

Legal Aid Bureau, Inc. and National Organization of Legal Service Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 2320, AFL-CIO. Case 5-CA-23144

September 29, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND
TRUESDALE

On February 22, 1994, Administrative Law Judge Stephen J. Gross issued the attached decision. The Respondent filed exceptions and a supporting brief, the General Counsel filed an answering brief, and the Union filed a brief in opposition to the exceptions and in support of the judge's decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions² and to adopt the recommended Order.

In addition to its exceptions and brief, the Respondent has filed a motion to reopen the record, amend an-

¹ The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enf. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

In the absence of exceptions, we adopt pro forma the administrative law judge's finding that the Respondent's "supervisory attorneys" are Sec. 2(11) supervisors.

² In adopting the judge's conclusion that the Respondent violated Sec. 8(a)(5) by failing to bargain about the removal of bargaining unit positions and work, we note that the Union's demands were aimed not at the management decision to create the position of supervisory attorney, but at the effects of that decision on the terms and conditions of employment. See *Porta-King Building Systems*, 310 NLRB 539 (1993).

We agree with the judge that the Union implicitly demanded bargaining over the effects of the decision to create the position of "supervisory attorney." The Union clearly maintained, in bargaining, that the position, despite its title, was not a supervisory one under the Act and that the position should therefore remain in the unit. Implicit in this position was the view that the creation of the position should not diminish the size of the unit or the amount of unit work. Our decision is not inconsistent with *Noblit Bros.*, 305 NLRB 329 (1992). In that case, the removal of unit work was bound up with a nonbargainable change in the scope and direction of the enterprise, i.e., a change in the way the respondent marketed its products. The union's efforts to preserve its bargaining rights were always put in terms of reversing the nonbargainable entrepreneurial decision rather than its effects. Here, the Union during bargaining did not take issue with the decision to create the position of supervisory attorney. Rather, the Union maintained that supervisory attorneys, because they would still be doing unit work, should be included in the unit. By so doing, the Union was effectively demanding bargaining over the impact of the Respondent's decision on the unit.

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swer, and Motion for Summary Judgment dismissing complaint. The General Counsel and the Charging Party filed oppositions to the motions.

Similarly, in Case 5-RC-13497, the Respondent filed a motion to revoke certification, set aside election, and reconsider Decision and Direction of Election in view of *NLRB v. Health Care and Retirement Corp.* 114 S.Ct. 1778 (1994). The Respondent contended that the Regional Director, in the representation case that led to the Union's certification, applied an erroneous standard to his consideration of whether the Respondent's managing attorneys were supervisors. The Respondent argued that, in light of the Supreme Court's decision in *NLRB v. Health Care and Retirement Corp.*, its managing attorneys should have been found to be supervisors and should not have been included in the unit that was certified. Ultimately, it argued that the Union's certification should be revoked. The Regional Director denied the motion to revoke. Thereafter, the Respondent requested review of the Regional Director's decision. On June 20, 1995, the Board denied review. In so doing, Members Browning and Truesdale assumed arguendo that the managing attorneys were supervisors under the Act. But, as managing attorneys constituted only 6 percent of the unit, Members Browning and Truesdale concluded that the change in the unit would not be sufficient to warrant setting aside the election and revoking the Union's certification. See *Toledo Hospital*, 315 NLRB 594 (1994). Finally, Members Browning and Truesdale noted that the Board's decision was without prejudice to the Respondent's right to file a unit clarification petition should it choose to do so. Member Cohen agreed the Respondent's motion to revoke certification should be denied. He relied, however, solely on the ground that the Respondent, by failing to challenge the Union's certification in court and by instead engaging in collective bargaining with the Union, waived its right to challenge the validity of the Union's certification. See *Technicolor Government Services v. NLRB*, 739 F.2d 323 (8th Cir. 1984).

In the motion before us here, the Respondent's primary contention remains that its managing attorneys, under the Supreme Court's decision in *Health Care*, must be deemed supervisors under the Act. Accordingly, in the Respondent's view, the certification of the Union was improper and it therefore has no obligation to bargain with the Union. We reject the Respondent's position. In this proceeding, the complaint alleged, the Respondent admitted, and the judge found, that the certified unit was appropriate and that the Union was the exclusive representative of unit employees. As noted, the Board has refused in Case 5-RC-13497 to disturb that certification. Therefore, the Respondent was obligated to bargain with the Union regarding employees' terms and conditions of employment. We note

that in Case 5–RC–13497 the Board’s denial of review was without prejudice to the Respondent’s right to file a unit clarification petition. The Respondent has not filed any such petition. If it does so, and if the Board reaches the merits, and if the Board decides that managing attorneys are supervisors, the Respondent could request reconsideration of the allegation that it unlawfully shifted work out of the unit. See Section 102.48(d)(1) of the Board Rules.³ However, given the speculative nature of this issue, we shall proceed on the basis of the original decision in Case 5–RC–13497 that the managing attorneys have not been shown to be supervisors. The Respondent did not seek court review by refusing to bargain; instead it removed the work of the managing attorneys from the unit in disregard of the Board’s express finding that they were not supervisors. In these circumstances, we deny the Respondent’s motions and conclude that the Respondent’s unilateral removal of unit work violated Section 8(a)(5) of the Act.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Legal Aid Bureau, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

³In ruling on such a motion, we may wish to take into account the fact that the Respondent, in neither its answer nor in litigation before the judge, raised the issue of the alleged supervisory status of the managing attorneys. See *Opportunity Homes*, 315 NLRB 1210 (1994).

Eileen Conway, Esq., for the General Counsel.
Larry M. Wolf, Esq. (Whiteford, Taylor & Preston), of Baltimore, Maryland, for the Respondent.
Robert E. Paul, Esq. (Zwerdling, Paul, Leibig, Kahn, Thomson & Driesen, P.C.), of Washington, D.C., for the Charging Party.

DECISION

STEPHEN J. GROSS, Administrative Law Judge. The Respondent, the Legal Aid Bureau (the Bureau), is a private, nonprofit corporation organized to provide legal services to the poor in the State of Maryland. Many of the Bureau’s employees are represented for collective-bargaining purposes by the Charging Party, the National Organization of Legal Service Workers (the NOLSW).¹ (Sometime after the NOLSW was certified—in April 1991—members of the bargaining unit formed a local unit of the NOLSW they call the Maryland Legal Aid Workers Union, or M-Law. M-Law is an agent of the NOLSW for collective-bargaining purposes. I will refer to the NOLSW and M-Law collectively as the Union.)

¹When this case began, the NOLSW was known as the National Organization of Legal Service Workers, District 65 (of the UAW). It was chartered as UAW Local 2320 in early 1993.

