

**In the Matter of Arbitration
Between :**

**Board of Commissioners of
Cecil County, MD.**

And

**Public Safety Professionals of Cecil
County, International Association of
Fire Fighters (IAFF), Local 4645**

FMCS Case No. 11-55304-1

APPEARANCES:

For the Employer: Stephen M. Silvesti, Esq.
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For the Union: Francis J. Collins, Esq.
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Introduction

This is an arbitration pursuant to the Arbitration Rules of the Federal Mediation and Conciliation Service. A hearing was held before the undersigned on June 29, 2011 in Elkton, Maryland. At the hearing, the parties were afforded the opportunity to present witnesses and evidence, and to examine and cross-examine witnesses. A transcript was made of the hearing.

Testimony was heard from two Union witnesses and one Employer witness. Each party offered two exhibits into evidence, Twenty-four joint exhibits were also entered into the record. The parties' briefs were received by the Arbitrator on July 18, 2011. The Employer

brief was accompanied by twenty-two cases, which included NLRB cases, Maryland and U.S. court cases, and arbitration cases. The Arbitrator's decision and award are due on or before August 18, 2011.

The Issues

The issue before the Arbitrator does not involve the interpretation or application of a collective bargaining agreement (CBA), since the parties did not have a CBA in effect during the relevant period involved in the matter before the Arbitrator. This matter involves Union charges of Unfair Labor Practices (ULP) committed by the Employer during the course of the parties' negotiations for an initial CBA during the Spring of 2011. Therefore, this Arbitrator's role is more akin to an administrative law judge under the NLRB.

Therefore, the issues in this case are:

1. Did the Employer commit Unfair Labor Practices during the parties' negotiations?
2. If so, what is the appropriate remedy?

Relevant Legal Provisions

"7. Impasse in collective bargaining. If after a reasonable period of negotiation over the terms of a Memorandum of Understanding, the Employer and the Employee Organization are unable to reach an agreement before April 1 of the year in which a Memorandum of Understanding is to take effect, it shall be deemed that an impasse has been reached, at which time the Board of Commissioners shall have the discretion to set the Terms and Conditions of Employment." (Ordinance No. 2011-04)

Background

In 2010, the Maryland Legislature passed a bill allowing the County Board of Commissioners to pass a County Labor Code providing procedures for the County Emergency Medical Service (EMS) employees, to engage in collective bargaining with the County Board of Commissioners (the Employer). In the development and passage of both of these laws, the Union and the Employer cooperated in making collective bargaining possible.

Once the County Labor Code was enacted, the Union petitioned the Employer for recognition to be the bargaining representative of the EMS employees. The Employer did not challenge the Union petition, and it certified the Union as the Exclusive Representative of the EMS employees on February 4, 2011.

On February 25, 2011, the parties met for their first negotiation session. They subsequently met again on March 4 and March 25. At the February 25th meeting each party presented a complete, proposed CBA. The Union draft was 30 pages and the Employer draft was 7 pages.

The Positions of the Parties

The parties set out their positions in testimony, exhibits, arguments and briefs including arbitration awards, court and administrative rulings, as follows:

Union Position

The Union negotiating committee researched the CBA's of other EMS employees, and based on that research drafted a complete contract proposal, which was presented at the first negotiation session.

The Union cited six issues on which the Employer committed an unfair labor practice. The issues are:

1. Failing to meet in good faith and reasonable times.

Three meetings is not enough meeting time to achieve an initial agreement. Three weeks passed without a meeting between March 4 and March 25 because the Employer Counsel was not available.

2. Making a final offer with too little time for the Union to accept.

The Union has its own rules and procedures to follow in ratifying a CBA. The Employer's final offer emailed to Union Counsel on March 30, 2011 did not allow the Union leadership the needed time to inform their members and allow a vote on the Employer's offer. The Employer Counsel knew of the April 1st deadline, but he choose not to mention it in his email. He intentionally left insufficient time for the union to ratify the Employer final offer.

The Union never believed that the April 1st deadline was a serious deadline.

3. Failing to implement tentative agreements.

The parties reached a number of agreements during their negotiation prior to April 1. These agreements were contained in the proposal emailed by Employer Counsel to Union Counsel on March 30. Once the Employer declared an impasse, the Employer refused to implement any of the agreements. The Employer used the April 1st impasse date as an opportunity to negate the agreements the parties had reached.

2. Retaliating against the Union for suggesting a one-year agreement.

By the Employer behavior cited above, the Employer retaliated against the Union for insisting on a one year agreement, and denied the Union members the opportunity to enjoy any of the benefits upon which they had negotiated.

3. Insisting on two-year agreement that would be unenforceable in the 2nd year.

While the Employer insisted on a two year agreement, they do not have the authority to consummate more that a single year CBA since the County budget is passed annually.

