2016 IL App (1st) 152260-U

THIRD DIVISION
July 20, 2016

No. 1-15-2260

IN THE
APPELLATE COURT OF ILLINOIS
FIRST JUDICIAL DISTRICT

BOARD OF TRUSTEES OF COMMUNITY COLLEGE DISTRICT #508, d/b/a CITY COLLEGES OF CHICAGO,	)	On Petition for Review of Order of Illinois Educational Labor Relations Board
Petitioner,	)	No. 2013-CA-0093-C
v.	)	
ILLINOIS EDUCATIONAL LABOR RELATIONS BOARD and FEDERATION OF COLLEGE CLERICAL AND TECHNICAL PERSONNEL, LOCAL 1708, IFT-AFT, AFL-CIO,	)	
Respondents.	)	

PRESIDING JUSTICE MASON delivered the judgment of the court.
Justices Fitzgerald Smith and Lavin concurred in the judgment.

ORDER

¶ 1 *Held*: Decision of Illinois Educational Labor Relations Board that employer City Colleges of Chicago violated sections 14(a)(1) and (a)(5) of the Illinois Educational Labor Relations Act (115 ILCS 5/14(a)(1), (a)(5) (West 2014)), affirmed where the College did not comply with terms of grievance settlement and failed to engage in impact bargaining over implementation of a new time reporting system.

¶ 2 Petitioner City College of Chicago (College) seeks direct administrative review of the finding of the Illinois Educational Labor Relations Board (Board) that it violated sections 14(a)(1) and (a)(5) of the Act when it (1) failed to comply with the terms of a grievance settlement with the Federation of College Clerical and Technical Personnel, IFT-AFT Local 1708 (Union) and (2) unilaterally implemented a new electronic time and attendance system. On direct appeal to this court pursuant to Illinois Supreme Court Rule 335 (eff. Feb. 1, 1994), and section 3-113 of the Code of Civil Procedure (735 ILCS 5/3-113 (West 2014)), the College argues that it complied with the terms of the grievance settlement and further contends that it was not required to bargain with the Union regarding the implementation of the new time and attendance reporting system. Finding no error, we affirm.

¶ 3 BACKGROUND

¶ 4 On June 27, 2013, the Union filed an unfair labor practice charge against the College, arising out of two[1] separate events: the College's alleged violation of a grievance settlement and the College's implementation of a new time reporting system. We address each in turn.

¶ 5 I. Grievance Settlement

¶ 6 In 2010, as the parties were negotiating a successor collective bargaining agreement (CBA), the Union reviewed its membership list and found that it was smaller than expected at the District Office. Andrew Cantrell, the Field Service Director for the Illinois Federation of Teachers, compared the Union's membership list with the list of employees at the District Office and discovered 10 positions that appeared to have been improperly excluded.

¶ 7 Cantrell's findings prompted the Union to file a grievance in April 2011, in which it alleged, among other things, that six full-time positions at the District Office in the College,

[1] A third allegation in the charge concerns changes made to overtime calculations, but this is not at issue on appeal.

including three assistants to the vice chancellor and assistant to the chief information officer, were improperly excluded from its bargaining unit. In support of its contention, the union cited Articles I, II, and III of its CBA. Article I(A) lists the employees represented by the Union as well as those employees who may be excluded. One category of excluded employees are those who "during the normal course of [their] duties, [have] routine access to confidential information concerning terms and conditions of employment of personnel employed by the Board. The Chancellor is authorized to designate not more than ten (10) such personnel at the central office who come within this category[.]" In its grievance, the Union alleged that the six full-time positions it sought to include in the bargaining unit did not meet "any of the requirements for exclusion in the [CBA] between the Board and the Union."

¶ 8 During negotiations of the successor CBA, which became effective on June 7, 2012, the parties ultimately resolved this grievance in a side letter. The letter stated, in relevant part: "Local 1708's grievance regarding adding [six][2] full-time titles from CCC's District Office to the Union is granted. Local 1708's grievance relating to those full-time titles is withdrawn."