The General Counsel contends that the Bureau violated Section 8(a)(5) and (1) of the National Labor Relations Act (the Act) in four respects: (1) by refusing to bargain with the Union about the Bureau’s plan to create a new classification of bargaining unit employees; (2) by failing to bargain before removing positions and work from the bargaining unit; (3) by changing the terms of employee health insurance without bargaining with the NOLSW; and (4) by eliminating certain employee holidays without bargaining with the Union. The Bureau admits that the Board has jurisdiction in this matter but denies that it has violated the Act.²

I. SUPERVISING ATTORNEYS

In a representation case that the Board decided in March 1991 (Case 5–RC–13497), the Board determined that the Bureau’s bargaining unit should consist of—

All full-time and regular part-time non-professional legal assistants, paralegals and professional employees, including managing attorneys, staff attorneys, law graduates, librarians and social workers employed by the Employer, but excluding the executive director, deputy executive director, chief attorneys, office managers, clerical workers and supervisors as defined in the Act.³

As of the hearing in this proceeding, there were about 185 employees in the bargaining unit.

One of the main issues in the representation case had to do with the status of “managing attorneys.” At the time that the representation case was litigated (and at the time of the hearing herein), the Bureau employed a number of managing attorneys. In the representation case, the Bureau contended that managing attorneys were supervisors; the NOLSW claimed that they were employees. The Board concluded that managing attorneys were employees and belonged in the bargaining unit (as indicated above).

Subsequent to the conclusion of the representation case the Bureau created the supervising attorney classification. As of the hearing there were five supervising attorneys. All had been bargaining unit employees prior to their being named as supervising attorneys.

The General Counsel makes two main allegations about supervising attorneys. One is based on the premise that supervising attorneys are “employees” within the meaning of Section 2(3) of the Act. The other assumes that supervising attorneys are “supervisors” within the meaning of Section 2(11).

There is no dispute that, if supervising attorneys are employees, they are members of the bargaining unit. According to the General Counsel, supervising attorneys are employees, the Bureau should accordingly have bargained with the Union before creating this new classification, and the Bureau

²The unfair labor practice charge was filed on November 18, 1992, and amended 2 days later. The complaint issued on February 19, 1993. I heard the case in Baltimore, Maryland, on June 30, and July 1, 2, 22, and 23, 1993. The General Counsel, the Bureau, and the Charging Party filed briefs.

³The decision was by the Regional Director. The Board denied the Bureau’s request for review. The Bureau admits that this unit is a unit appropriate for the purposes of collective bargaining and that the Union is the exclusive collective-bargaining representative of the unit.

failed to do that. On the other hand, continues the General Counsel, if supervising attorneys are deemed to be supervisors, the creation of the supervising attorney classification has resulted in the removal of positions and work from the bargaining unit. The General Counsel argues that an employer may not do that without bargaining with the Union, and the Bureau failed to do that.⁴

A. Are Supervising Attorneys "Supervisors" or are They "Employees"?

The Bureau has 14 offices throughout Maryland. In general, each office is headed by a chief attorney. (All parties agreed that chief attorneys are "supervisors" within the meaning of the Act.) Again, generally speaking, each office is divided into "units." In units in which there is a supervising attorney, the supervising attorney heads the unit.

The Bureau's job description for its supervising attorneys portrays the position as one having obvious supervisory authority. For example, it states that each supervising attorney—

supervises: Managing Attorneys, Legal Assistants, Clerical Employees.⁵

The job description goes on to state that—

The Supervising Attorney is responsible with the Chief Attorney for planning the work of the office/unit, implementing the priorities, assigning work, hiring, supervising and evaluating staff to assure quality legal representation.

Then, in listing the "duties and responsibilities" of supervising attorneys, the job description states, inter alia—

Responsible for interviewing applicants for employment and effectively recommending employment.

Monitor and supervise case handling of persons supervised and direct appropriate action to ensure quality representation.

Evaluate the performance of persons supervised and effectively recommend action to the Chief Attorney, Executive Director and Deputy Director.

Responsible for exercising discretion in handling personnel matters within the office, and if necessary to effectively recommend action to the Chief Attorney, Executive Director and Deputy Director.

Responsible for conducting initial investigation and rendering effective recommendations in matters involving employee discipline, including termination.

Responsible, in conjunction with the Chief Attorney or on his/her own for handling and solving employee personnel problems such as grievances, complaints, etc.

Filling in for the Chief Attorney and assuming the duties of the Chief Attorney when the Chief Attorney

⁴The General Counsel does not contend that the Bureau created the supervising attorney classification for discriminatory, antiunion reasons.

⁵Elsewhere the position description makes it clear that supervising attorneys also supervise staff attorneys.

is absent for any reason, including vacation, leave of absence, illness, teaching assignment, etc.

Taking other managerial/supervisory action not specifically listed above as determined from time to time by the Executive Director, Deputy Director, and Chief Attorney.

Additionally, in the course of job interviews management routinely advises applicants for supervising attorney positions that as supervising attorneys they will be considered part of management, that they will be responsible for managing a unit of attorneys and paralegals, that they will have the authority to discipline employees, that they will be expected to discipline employees when appropriate, and that supervising attorneys have greater authority than do managing attorneys.

It is the existence of supervisory authority, not its exercise, that determines whether an individual is an employee or supervisor. E.g., *Famous Amos Chocolate Chip Cookie Corp.*, 236 NLRB 1093 (1978); *Vacuum Platters, Inc.*, 154 NLRB 558, 593 (1965) ("the Board and courts have uniformly held that supervisory status is not dependent upon the frequency of the exercise of, but upon the existence of, such authority"). Moreover "the types of supervisory authority are listed in the disjunctive and authority with regard to any one is sufficient to confer supervisory status": *Phelps Community Medical Center*, 295 NLRB 486, 489 (1989). Plainly, then, supervising attorneys are "supervisors" within the meaning of the Act unless the Bureau's management has prevented supervising attorneys from exercising their purported supervisory authority or, perhaps, unless no supervising attorney has in fact exercised any supervisory authority. See *Great Lakes Towing Co.*, 168 NLRB 695, 700 (1967) ("while the statute merely requires the individual to possess the right to exercise such [supervisory] authority, the total absence of its exercise . . . may negative its existence").

Directing and assigning employees. Most of the time the direction that supervising attorneys give to the employees in their units is indistinguishable from that provided by managing attorneys (who, as discussed earlier, the Board found to be employees, not supervisors). Supervising attorneys allocate work among the members of their units, and they provide the kind of advice and direction that senior attorneys without supervisory authority could be expected to give less experienced attorneys and paralegals. See *Neighborhood Legal Services*, 236 NLRB 1269, 1273 (1978). But that does not negate the existence of greater authority. And one example, in particular, evidences that greater authority.

