 1238, 1241, MUPL-2018 (December 15, 1975) ("A determination that a subject which is nonmandatory at the outset may become mandatory merely because a party had exercised this freedom [to bargain or not to bargain] by not rejecting the proposal at once or sufficiently early might unduly discourage free bargaining on nonmandatory matters. Parties might feel compelled to reject nonmandatory proposals out of hand to avoid risking waiver of the right to reject." Id. at 1240(quoting NLRB v. Davidson, 318 F. 2d 550, 558 (4th Cir. 1963))(brackets in original).

Finally, to the extent the City argues that the Investigator's analysis was too "limited," we disagree. The conciseness of her analysis in no way compromised its accuracy.

Conclusion

For the foregoing reasons and those stated in the dismissal letter, we affirm the dismissal of the charge.

COMMONWEALTH EMPLOYMENT RELATIONS BOARD

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**APPEAL RIGHTS**

Pursuant to the Supreme Judicial Court's decision in Quincy City Hospital v. Labor Relations Commission, 400 Mass. 745 (1987), this determination is a final order within the meaning of M.G.L. c. 150E, Section 11. Any party aggrieved by a final order of the Board may institute proceedings for judicial review in the Appeals Court pursuant to M.G.L. c. 150E, Section 11. **To claim such an appeal, the appealing party must file a Notice of Appeal with the Commonwealth Employment Relations Board within thirty (30) days of receipt of this decision.** No Notice of Appeal need be filed with the Appeals Court.