¶ 9 During the course of the next year, the parties met at least three times to discuss implementing the settlement. At the first two meetings, representatives of the College never raised any issue regarding inclusion in the bargaining unit of the employees in the six full-time positions. Then, in an April 2013 meeting, contrary to its agreement to add the positions of assistant to the vice chancellor to the bargaining unit, Stephanie Tomino, the Vice Chancellor of Human Resources, informed the Union that the College planned to challenge the inclusion of all assistants to the vice chancellor. The College confirmed the exclusion of these employees in a June 2013 letter, in which it began by acknowledging "that this title is now part of the bargaining unit," but nevertheless stated that it would be excluding four assistants to the vice chancellor

[2] The letter actually referenced seven full-time positions, which Cantrell attributed to a typographical error.

from the unit pursuant to Article I(A)(3), exempting employees who have access to confidential information. In response, the Union filed an unfair labor practice charge with the Board on June 28, 2013.

¶ 10 II. New Time Reporting System

¶ 11 The second unfair labor practice the Union alleged relates to the College's decision to implement a new time reporting system. In 2012, after the successor CBA was in place, the College informed all unions that it was considering moving from a paper to an electronic time reporting system, to be known as CCCWorks. The College held a series of informational sessions discussing the proposed change, which Union representatives attended. During one of those sessions, the Union learned that the new system might use biometric information, in the form of employees' fingerprints, to record time.

¶ 12 In October 2012, the Union demanded decisional and impact bargaining over the change in the time reporting system and the use of biometrics. The parties met the following month, at which point the College had not determined the final form of CCCWorks. The Union requested that negotiations resume after the College had more information on CCCWorks, and further requested that implementation of a new system be delayed until bargaining could occur.

¶ 13 In the ensuing months, the Union met with Tomino on numerous occasions to discuss CCCWorks. During these meetings, the Union expressed its concern regarding identity theft, safety, and privacy in connection with the use of biometrics. In addition to the security concerns, the Union was also concerned that, under CCCWorks, a supervisor would no longer have discretion to allow an employee who arrived late to work to make up the time at the end of the day. Tomino did not consider these meetings negotiations, and, indeed, the College still did not have specific information about the form of the new system available during this time.

¶ 14 On June 27, 2013, having heard that implementation of the new system was imminent, the Union issued a demand to bargain, stating "Local 1708 once again demands decisional and impact bargaining" over the new time reporting system. Receiving no response, the Union filed its unfair labor practice charge on June 28, 2013, alleging that "the Employer engaged in bad faith bargaining when it advised Local 1708 that it was unilaterally modifying the payroll reporting system requiring bargaining unit members to punch in and out through a time clock system."[3]

¶ 15 The next meeting between the parties took place almost one year later in May 2014, during which a project manager from the College's human resources information services department explained the details of the system. In order to enroll in CCCWorks, employees would be required to place their finger on a biometric scanner which would take a partial picture of their fingerprint. The prints would then be changed to a numeric code, which would be stored in the system. To record their work time, employees would swipe their identification badges and scan their finger. The Union again issued a demand to bargain over the implementation of the new system, but no bargaining occurred.

¶ 16 On June 4, 2014, Tomino sent a letter to the Union's representatives informing them of the implementation schedule for the CCCWorks system. The Union responded via letter on June 19, 2014, demanding to bargain over the implementation of the system and requesting a delay in implementation until bargaining could occur. But the College implemented the system on July 13, 2014, before bargaining took place.

¶ 17 After CCCWorks was implemented in July, the College stated that it would meet with the Union for negotiations in August 2014, and requested that the Union prepare a counterproposal

[3] This allegation was unchanged in the July 2, 2013 amended charge.

to CCCWorks. The Union presented a counterproposal that did not involve the collection of biometric details at the meeting in August, but the College did not respond.

¶ 18 III. Proceedings Before the Board

¶ 19 The Board filed its complaint against the College on August 4, 2014, alleging a violation of the Act based on the College's failure to "act in accordance with the terms [of the grievance settlement]," and the College's implementation of the new time reporting system without notifying the Union or "offering it an opportunity to bargain."

¶ 20 Following an October 2014 hearing before an Administrative Law Judge, the College contended that it did not violate the terms of the grievance settlement because it acknowledged that the titles of assistant to the vice chancellor remained in the bargaining unit, and only excluded the employees *holding* that title. And with regard to the time reporting system, the College maintained that changes to time reporting were not a mandatory subject of bargaining, or, alternatively, that bargaining had occurred.