Jesse Alvarez is the supervising attorney in the general legal services unit of the Bureau's Prince Georges County office. That unit encompasses the representation of defendants in landlord-tenant litigation in the district court in Prince Georges County. Alvarez came to the view that his unit's clientele could be better represented if some of the unit's personnel worked out of the courthouse, rather than all working out of the Bureau's Prince Georges County office. Alvarez thereupon reached agreement with a district court judge about stationing some Bureau personnel in the courthouse and then assigned an attorney, a paralegal, and several student volunteers to the courthouse location. Alvarez kept senior management informed of his plans. But he acted without seeking approval.

Alvarez was one of three supervising attorneys to testify in this proceeding. The other two were Selene Almazan-Altobelli (Almazan) and Thomas Weisser. Neither Almazan nor Weisser appears to have taken any action that evidences the authority “responsibly to direct” employees (using the language of Sec. 2(11)). On the other hand, neither claimed that he or she was told to avoid exercising supervisory authority in directing employees or that he or she sought to direct employees in that fashion and was told not to. And the Bureau’s deputy director, Harriette Taylor, credibly testified that it is the Bureau’s intention that supervising attorneys possess supervisory authority.

Disciplining employees. There is considerable evidence in the record about the disciplining of several employees, all in the Bureau’s Prince Georges County office, who had joined together in an improper attempt to gain health insurance coverage under the Bureau’s policy for someone unconnected with the Bureau. When this undertaking was first uncovered, an investigation into the facts was conducted by the office’s chief attorney (Lauren Young), the two supervising attorneys in the Bureau’s Prince Georges County office (Alvarez and Althea Stewart-Jones), and the office’s office manager (Judy Wilson). Subsequently Young, Alvarez, Stewart-Jones, and Wilson discussed the matter with the executive director and deputy director of the Bureau. During the course of these discussions both supervising attorneys (Alvarez and Stewart-Jones) recommended the discipline that they considered appropriate. (Alvarez thought three of the employees should be fired. Stewart-Jones thought two of them should be.) Thereafter Young (the chief attorney) drafted memorandums recommending that two of the employees who had engaged in the scheme be discharged. The memorandums were jointly signed by Young, Alvarez, Stewart-Jones, and Wilson. The Bureau did discharge the two employees. The third employee (the one Alvarez but not Stewart-Jones wanted to fire) was demoted. There is no doubt that these circumstances amounted to Alvarez and Stewart-Jones “effectively . . . recommend[ing]” the “discharge . . . or discipline” of the employees in a situation that “require[d] the use of independent judgment,” in the words of Section 2(11).⁶

Almazan and Weisser have not disciplined employees or even “effectively . . . recommend[ed]” such action. Weisser, indeed, on one occasion went out of his way to avoid doing so. Neither Almazan nor Weisser has been criticized by the Bureau’s management for failing to exercise supervisory authority. Again, however, nothing in the record suggests that Almazan and Weisser do not have the authority to discipline and/or to effectively recommend discipline at such time as they see a need to do so.

Other indicia of supervisory authority. Supervising attorneys play no role in setting employees’ pay levels. The Bureau does not lay off (or recall) employees, so supervising attorneys have no authority in that respect. Employees supervised by supervising attorneys do not receive overtime pay and thus supervising attorneys play no role there either.

Employees who have a need to leave early for the day or to come in late or temporarily to work nonstandard hours ask

⁶ Alvarez played no role in the disciplining of a fourth employee who was involved in the scheme. (The record does not tell us whether Stewart-Jones was involved in the disciplining of this fourth employee.)

the permission of their supervising attorney to do so. While the authority of supervising attorneys to deny such requests is implicit in these circumstances, all three supervising attorneys who testified in this proceeding said that they have approved all such requests. (One attorney asked Alvarez’ permission to work permanently on a part-time basis. Alvarez denied the request. The attorney then sought the approval of the executive director, who also turned down the request. The record does not tell us whether the executive director took into account Alvarez’ position in the matter.)

Supervising attorneys play a limited role in the hiring process. When an opening arises, the supervising attorney in the relevant unit is responsible for reviewing resumes in order to determine which of the many applicants ought to be interviewed. (In a manner of speaking supervising attorneys thus have a veto over whom the Bureau hires. But it is not clear to me that this role reflects the exercise of supervisory authority.) Supervising attorneys thereafter give their recommendations as to whom among the interviewed applicants should be hired. But the record fails to indicate how much weight those recommendations carry.⁷

Supervising attorneys do evaluate the employees in their units. When it is time for an employee to be evaluated, the supervising attorney and the chief attorney of the office each independently prepare evaluations. The two then meet with the employee being evaluated and discuss their evaluations (along with the self-evaluation of the employee). But no management action results from these evaluations.

Consonant with the job description, supervising attorneys fill in for chief attorneys in the latter’s absence. Thus when Alvarez’ chief attorney was absent for 3 months (on maternity leave), Alvarez took her place.

As for pay differentials, the salaries of all of the Bureau’s attorneys are dependent in part on factors such as how long they have been members of the bar. But all other things held equal, a supervising attorney earns \$500 per year more than a managing attorney who earns \$2500 more per year than a staff attorney.⁸

Nonsupervisory tasks. As stated earlier, most of the time a supervising attorney’s workday is indistinguishable from that of a managing attorney’s. Moreover all supervising attorneys spend a considerable portion of their time handling cases; that is, doing the kind of work the Bureau’s staff attorneys do. These factors are relevant to whether the Bureau had a duty to bargain with the Union about the impact on the bargaining unit of the appointment of supervising attorneys (as will be discussed below). But they do not mean that supervising attorneys are employees rather than supervisors.

Conclusion—supervising attorneys are supervisors. Through both the job description for the supervising attorney position and the application process, persons selected by the

⁷ I note that the party alleging supervisory status, here the Bureau, bears the burden of proving that an individual is a supervisor. E.g., *St. Alphonsus Hospital*, 261 NLRB 620, 624 (1982).

⁸ There is considerable evidence in the record about such matters as whether supervising attorneys attend meetings of the Bureau’s management, the placement of the names of supervising attorneys on the letterhead of the Bureau’s stationary, the role of supervising attorneys in respect to travel reimbursement requests and requests for the use of litigation funds, supervisor/employee ratios, and the like. I do not consider any of such evidence to be significant in determining whether supervising attorneys are supervisors or employees.

Bureau to be supervising attorneys are told that they have authority that makes them supervisors within the meaning of Section 2(11) of the Act. That the Bureau intends supervising attorneys to have and exercise supervisory authority is further supported by the testimony of the Bureau's deputy director. At least one supervising attorney has exercised such authority in the areas of directing employees and effectively recommending the discipline of employees. And nothing in the record evidences an intention on the Bureau's part that supervising attorneys be precluded from exercising their purported supervisory authority.