The Employer explained the reasoning behind their desire for a two year: The Employer did not want the Fraternal Order of Police (FOP) and the IAFF agreements to be negotiated during the same year. This was unfair to the IAFF given that this was an initial agreement, which would need some adjustments in the second year.

4. Causing an impasse by insisting on illegal subjects of bargaining.

As a result of the parties' final meeting on March 25, they had reached agreement on all issues except two, the length of the agreement and a wage increase. The Union wanted a one-year agreement covering FY 2012; while the Employer insisted on a two year agreement extending through FY 2013 . Since the second year would not be funded until the end of FY 2012, based on the Employers annual budget year, the economic terms of a two-year agreement is inherently illegal. Since that second year is legally unenforceable, it cannot be considered a mandatory subject of bargaining. Thus the Employer is not free to insist upon it to the point of impasse. But the Employer did, and in doing so, the Employer committed an Unfair Labor Practice.

The Union brief urged a remedy that orders the Employer to resume negotiation to remedy the harm they have caused. Or order the Employer to ratify the items agreed upon during negotiations and limit the agreement to one year.

Employer Position

The Employer brief condensed the six Union ULP issues into three subjects:

1. Failure to meet in good faith and at reasonable times.

As soon as the Labor Code was effective and the Union petitioned to be recognized as the EMS bargaining agent, the Employer voluntarily granted recognition to the Union.

During an open session of the Board of Commissioners discussing details of the labor ordinance, Union President Burchett asked the Commissioners to extend the impasse date from March 1st to April 1st to allow more time for bargaining. The Board made that

change. Thus the Union cannot deny an early awareness of the April 1st deadline for completing negotiations.

During the first negotiation meeting on February 25, the Union presented a very long, proposed CBA. They did not modify that proposed document during the course of the negotiations. In contrast, the draft CBA of the Employer was modified and amended during the two subsequent negotiation sessions in response to Union suggestions and requests. This is another example of the Employer's good faith effort to reach an agreement with the Union.

Another example of the Employer's good faith is its response to the Union requested information and data.

2. Wrongfully declaring an impasse on April 1;

County Ordinance Appendix on negotiation impasse clearly states that if the parties do not reach an agreement by April 1 an "impasse shall be reached" Since the parties did not reach an agreement by April 1, by law the parties had reached an impasse. Once an impasse is reached, the Board of Commissioners "shall have the discretion to set the Terms and Conditions of Employment."

3. A two-year agreement CBA is an illusory contract.

The Union claim that only a single year contract is appropriate because the Employer is on an annual budget year is simply incorrect.

In support of its position, the Employee provided twenty-two cases from the NLRB, Arbitrators, Maryland and U.S. courts.

The Union lacks evidence to support their charge of six unfair labor practices.

The Employer brief requested that the Arbitrator dismiss the Union ULP charges because of the lack of evidence.

Discussion and Analysis

The Union cited six issues on which they believe the Employer committed an unfair labor practices. The issues and discussion follow below:

1. Failing to meet in good faith and at reasonable times.

Prior to the beginning of negotiations, the parties did work together in apparent good faith on two key matters: 1) At the State legislature and the County Board, they helped develop the legal foundation and framework to make collective bargaining possible; 2) The Employer could have contested the Union's petition for recognition, and thus delay the start

of negotiation, or possibly avoid negotiations entirely. The Employer decided not to take that approach. Instead, the Employer granted the Union the right to negotiate on behalf of the EMS Employees

Normally, more time is needed to negotiate an initial CBA than is required in renegotiating an existing CBA. The lack of a relationship and the task of developing a complete CBA typically require more time to work through such obstacles.

On February 4, 2011, the Employer indicated that the Union petition for recognition would not be challenged. Both parties took the time between that date and their first negotiation meeting on February 25 to prepare CBA proposals. Their second negotiation meeting on March 4 was followed by their final meeting on March 25. By the conclusion of their final meeting, the parties had agreed to everything except the length of the agreement, and the Union's desire for a wage adjustment. On the latter issue, the Union President informed the Employer negotiating team that she planned to make a direct appeal to the Board of Commissioners because of her concern that more staff turn-over would occur without a pay increase.

While three negotiating meetings seem to be a very limited amount of time for negotiating an initial CBA, the parties did achieve significant progress. The three negotiating meetings occurred within a 30 day period, and that period included a two-week period during which no meetings were held.

A final example of working in good faith was the Employer's cooperative response to the Union request for information.

The negotiating period prior to the Employer's final offer on March 30 does not constitute a failure by the Employer to meet in good faith and at reasonable times. Therefore, the Union charge on this issue is rejected.