¶ 21 The ALJ disagreed and found that the College's actions constituted an unfair labor practice in violation of sections 14(a)(1) and (a)(5) of the Act. Initially, the ALJ found that because the grievance settlement unambiguously added the relevant titles to the bargaining unit, the College's later exclusion of the employees holding those titles violated the terms of the settlement. As support for its conclusion, the ALJ cited testimony from Cantrell as well as Delores Withers, the Union president, who both stated that during negotiations, the College agreed to include the employees holding the titles of assistant to the vice chancellor in the bargaining unit. The ALJ also found that the change to the time reporting system was a mandatory subject of bargaining and the benefits to the Union of bargaining this decision outweighed the burden on the College's managerial authority.

¶ 22 The College filed exceptions to the ALJ's ruling and the matter was heard before the Board. The Board agreed with the ALJ's conclusion that the College committed unfair labor practices, but premised its holding on different grounds. First, the Board held that because the grievance settlement unambiguously indicated that certain positions would be included in the bargaining unit, the College's subsequent exclusion of those positions evinced a violation of section 14(a)(5) without the need to look to Cantrell or Withers' testimony. And with regard to the time reporting system, the Board held that the implementation of the new system was *not* a mandatory subject of bargaining, but that the College nevertheless committed an unfair labor practice by failing to bargain over the impact of the new system. The College timely appealed.

¶ 23 ANALYSIS

¶ 24 Our review of the Board's decision is governed by the Administrative Review Law (735 ILCS 5/3-101 *et seq*. (West 2014)). See *SPEED District 802 v. Warning*, 242 Ill. 2d 92, 111 (2011). The Law provides that the Board's factual findings are *prima facie* correct (735 ILCS 5/3-110 (West 2014), and will be reversed only if they are against the manifest weight of the evidence. *Chicago Teachers Union, Local No. 1 American Federation of Teachers, AFL-CIO v. Illinois Labor Relations Board*, 334 Ill. App. 3d 936, 942 (2002). However, the Board's findings on purely legal questions are subject to *de novo* review. *Id.* Generally, Board decisions present mixed questions of law and fact, and we apply the clearly erroneous standard of review. *Id.; see also SPEED District 802*, 242 Ill. 2d at 112. A Board's decision is clearly erroneous where the entire record leaves the reviewing court with "a definite and firm conviction that a mistake has been made." *Universal Security Corp. v. Department of Employment Security*, 2015 IL App (1st) 133886, ¶ 13.

¶ 25 Turning first to the grievance settlement, the parties do not dispute that the failure to implement a grievance settlement amounts to an unfair labor practice violating section 14(a)(5) of the Act. The parties' dispute instead focuses on the meaning of the settlement and whether the College did in fact fail to implement it. Contrary to the College's contention, this is not a pure question of law but a mixed question of law and fact subject to a clearly erroneous standard of review. *Cf. Covinsky v. Hannah Marie Corp.*, 388 Ill. App. 3d 478, 483 (2009) (construction of contract is question of law, but issue of whether contract is breached is factual question).

¶ 26 The settlement provided that the Union's grievance "regarding adding [six] full-time titles from CCC's District Office to the Union" was granted. These titles, as listed in the grievance, included assistant to the chief information officer and various assistants to the vice chancellor. Notwithstanding this settlement, Tomino invoked Article I(A)(3) to exempt the employees holding the title of assistant to the vice chancellor and assistant to the chief information officer from the unit.

¶ 27 The College urged the Board to interpret the agreement as adding only titles, and not employees, to the bargaining unit. But the Board did not clearly err in rejecting this crabbed interpretation.

¶ 28 A CBA is a contract, subject to traditional rules of contract interpretation. *Matthew v. Chicago Transit Authority*, 2016 IL 117638, ¶ 76. It is axiomatic that the primary goal in interpreting a contract is to give effect to the parties' intent and consider the contract as a whole. *Village of Arlington Heights v. Anderson*, 2011 IL App (1st) 110748, ¶ 22. Here, the Union's intent in acquiescing to this settlement is clear: it sought to increase its membership by including six positions the College had previously improperly categorized as exempt. And the College's

acquiescence to the settlement correspondingly reflects that it no longer believed the six positions were exempt under the CBA.