Under these circumstances I conclude that the Bureau's supervising attorneys are supervisors within the meaning of Section 2(11) of the Act. See *Bridgeport & Port Jefferson Steamboat Co.*, 313 NLRB 542 (1993). And since an employer may establish a new supervisory classification without bargaining,⁹ I further conclude that the Bureau's unilateral creation of the supervising attorney classification did not violate the Act.

*B. The Duty to Bargain About the Effects on the
Bargaining Unit of the Appointment of
Supervising Attorneys*

The complaint alleges that—

Since on or about July 8, 1992, Respondent has failed and refused to bargain with the Union before removing bargaining unit positions and work from the Unit.

As discussed above, in early 1991 the Board determined, over the objections of the Bureau, that the Bureau's managing attorneys were part of the bargaining unit. That resulted in a structure in which the only supervisors of attorneys and paralegals were the chief attorneys (plus the executive director and the deputy director).

The Bureau's management, still convinced that the chief attorneys need the assistance of lower ranking supervisors for the management of legal work, promptly responded by creating the position of supervising attorney and by determining to gradually replace each of the managing attorneys with a supervising attorney (or, in some cases, to replace two managing attorneys with one supervising attorney). Under this arrangement, supervising attorneys would perform the tasks previously performed by managing attorneys and would, in addition, carry out the supervisory responsibilities discussed above.

In January 1993 an agent of the Bureau virtually said as much, although his statement can be understood to mean that *thereafter* the Bureau would replace managing attorneys in that manner. (The Bureau admits that at that time its chief negotiator stated, "[T]hat as managing attorney positions become vacant they will be replaced by supervising attorney positions.") But even had no such statement been uttered, the fact of the Bureau's determination in 1991 to replace managing attorneys with supervising attorneys is evident from the combination of: the Bureau's position during the representation case; the creation of the supervising attorney classification within a few months of the Board's decision in that case; evidence of the obvious anger and irritation of the Bureau's management with the Board's decision and with the

testimony of the Union's witnesses in the representation case concerning managing attorneys; and the Bureau's replacement of unfilled managing attorney slots with supervising attorneys since October 1991.

Taylor (the Bureau's deputy director), in statements to the Union during bargaining in July 1992 and as a witness in this proceeding, said that the Bureau had not concluded that it would replace all vacant managing attorney slots with supervising attorneys and that, instead, the Bureau would consider whether to replace managing attorneys with supervising attorneys on a case-by-case basis. I do not credit those statements.

Because supervising attorneys have replaced managing attorneys and because supervising attorneys perform bargaining unit work, this arrangement has directly affected the bargaining unit: it has reduced the amount of bargaining unit work and the number of unit members. If this impact has been a significant one, the Bureau was required to have bargained with the Union about the effects on the bargaining unit of the switch to supervising attorneys from managing attorneys. E.g., *Bridgeport & Port Jefferson Steamboat Co.*, supra.

I consider the change to be significant. It is true that the number of individuals involved is not large relative to the 185-employee size of the bargaining unit. But managing attorneys generally are the most senior employees in the bargaining unit and play important roles in the functioning of the Bureau. Thus, even if one focuses just on the six managing attorneys currently employed by the Bureau, I think its plain that the loss of those positions would materially impair the strength of the Union. And the significance of the change is even more marked if one takes into account the five supervising attorneys who are already in place (the appointment of each of whom, as discussed earlier, meant the elimination of one or two managing attorney positions).

The Bureau has not bargained to agreement or impasse about its determination to replace managing attorneys with supervising attorneys. There was discussion about supervising attorneys at only one bargaining session—on July 8, 1992. That occurred when the Union expressed its view that supervising attorneys should be deemed bargaining unit members. The Bureau disagreed, and the conversation promptly turned to other matters. Obviously, therefore, no agreement or impasse was reached about the Bureau's plan regarding supervising attorneys.

Whether the Union waived bargaining about the matter, however, is a more serious question.

In June 1991 Taylor (the deputy director of the Bureau) sent the following letter to Dwight Loines, who is the president of the NOLSW:

The Legal Aid Bureau has developed the position of Supervising Attorney to assist our Chief Attorneys and Executive personnel in meeting the objective of ensuring the effective and efficient delivery of legal services. This new position is supervisory/managerial in nature and involves the exercise of supervisory functions as defined in Section 2(11). . . . The Supervising Attorney position will include the duties of planning and implementing the work of an office/unit.

The Bureau intends to post the position in its offices throughout the state for positions available in Prince Georges and Montgomery Counties. A copy of the new

⁹Id. at 542.

position description is enclosed for your information. Feel free to call me should you wish to discuss the matter further.

As early as June 1991, in other words, the NOLSW was on notice that Bureau had created a position called supervising attorney and that the Bureau contemplated that persons the Bureau appointed to that position would be supervisors within the meaning of the Act. But nothing in the letter indicated that Bureau intended to have the supervising attorneys replace managing attorneys.¹⁰

Neither Loines nor anyone else on behalf of the Union responded to Taylor's letter.

On June 19, 1991, the Bureau posted announcements in its facilities advising of three supervising attorney openings and attaching copies of the same job description that Taylor had sent to Loines. M-Law became aware of the supervising attorney classification on or about that date. (It is the Union's position that, notwithstanding what the job description had to say about the duties and responsibilities of supervising attorneys, M-Law's officials assumed that supervising attorneys would be members of the bargaining unit.) Again, nothing in the Bureau's communication indicated that the Bureau intended to replace managing attorneys with supervising attorneys.

The Union did not ask to bargain about the supervising attorney classification.

On July 1, 1991, Taylor again wrote to Loines, this time enclosing "the revised job description for supervising attorney. The revisions are underlined." The revised job description prominently shows that, while supervising attorneys had duties and responsibilities that would constitute them supervisors for purposes of the Act, the supervising attorneys were to "handle cases"—that is, were to spend at least some of their time doing bargaining unit work. Also according to the revision, supervising attorneys were to supervise "where applicable, managing attorneys. . . ." Again, no one from the Union responded to Taylor's letter. (And again, Loines did not notify M-Law of Taylor's letter.)

On July 26, 1991, the Bureau posted a notice announcing that it was planning to fill a fourth supervising attorney position.