2. Making a final offer with too little time for the Union to accept.

The Union has a process requiring that the membership be given adequate time to consider a proposed CBA before a ratification vote. As a first-time bargaining unit, the members probably needed even more time to consider a new CBA. The Employer's final offer transmitted via email from the Employer Counsel to the Union Counsel on the morning of March 30 was an entirely comprehensive agreement resulting from three days of negotiation during the past month. Employer's Counsel email made no reference to the approaching deadline on April 1st. The email referred to the CBA attachment as final, suggested that a meeting on Friday, April 1st was not necessary, and ended with "If you have any questions or further proposed changes, please call me." (Jt.Ex. 21)

The Employer Counsel could have prepared the CBA final a day earlier (Tuesday) to give the Union an additional day to share the document with their membership. Counsel had

the necessary information on the previous Friday to prepared the CBA final. Also, he might have mentioned the deadline in his transmittal email.

The impasse language in paragraph No. 7 in the Ordinance establishes a clear impasse process. If the parties are unable to reach an agreement **before** April 1, the Board of Commissioners shall have the discretion to set Terms and Conditions of Employment. (Emphasis Added)

The deadline was not Friday, April 1st: It was the day before, Thursday March 31. That being the case, the Employer's final offer on Wednesday morning provided the Union from 9AM Wednesday until midnight Thursday to explain, discuss and vote to accept the proposed CBA. While that document contained a number of items upon which the parties had reached agreement during three days of negotiations, it also lacked agreement on two matters important to the Union (duration of agreement and pay increase). Under those circumstances, a quick ratification by the Union members was not a sure thing. Certainly, the experienced Employer Counsel understood the difficulty the Union would have in securing membership ratification in such a short time period, and yet he delayed giving the Union the final offer until near the deadline, which he failed to mention, just hours away.

Another deadline regarding negotiation is contained in 6(a)(2) of the Ordinance. It states in part: "regardless of the date upon which certification is issued to the Employee Organization, negotiations shall be held **only** between November 1 and March 1." (Emphasis Added) Only one of the three negotiation dates met that Ordinance clear requirement. Such gross ignoring of clear statutory requirements during the majority of the negotiating period suggests that negotiating deadlines were mere suggestions. Since negotiations in this case began over three months after the November 1st start date, some flexibility on the terminal date would seem appropriate.

The Employer Counsel's transmittal email, on Wednesday, March 30, had this interesting reference to a future meeting on Friday (the day after the deadline): "We do not see the need to meet on Friday. If you believe differently, then lets talk." The quote suggests that the parties had talked earlier about meeting on Friday, and the Employer Counsel seems open to discussing a Friday meeting. All of that seem to ignore the fact that Friday was after the deadline, and it seems to suggest some softness about the deadline. The March 30 transmittal email also included this sentence: "If you have any questions or further proposed changes, please call me." That sentence contradicts an earlier sentence asserting that the attached document was a final offer. It also suggests that negotiations are continuing.

In the Employer Counsel's next email, on April 6, addressed to Union leaders and Counsel, the deadline plays a prominent role, and appears to serve the Employer's interests very well. The email states that they have not heard from the Union since the final offer was made on March 30, the Union has not indicated their acceptance of the final offer, the deadline has passed without agreement, therefore, there is no CBA, thanks for your efforts in negotiations, hopefully the parties can reach an agreement next year, and finally, the

email notes that a Union email was received on April 6, and Counsel will call and react to it the following day.

It is fair to assume that the Union knew of the April 1 deadline based on the fact that the Union suggested April 1st as better deadline than an earlier deadline discussed during the development of the County Labor Code Ordinance and Appendix. However, given the intensity of negotiating a first contract, some lack of clarity about the deadline is understandable. Other deadlines were mentioned during the course of the hearing (budget completion deadline and the deadline for submission to the Board of Commissioners), which could cause confusion for newer negotiators. Even the Employer Counsel may have forgotten about the deadline, and that explains why he failed to mention it as he transmitted his final offer less than two days before the deadline. When the deadline passed, he was certainly aware of it, and of the advantages the lack of Union acceptance of the final offer presented to the Employer.

Union April 6 email, to which Employer Counsel referred to in his April 6 email, does not acknowledge the deadline and continues to negotiate by making a counter proposal. This certainly demonstrates some miscommunication about the deadline and the status of negotiation.

It is possible that the Employer Counsel was aware of the deadline when he choose not to alert the Union of the limited opportunity they had to accept the proposed final agreement or risk having no CBA for the coming year. Only the Employer Counsel knows whether he was conscious of the deadline at that point in time, or when he became conscious of it. But the Arbitrator takes note of the Employer's delay in giving the final offer to the Union, and the failure to alert the Union of the short time remaining to accept the final agreement or loose the benefit of CBA for a full year.