¶ 29 The Union's grievance invoked, among other provisions, Article I of the parties' CBA and contended the College was improperly excluding certain positions from membership in the bargaining unit. When it entered into the side letter agreeing to include these positions in the bargaining unit, the College never hinted that other provisions of Article I, specifically Article I(A)(3), operated to exclude the very employees holding these positions because these employees routinely had access to confidential information. Had the College intended to justify exclusion under Article I(A)(3), the time to do so was in response to the Union's grievance and not nine months later after the Union had agreed to a new CBA. The ALJ and the Board properly rejected the College's bait and switch tactic.

¶ 30 Adopting the interpretation of the agreement the College advances here would not effectuate the parties' intent. That is, the Union would not have realized an increase in membership from a concession to include titles, but not employees (members), in the bargaining unit. Indeed, the College's interpretation of the agreement leaves the Union in the same position as if the grievance had been denied.

¶ 31 In arguing to the contrary, the College contends that the designation of employees as exempt under Article I(A)(3) is a "zero-sum game" in which the designation of specific individuals as exempt necessarily removes others currently in that category. But there is no support in the record for this contention. Article I(A)(3) does not *require* that the College classify 10 employees having access to confidential information as exempt from the bargaining unit, and there is no evidence that prior to exempting the assistants to the vice chancellor and assistant to the chief information officer, the College had utilized all 10 exemptions. Nor is there

any evidence in the record that the College offered to add other positions to the bargaining unit that it had previously claimed were exempt.

¶ 32 Finally, the College's argument that the Board erroneously considered matters outside the contract in its analysis is factually incorrect. It was the ALJ, and not the Board, who considered the testimony of Withers and Cantrell in determining the meaning of the side letter. The Board explicitly stated that "it is unnecessary to consider any evidence beyond the terms of the grievance, the terms of the grievance settlement, and Tomino's June 2013 letter concerning the exclusions from the bargaining unit" when determining whether the College violated the Act. The Union and the Board correctly point out that in an administrative review proceeding, we review the final decision of the agency, *not* the findings of an ALJ. *Parikh v. Division of Professional Regulation of Department of Financial and Professional Regulation*, 2012 IL App (1st) 121226, ¶ 13. And, for the reasons discussed above, we find no clear error in the decision of the Board that the College failed to abide by the terms of the settlement requiring the College to include the six employees in the bargaining unit.

¶ 33 Nor do we find the Board's decision on the issue of the College's failure to bargain over the new time reporting system erroneous. Section 10 of the Act provides that employers are required to bargain with unions over "wages, hours and other terms and conditions of employment." 115 ILCS 5/10(a) (West 2014). But section 4 narrows this broad duty, stating that employers "shall not be required to bargain over matters of inherent managerial policy, which shall include such areas of discretion or policy as the functions of the employer, standards of services, its overall budget, the organizational structure and selection of new employees and direction of employees." 115 ILCS 5/4 (West 2014).

¶ 34 Our supreme court has implemented a three-part test to reconcile these "incongruous" sections of the Act and determine what issues are mandatory subjects of bargaining. *Central City Education Association, IEA/NEA v. Illinois Educational Labor Relations Board*, 149 Ill.2d 496, 508-09 (1992). First, the Board must determine whether the matter concerns wages, hours and terms and conditions of employment. *Id.* at 523. If the answer is no, the inquiry ends, and there is no mandatory duty to bargain. *Id.* But if the answer is yes, the second question is whether the matter concerns "inherent managerial policy." *Id.* If not, then the matter is a mandatory subject of bargaining, but if yes, then the Board must proceed to the third and final step, balancing the benefits of bargaining on the decision-making process with the burdens bargaining would impose on the employer's authority. *Id.*

¶ 35 Significantly, a Board's finding that the burden on the employer outweighs the benefits of bargaining is not the end of the inquiry: if the Board finds that the burden outweighs the benefit, an employer may still be required to bargain over the impact of its decision. 115 ILCS 5/4 (West 2014); see also *Chicago Transit Authority v. Amalgamated Transit Union, Local 241*, 299 Ill. App. 3d 934, 943 (1998) (upholding Illinois Local Labor Relations Board's finding that although matter at issue was not mandatory subject of bargaining, because matter nevertheless affected employees' wages, hours and terms and conditions of employment, impact bargaining was required); *American Federation of State, County & Municipal Employees v. State Labor Relations Board*, 190 Ill. App. 3d 259, 268 (1989) (same). In other words, while an employer may not be required to negotiate over whether to implement a particular practice, it may still be obligated to negotiate over the effects of its decision. See *Amalgamated Transit Union, Local 241*, 299 Ill. App. 3d at 943.