In October 1991 Bureau appointed Almazan and Leslie Fried to be supervising attorneys. Alvarez became a supervising attorney in March 1992. As noted earlier, by the time of the hearing herein, the Bureau had filled a total of five supervising attorney positions.¹¹ On each occasion the appointment amounted to, as a practical matter, the permanent replacement of one or two managing attorney positions by a supervising attorney. But nothing in the record indicates that

¹⁰Taylor did not send a copy of the letter to any official of M-Law or otherwise notify M-Law of its plans regarding supervising attorneys. Loines did not notify M-Law about Taylor's letter. But I do not consider that significant since it is NOLSW, not M-Law, that is the exclusive representative of the bargaining unit employees. And NOLSW had not instructed the Bureau that communications were to be directed to M-Law.

¹¹As of the hearing the Bureau had named six persons to be supervising attorneys. One of the six was a replacement for Almazan, who was in the midst of a year's leave of absence from the Bureau at the time of the hearing.

the Bureau advised the Union of this elimination of managing attorney slots.

As discussed earlier, at a bargaining session on July 8, 1992, the Union demanded that supervising attorneys be included in the bargaining unit, the Bureau rejected that demand, and an inconclusive discussion followed. It was in the course of that discussion that Taylor indicated that the appointment of supervising attorneys would result in the elimination of a managing attorney positions. Finally, as also discussed earlier, in January 1993 the Bureau told the Union that the Bureau intended to replace all vacant managing attorney positions with supervising attorneys.

This sequence of events does not seem to me to be up to a waiver by the Union of its right to bargain about the transfer of bargaining unit work to supervising attorneys.

The Bureau's letters to Loines indicated nothing about this transfer of bargaining unit work. It is true that as early as July 1991 the Union was on notice that supervising attorneys were to "handle cases" and thus be doing some unit work. But it is one thing for a new class of supervisors to be doing some unit work; it is altogether something else for the appointment each of the new supervisors to mean the complete elimination of one or more senior bargaining unit positions. As for the appointments of Almazan, Fried, and Alvarez, none were officers of the Union, so that information transmitted to them did not amount notice to the Union (even though, at the time of Almazan's appointment, she was one of the most actively prounion employees of the Bureau). In any case, there was no reason even for Almazan, Fried, and Alvarez to conclude that their appointments as supervising attorneys necessarily meant that the Bureau intended to eliminate managing attorney positions.

It is also true that the Union did not demand effects bargaining even after Taylor indicated (in July 1992) that the appointment of supervising attorneys would result in the loss of bargaining unit work. But when Taylor raised that subject, she knew that the Union's position was that supervising attorneys should be deemed to be part of the bargaining unit. Given that the Union had staked out that most aggressive of positions, the absence of any reference by the Union to "effects on the bargaining unit" or the like can hardly be considered to be agreement by the Union to forego the less aggressive position that the Bureau was obligated to bargain about the transfer of bargaining unit work out of the unit.

The Bureau raises Section 10(b) of the Act as a defense.¹² The charge herein was filed on November 18, 1992. Thus the 10(b) period began in May 1992. And as discussed earlier, it was in mid-1991 that the Bureau decided to eliminate managing attorney slots in favor of supervising attorney positions, leading to the appointment of three supervising attorneys by March 1992.

But the issue under Section 10(b) is when the Union first knew, or should have known, of the Bureau's plan to replace managing attorneys with supervising attorney positions as managing attorney positions became vacant. And that occurred only with Taylor's remarks in July 1992. I conclude, therefore, that the complaint could properly allege that the

¹²The relevant portion of Sec. 10(b) reads:

"no complaint shall issue based upon any unfair labor practice occurring more than six months prior to the filing of a charge with the Board."

Bureau violate Section 8(a)(5) by failing to bargain about the removal of bargaining unit positions and work from the unit.

I accordingly further conclude that the Bureau violated Section 8(a)(5) and (1) of the Act by failing to bargain with the Union about the effects on the bargaining unit of the Bureau's plan to gradually replace an employee classification (managing attorneys) with supervisors (supervising attorneys).

II. HEALTH INSURANCE

The health insurance issue in this proceeding stems from a tragic circumstance. The child of one of the Bureau's employees suffers from cerebral palsy and needs massive levels of medical care. (I will hereafter refer to this child as "the child.")

At times material, the child was incurring medical expenses at the rate of about \$23,000 per month.

The Bureau provides health insurance for its employees and their dependents.¹³ Beginning in October 1991 the Bureau provided that insurance via Blue Cross/Blue Shield of Maryland (BC/BS). By virtue of a September 1992 contractual arrangement between Bureau and BC/BS, on October 1, 1992, the previous health insurance coverage continued with two changes. First, the new coverage provided for "well-baby care," a change that the Union had requested. Second, the new coverage provided that benefits were subject to a \$1 million lifetime cap; that is, the health insurance offered by the Bureau covers only the first \$1 million of an individual's medical expenses over the course of the individual's lifetime.

The General Counsel contends that Bureau's imposition of this cap violated Section 8(a)(5) of the Act.

A. BC/BS's Demands

Under the contract between Bureau and BC/BS in effect from October 1, 1991, through September 30, 1992 (the 1991 contract), the Bureau was a self-insurer for the first \$50,000 per year of each covered individual's medical expenses. BC/BS administered the health insurance that the Bureau provided for its employees and their dependents. In addition, BC/BS insured the employees/dependents to the extent that an individual's expenses exceeded \$50,000 in any year. The Bureau paid BC/BS a fee for BC/BS's administrative and insurance functions.

At the end of August 1992, BC/BS advised Bureau that the terms of the 1991 contract were no longer acceptable. The problem, as BC/BS saw it, was the high level of the child's medical expenses. According to BC/BS's message to Bureau, "based upon the most recent two months of care, a reasonable estimate of current annualized claims [for the child] would approximate \$275,000." Under these circumstances, said BC/BS, it would be willing to renew its arrangement with the Bureau only if the Bureau agreed either to self-insure the first \$350,000 of the child's annual medical expenses (with the 1991 contract's \$50,000 standard continuing to apply to everyone else) or to exclude the child from the health insurance package. BC/BS made it clear that it was not going to budge from this position.

¹³The insurance is not free for the employees. The contribution formula applicable to any given employee depends on whether it is only the employee who is covered, or both the employee and his or her dependents.

The Bureau did not consider the immediate exclusion of the child from health insurance to be an acceptable option. Accordingly the Bureau determined to agree to BC/BS's alternative demand that the Bureau self-insure the first \$350,000 (per year) of the child's medical expenses. Yet looking at the situation faced by the Bureau as of early September 1992, the \$350,000 self-insurance requirement for the child could easily result in the Bureau's health insurance bills for the 1992-1993 period (and each year thereafter) being in the neighborhood of \$300,000 higher than under the 1991 contract (even apart from the usual year-to-year increases in medical costs).