The Union Brief and Union Exhibit 2, which is a four page letter dated June 21, 2011 from Union Counsel to Employer Counsel, argued the Employer never cited the impasse language in No. 7 of the Ordinance as a deadline during the three negotiation sessions, nor in the email transmitting the final offer. From the Union reading of that impasse language, it is clear they believe the language does not end negotiations. It merely places negotiations in the hands of the Commissioners to negotiate further or to impose the final offer made by the employer. There is no support in the impasse language, the Union argues, for the Employer to withdraw all the tentative agreements the two parties had worked hard to achieve.

The Employer Brief argues that a remedy that directed the Employer to implement the final offer would not be appropriate because the Employer had not agreed to it. That is an odd assertion since the final offer was drafted by the Employer, and therefore the Employer had agreed to it.

Employer's negotiating behavior prior to March 25 was found by the Arbitrator to be in good faith, therefore, the Union charge of bad faith bargaining before March 25 is rejected.

The actions of the Employer after the final negotiation meeting on March 25 are of concern to the Arbitrator because they are out of sync with the positive actions taken before and during negotiation. Those actions demonstrated a positive start to a new relationship based on trust and cooperation that would be beneficial to both parties. Employer actions since March 25 are discussed below.

3. Failing to implement tentative agreements.

The Employer did not implement the tentative agreements reached by the parties during negotiations. The parties did reach agreement during negotiations on a number of issues. Those agreements were memorialized in the draft agreement, which the Employer Counsel emailed to the Union Counsel on March 30. That document was not a complete agreement because of several issues the parties had not settled (length of agreement and wage increases). It is that document that the Union referred to as a tentative agreement in ULP charge number 3.

The impasse language in paragraph No. 7 of the Ordinance gives the Board of Commissioners, after an impasse has been reached, the discretion to set the terms and conditions of employment. In exercising its discretion, the Commissioners can be expected to be guided by common sense and their understanding of existing circumstances. A primary circumstance in this case is the fact that, on behalf of the Commissioners, a negotiating committee met with a Union negotiating committee for three days and reached agreement on a number of terms and conditions of employment. If the negotiators had failed to agree on anything, the negotiators' efforts would provide no guidance to the Commissioners. But in fact the negotiators reported reaching agreement on everything but two items (length of an agreement and employee pay).

Therefore, if the Commissioners fail to honor those agreements, reached in good faith by negotiators on the Commissioners behalf, by not make those agreements part of their setting of terms and conditions of employment, the Commissioners will have violated 8(a) (4) of their Ordinance. The Commissioners will have failed to act in good faith in their role of setting terms and conditions of employment.

4. Retaliating against the Union for suggesting a one-year agreement.

No persuasive evidence or argument was present on this issue. The Union charge on this issue is therefore found to be without merit.

5. Insisting on a two-year agreement that would be unenforceable in 2nd year.

6. Causing an impasse by insisting on illegal subjects of bargaining.

Issues 5. and 6. are discussed together.

The Union claim that a two-year agreement was not possible because the Employer is on a yearly budget cycle. That claim is not accurate because many public employers in Maryland have multi year CBA's. In a multi year CBA, the impact of any cost increase in the second or third year is handled in each subsequent annual budget process like any other anticipated cost increase.

The Union facts on these two issues are not accurate, and therefore the charges on these two issues are found to be without merit.

The Union's Unfair Labor practice Charges on issues 1, 4, 5 and 6 are found to lack merit, and therefore, they are dismissed.

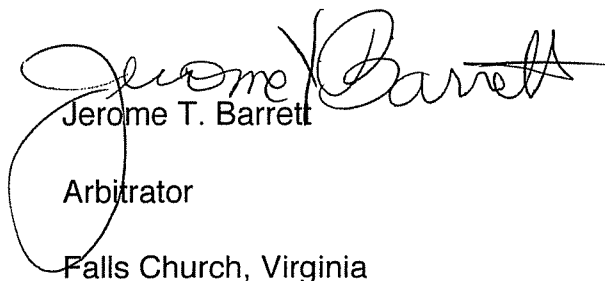
The undersigned finds that the Employer failed to negotiate in good faith on issues 2 and 3, and, thus violated the County Labor Code at 8(a)(4) by:

1. Failing to give the Union sufficient time to consider their final offer and failing to alert the Union of the consequences of not meeting the deadline.
2. Failing to include in the Commissioners' setting of terms and conditions of employment for the EMS staff all agreements reached during three days of negotiation by the Commissioners' representatives.

AWARD

Based on the forgoing discussion and decisions, the following award it made:

The Board of Commissioners is ordered to place in the terms and conditions of employment for EMS employees during Fiscal Year 2012 all of the matters agreed upon by the County's negotiating committee during three days of negotiating with the Union.


Jerome T. Barrett
Arbitrator
Falls Church, Virginia

August 10, 2011