¶ 36 In this case, the Board applied the three-part *Central City* test and found that while the decision to implement a new time-reporting system affected the wages, hours, and terms and conditions of employment, it also concerned "inherent managerial policy." On balance, the Board concluded that the burden to the College to bargain over implementation of the new system outweighed the benefits, and thus, it was not a mandatory subject of bargaining. But the Board also determined that the College was nevertheless required to bargain over the impact of CCCWorks, given the Board's determination that the new system affected wages, hours, and terms and conditions of employment.

¶ 37 Initially, the College disputes the Board's conclusion that the implementation of CCCWorks affected wages, hours, and terms and conditions of employment, arguing that "no credible testimony" establishes a change in working conditions under CCCWorks. The record belies this contention. Withers, the Union president and financial aid advisor at the College, testified that prior to the implementation of CCCWorks, a supervisor had the discretion to allow an employee who arrived 5 to 10 minutes late for work to "make up" that time at the end of the day. But, according to Withers, following the implementation of the new system, supervisors were no longer vested with this discretion. To be sure, Sarah Levee, a Labor and Employee Relations Specialist with the College, denied that employees were permitted to "make up" time under the old system, but the Board credited Withers' testimony, and we will not disturb this finding. See *Board of Regents of Regency Universities v. Illinois Educational Labor Relations Board*, 208 Ill. App. 3d 220, 230 (1991) ("[T]he determination of the witnesses' credibility [is] primarily within the province of the administrative agency"). The Board's conclusion that CCCWorks effected a change in the terms and conditions of employment is thus clearly supported by record evidence, and the College's argument to the contrary fails.

¶ 38 The parties do not dispute the Board's findings regarding the remaining two prongs of the *Central City* test – namely that the implementation of CCCWorks was a matter of managerial authority, and that the burden that bargaining would impose on the College's authority outweighed the benefit to the Union.

¶ 39 The only remaining issue is whether the Board erred in finding that the College had a duty to engage in impact bargaining over the new system after it was implemented. The College does not challenge the merits of the Board's decision in this regard, but argues only that the Union waived this issue. We disagree.

¶ 40 The Union's unfair labor practice charge generally alleged that the College "engaged in bad faith bargaining" when it advised the Union that it was modifying the time reporting system. And the Board's complaint alleged that the modification of the system was made "without notice" to the Union, and without "offering [the Union] an opportunity to bargain." The allegation that the College did not offer the Union "an opportunity to bargain" regarding the new system can be read to encompass both mandatory and impact bargaining. This is particularly true where the Union, in its June 27, 2013 letter demanding to bargain, asked specifically for "decisional and impact bargaining." The letter, coupled with the language in the unfair labor practice charge and the complaint generally alleging a failure to bargain, supports the conclusion that the Union sought relief for the College's failure to bargain over the impact of its decision to implement CCCWorks as well as the decision itself.

¶ 41 As such, this case is distinguishable from *Fraternal Order of Police, Chicago Lodge No. 7 v. Illinois Labor Relations Board, Local Panel*, 2011 IL App (1st) 103215, on which the College heavily relies. There, we affirmed the Board's finding that the union waived an impact bargaining claim, but contrary to the College's contention, our decision did not turn on the fact

that neither the charge nor the complaint alleged a violation of the Act based on a failure to bargain over the effects of the employer's decision. *Id.* at ¶¶ 27-29. Instead, our decision rested on the union's express disavowal of an impact bargaining claim during the hearing. *Id.* at ¶ 29. Specifically, we pointed out that the union objected on relevance grounds to testimony elicited by the employer that impact bargaining had occurred. *Id.*

¶ 42 Here, in contrast, the Union made no such disavowal, and, indeed, Cantrell repeatedly testified that the Union's multiple demands for bargaining explicitly requested bargaining over the impact of the time reporting system. Thus, far from disavowing its claim regarding impact bargaining, the Union affirmatively asserted it at all relevant times during the litigation, precluding a finding of waiver. *Cf. State Farm Mutual Automobile Insurance Co. v. Easterling*, 2014 IL App (1st) 133225, ¶ 23 (waiver is "an intentional relinquishment of a known right").

¶ 43 We affirm the decision of the Board.

¶ 44 Affirmed.