In response, the Bureau decided to make one change to the health insurance it provided to its employees (in addition to the well-baby care provision); namely, to impose a \$1 million lifetime cap per covered individual on health insurance benefits. That is, each person previously covered by the Bureau's health insurance would continue to benefit from the same terms as in effect under the 1991 contract with the exception that at such time as the medical bills of any such person totaled \$1 million (measured from October 1, 1992), that person's health insurance would cease. (I note that while the cap was to be written into the Bureau's contract with BC/BS, the cap was the Bureau's idea, not BC/BS's.) One of the advantages of this approach, the Bureau's management believed, was that, for many Bureau employees, the \$1 million cap was not a novel feature. Until October 1991 (i.e., prior to the 1991 contract), the Bureau's health insurance had included just such a limitation.¹⁴

At some point in September—probably early in September and in any event prior to September 29—the Bureau and BC/BS entered into a "tentative agreement" which included the cap.

B. The Bargaining Between the Bureau and the Union About Health Insurance

The Union had provided the Bureau with a set of contract proposals before bargaining started. In respect to health insurance, the Union proposed that the terms of the 1991 contract continue, with the addition of well-baby care. Thereafter health insurance was not mentioned during the bargaining until September 8 (a week or two after the Bureau had received BC/BS's demand regarding the child).

At the bargaining session on September 8, the Bureau agreed to the Union's well-baby care demand (pointing out that state law required such a provision). A Bureau spokesman went on to say that the Bureau was negotiating with BC/BS concerning the 1992-1993 Bureau-BC/BS contract and did not yet know whether there would be any changes in the health insurance that the Bureau provided its employees.

A day or two later the Bureau proposed to the Union that they hold a bargaining session on September 11 in order to discuss some "general issues" concerning health insurance. Because some of the Union's representatives were not available on that date, the parties agreed to meet on September 16.

Medical insurance was the sole subject of the meeting on September 16. It was at this meeting that the Bureau told the Union about BC/BS's demand and about the Bureau's inten-

¹⁴BC/BS was not the administrator of that earlier plan.

tion to impose a \$1 million cap. Louise Carwell (M-Law's president) objected to the cap and, additionally, said that the issue was a complicated one, one that the Union would need more time to consider. A Bureau representative said that the Bureau would be glad to discuss the matter further with the Union.

Carwell met with Phil Stillman (the Bureau's personnel officer) on September 22 to discuss health insurance issues. The record tells us virtually nothing about what occurred during this discussion.

The Bureau and the Union again discussed health insurance issues on September 26. The Union continued to object to the \$1 million cap and proposed that the Bureau agree to provide the same coverage that it had under the 1991 contract (with the addition of the well-baby benefits). In that connection, the Union argued that the parties needed more time to consider how to deal with the problem caused by BC/BS's position and that the cap would not save the Bureau anything during the coming year. A Bureau representative said that he understood the Union's position and that the parties could continue to bargain about the matter.

Two days later—on September 29—a Bureau representative told union representatives that since the Bureau's 1991 contract with BC/BS was going to expire the next day (at the close of September 30), the Bureau "had to move forward," and that the Bureau was going to put into effect as of October 1 its "tentative agreement" with BC/BS, imposing the \$1 million lifetime cap.

The Bureau did thereupon enter into a contract with BC/BS that provided for a \$1 million cap effective October 1, 1992. Subsequent to October 1 the Bureau proposed to the Union that they meet to discuss health insurance with the Union. The Union refused to do so unless and until the Bureau removed the cap. The cap has remained in place. No discussions have occurred.¹⁵

C. Health Insurance—Conclusion

A material change in employee health insurance is, of course, a mandatory subject of bargaining. E.g., *Joey's Stables*, 279 NLRB 728, 738 (1986). The Bureau does not dispute that and, in addition, agrees that the Union did not consent to the cap. The Bureau argues, however, that including the \$1 million health insurance cap does not amount to a material change in the employees' health insurance. The Bureau's theory is that it would take years for any employee to incur \$1 million in medical expenses; even the child's extraordinary medical expenses, after all, would not reach the \$1 million mark for about 3 years. The Bureau also contends that it added the cap only after bargaining to impasse on the issue.

I turn first to the contention that the change was not a material one.

Part and parcel of the Bureau's argument is the theory that, since the Bureau-BC/BS contract that includes the cap will terminate in September 1993, the materiality of the \$1 million cap must be measured solely against the period October 1992 through September 1993.

¹⁵The Bureau filed an unfair labor practice charge contending that the Union's post-October 1 refusal to bargain about health insurance constituted a violation of the Act. That charge has been held in abeyance pending the outcome of this proceeding.

Accepting that theory for the moment, it is true that the probabilities were very low that any covered individual would incur medical expenses of more than \$1 million within the first couple years following implementation of the cap. But an object of insurance is to protect against disasters, including disasters that are unlikely to occur. Cf. *Beitler-McKee Optical Co.*, 287 NLRB 1311, 1312 (1988); *Florida Steel Corp.*, 273 NLRB 889, 921 (1984). Here each employee of the Bureau was less protected against disaster after September 30, 1992, than he or she was on that date, just focusing on the period October 1992 through September 1993.

One might hypothesize a health insurance cap that came into play only at so high a dollar level that it could not reasonably be deemed to materially affect one's terms and conditions of employment over the course of 1 year. But given the current level of medical costs in situations in which the patient needs massive medical intervention over a period of months, it does not seem to me that a \$1 million cap even approaches immateriality. Reasonable employees, that is to say, would consider themselves less protected against medical disaster after the imposition of a \$1 million cap than before.¹⁶

In any case, I reject the Bureau's theory that the materiality of the cap must be measured solely against the 1 year, October 1992 through September 1993. Were the \$1 million cap permitted to remain in place, the Union's position when bargaining over health insurance terms in subsequent years would be very different than if the cap were not part of the 1992–1993 contract. (The relevance of the Bureau's fait accompli is again considered below in a slightly different context.) Because of this, and because the cap is, by its terms, a cap on the reimbursement of medical expenses over an individual's "lifetime," the materiality of the cap ought to be based on the assumption that it will remain in effect for the foreseeable future. And given that assumption, the materiality of the cap is too obvious to warrant further discussion.

That brings us to the Bureau's impasse argument.

My conclusion is that there was no impasse.

To begin with, the evidence shows that the Bureau's representatives went into the discussions with the Union about health insurance with their minds made up. Faced with BC/BS's demands concerning insurance coverage of the child, the Bureau concluded, prior to any bargaining with the Union, that it would limit its exposure by imposing the cap. The Bureau thus did not participate in bargaining with the Union about health insurance with the open mind and desire to reach agreement that Section 8(a)(5) and (d) require. See, e.g., *NLRB v. Herman Sausage Co.*, 275 F.2d 229 (5th Cir. 1960); *General Electric Co.*, 150 NLRB 192 (1964), enf. 418 F.2d 736 (2d Cir. 1969). And there can be no impasse

¹⁶As touched on above, during bargaining the Union argued that the cap would save the Bureau nothing for years. That could, I suppose, be interpreted as an expression by the Union of the view that there was no possibility that any of its members would incur medical expenses of more than \$1 million during the term of the 1992–1993 Bureau-BC/BS contract. But I consider that argument by the Union to be merely an effort by the Union to dissuade the Bureau from imposing the cap on October 1, 1992, rather than an expression of the Union's position about the value to the Bureau's employees of their health insurance.

where there has been no bargaining in good faith. E.g., *Kuna Meat Co.*, 304 NLRB 1005, 1014 (1991), *enfd.* 966 F.2d 428 (8th Cir. 1992).

Secondly, even assuming good-faith bargaining by the Bureau, there was no impasse. For purposes of the Act, an impasse occurs at that “point in time of negotiations when the parties are warranted in assuming that further bargaining would be futile. . . . ‘Both parties must believe that they are at the end of their rope.’” *Larsdale, Inc.*, 310 NLRB 1317, 1318 (1993) (citations omitted).

Here, plainly, the Union’s representatives thought further bargaining might bear fruit. And had the Bureau viewed the matter reasonably, its representatives would have thought so too. Consider: (1) the matter did raise complex issues (as the Union pointed out); (2) the parties met only four times to consider how to deal with BC/BS’s demands relative to the child (the bargaining sessions of September 16, 26, and 29, and the meeting between Carwell and Stillman on September 22); (3) the Union first became aware of the matter for only 2 weeks before the Bureau unilaterally imposed the cap; and (4) the only way of dealing with BC/BS’s demands that was considered was the imposition of the \$1 million cap.

The Bureau, however, contends that it was faced with a September 30, 1992 deadline. (As may be recalled, beginning on October 1, BC/BS was willing to administer the Bureau’s health insurance and perform its insurance role only if the child was excluded from insurance coverage or the Bureau self-insured the first \$350,000 of the child’s medical expenses per year.) Taking that deadline into account, argues the Bureau, there was an impasse. (See, in this respect, *Bottom Line Enterprises*, 302 NLRB 373, 374 (1991).)

The Bureau, that is, contends that because of BC/BS’s position, it had to impose the cap (or, still worse, exclude the child from coverage) by October 1.

It was a certainty, based on prior medical history, not a possibility, that there would be huge claims for years to come. Under these circumstances, the one million dollar lifetime cap, imposed by the Bureau, went hand-in-hand with the \$350,000 liability that was assumed. . . . The two items are inseparable. . . . Since the Bureau assumed the \$350,000 liability as of October 1, 1992, it is only reasonable that it implement the cap as of this same date. [R. Br. 66–67. Emphasis omitted.]

But that is simply not so.

Admittedly there was the ever-present possibility that any of the Bureau’s employees (or their dependents) could in the near future meet with a disaster that could eventuate in medical expenses greater than \$1 million (as discussed above). But the record is altogether clear that that was not the Bureau’s concern. Rather, the Bureau’s focus was entirely on the \$23,000-per-month medical expenses being incurred by the child and on BC/BS’s demand regarding the child.

It certainly was appropriate for the Bureau to be concerned about the huge drain on its resources that could ultimately result from the child’s medical expenses if the Bureau agreed to BC/BS’s demand for the \$350,000 self-insurance figure and thereafter did nothing to deal with the expenses it could incur under that arrangement. But at \$23,000 per month (or even, say, triple that figure) the \$1 million cap would not be

reached for more than a year. Thus the only advantage to putting the cap into effect on October 1—as opposed to some date weeks or months later—was that employee and dependent medical expenses (and, specifically, the child’s medical expenses) would from that day start counting toward the \$1 million lifetime cap. The Bureau, that is, wanted to start the meter running.

But the Bureau did not need to start the meter on October 1 in order to achieve the protection it wanted. For example the Bureau could have obtained comparable financial protection (upon agreement or impasse) by subsequently adopting a cap set at some lower figure (to take into account medical expenses incurred since October 1). Or (again, upon agreement or impasse) the employee contribution formula could have been changed in the Bureau’s favor or, for that matter, employee health insurance could have been eliminated altogether.

I do not mean to suggest that the outcome of further bargaining between the Bureau and the Union would have been, or should have been, any of the alternatives to which I just referred. Indeed, further bargaining might have led to some entirely different approach to the medical insurance problem. Rather, my point is that no emergency impelled the Bureau to impose a lifetime cap on health insurance benefits prior to a reasonable period of bargaining.

D. The Bureau’s Continuing Willingness to Meet with the Union About Health Insurance

The Bureau has made it clear that it stands willing to meet with the Union to discuss health insurance generally and the lifetime cap in particular.

As discussed earlier, the Bureau did not approach its meetings with the Union regarding health insurance with an open mind; considerably before September 30 the Bureau’s representatives concluded that the way to handle the problem posed by BC/BS’s demands was to re-adopt the \$1 million cap that had been in effect prior to the 1991 contract. The invitation to the Union to continue to meet to discuss the cap thus was obviously a sham—a kind of “we’re not going to change our minds but if they want to talk let them talk” approach to union-management relations.

But let us assume that the Bureau had bargained in good faith until the moment it imposed the cap. Even under this assumption, the Bureau’s expressed willingness to continue to discuss health insurance terms is not a defense to the General Counsel’s unfair labor practice allegation. For as I understand the Board’s position on such matters, the presumption must be that if the Bureau was willing to impose the cap without reaching either agreement or impasse, the Union’s subsequent meeting with the Bureau in an attempt to achieve a health insurance terms more acceptable to the Union would be “a futile and unnecessary gesture.” *Peat Mfg. Co.*, 261 NLRB 240 fn. 2 (1982).

III. FLOATING HOLIDAYS

Thanksgiving day is a holiday at the Bureau. So are Christmas and New Year’s day. In addition, for many years the Bureau’s employees were allowed to take three “floating holidays” during the Thanksgiving and Christmas-New Year’s periods. That is, an employee could take 1 paid day off work during the days immediately before or after Thanks-

giving, with the precise day up to the employee (limited, however, by work requirements and the need to avoid too many employees being off work at once). Similarly, each employee could take 2 paid days off during the period that begins just before Christmas and ends just after New Year's day.

In 1992 the Bureau unilaterally determined that it would not permit employees to take any floating holidays. The General Counsel alleges that the Bureau thereby violated Section 8(a)(5) of the Act.

It is undisputed that each year for at least the 15 years prior to 1992 the Bureau granted three floating holidays to each employee (subject to the limitations note above). Ordinarily that would result in the Bureau's grant of floating holidays being deemed "an established practice" which management could not change without first bargaining with the Union. E.g., *Central Maine Morning Sentinel*, 295 NLRB 376, 377 (1989). The Bureau recognizes that. But the Bureau argues that floating holidays are not benefits that automatically come with the job. Rather, the Bureau contends, the Bureau's employees know that, each Thanksgiving and Christmas/New Year's seasons, management newly goes through a process of determining whether or not to allow the employees to have any floating holidays. That means, the Bureau's argument continues, that the grant of floating holidays was not an established practice, and the Bureau accordingly could unilaterally determine to withhold the floating holidays.

The Bureau's factual contentions in this respect are, to a considerable extent, accurate.

Consider, to begin with, the Bureau's personnel manual. It states that "The Bureau observes the following holidays," and then lists 13 days such as Christmas, New Year's Day, Labor Day, and so on. The manual makes no reference whatever to floating holidays; nor have previous versions of the manual said anything about floating holidays.

Second, when the Bureau hires an employee, a Bureau official talks to the employee about the benefits the Bureau provides. Among those benefits are holidays, and the holidays mentioned during such interviews—the only holidays mentioned—are those listed in the personnel manual.

Third, the absence of any reference to floating holidays in the personnel manual and during employment interviews is a deliberate reflection of management's view that the decision to grant floating holidays, and to withhold them, is one that management makes on a year-by-year basis.

Fourth, many of the Bureau's employees realized that management had never concluded that floating holidays would be granted year-in, year-out. (Some of the chief attorneys would specify, in announcing the grant of floating holidays, that "I can't promise that you'll get them next year.") The result of that was that each year, as the floating holidays season approached, many of the Bureau's employees would ask their supervisors whether the employees were going to be getting floating holidays that year.

On the other hand, other employees proceeded on the assumption that they would be getting three floating holidays each holiday season. (The record does not permit any determination of how many of the bargaining unit employees were unsure that they would be getting floating holidays and how many assumed that they would be.)

Additionally, prior to 1992 the Bureau's management never warned employees that floating holidays would not be granted every year. In fact, there has never even been a Bureau-wide announcement that floating holidays might not be granted every year. Rather, as touched on above, the record shows only haphazard statements to that latter effect by some, but not all, chief attorneys.

The issue here is whether, as the 1992 holiday season approached, members of the bargaining unit should reasonably have expected that they once again would be receiving three floating holidays. In my judgment, that long, long history of the unvarying grant of floating holidays requires the conclusion that reasonable employees would have expected the grant of such holidays. And management's coyness, until November 1992, about the floating holiday program—its unwillingness to formally declare that floating holidays were entirely a matter of year-to-year discretionary decision by management—strengthens my conclusion.

Having concluded that reasonable employees would have come to expect the floating holidays, I further conclude that the Bureau was obligated to notify the Union about the Bureau's plan not to grant floating holidays during the 1992 holiday season and to bargain about the matter upon the Union's request. Since the Bureau failed to do that, the Bureau violated Section 8(a)(5) and (1) of the Act.

The Bureau raises as a defense a consideration not discussed above; namely, that the Bureau had important financial reasons for not permitting employees to take floating holidays in 1992. And during the hearing the Bureau sought to introduce evidence supporting that contention. But I precluded the Bureau from introducing such evidence. Evidence of that sort presumably would have been relevant had the General Counsel alleged that the Bureau had withheld the floating holidays for discriminatory, antiunion reasons in violation of Section 8(a)(3). But the General Counsel made no such allegation. And while the Bureau's reasons for wanting to withhold floating holidays might well be a matter that the Bureau would want to raise in the course of bargaining with the Union, I fail to see their relevance for 8(a)(5) purposes. See *Laidlaw Waste Systems*, 307 NLRB 52, 53-54 (1992).

The Bureau also argues that it and the Union bargained about floating holidays through November 18, that with Thanksgiving approaching "a decision had to be made immediately" (Br. 89), and that, taking into account this time constraint, impasse had been reached. In fact, however, there was no bargaining about the withholding of floating holidays. Apart from a proposal by the Union, early in the bargaining, that floating holidays be written into the collective-bargaining agreement, the only discussion about floating holidays occurred when a representative of the Union raised the issue upon hearing that the Bureau had decided to withhold the Thanksgiving-period floating holiday. The Bureau, which indeed had reached that decision, responded that it was entirely within the Bureau's discretion to withhold floating holidays and that financial considerations prevented the Bureau from granting the Thanksgiving floating holiday. There was no discussion at all about the elimination of the two Christmas/New Year's period floating holidays.

REMEDY

Supervising attorneys. As discussed earlier, in 1991 the Bureau adopted a plan by which the Bureau would create a

new class of supervisors called supervising attorneys and gradually eliminate a class of bargaining unit positions—managing attorneys—by having the supervising attorneys perform the work previously done by managing attorneys. The Bureau should have bargained with the Union prior to effectuating this plan but did not do so. Indeed, the Bureau has at no time bargained with the Union concerning this transfer of work and positions out of the bargaining unit.

Where an employer has acted unilaterally, instead of in accordance with an agreement with the employees' representative or after impasse, the usual remedy is to require the employer to rescind its unilateral action. E.g., *Facet Enterprises*, 290 NLRB 152, 183 (1988). The accompanying order requires that of Bureau. Thus until the Bureau negotiates in good faith with the Union to agreement or impasse, the Bureau will be required to preclude supervising attorneys from performing any significant amount of bargaining unit work. (The Bureau may accomplish that either by recasting the supervising attorney classification or by eliminating it.)

I note that the complaint alleges only that “[s]ince on or about July 8, 1992 Respondent has failed and refused to bargain” about the supervising attorney issue. (Emphasis added.) But at the hearing the parties explored the entire history of the supervising attorney classification. I accordingly see no reason to limit the remedy to supervising attorney positions filled since July 8, 1992.

There has been no showing that any employee suffered any loss of pay or benefits because of this transfer of bargaining unit work to supervisors. Rather, it appears that the Bureau appointed supervising attorneys only in situations in which managing attorney slots were vacant. Accordingly no backpay is warranted for this violation of the Act.

Health insurance. The accompanying order requires the Bureau to eliminate the \$1 million cap from the health insurance that the Bureau provides its employees and to retain in force the terms of the old contract (with the addition of well-baby care) until the Bureau negotiates in good faith with the Union to agreement or impasse concerning changes in such health insurance. Additionally, if the cap has come into play in respect to any member of the bargaining unit (or dependent of such employee), the Bureau shall reimburse such employee, with interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987), for the resulting loss in reimbursements.

Floating holidays. The Bureau will be required to reinstate its floating holidays program and continue it in effect until the Bureau negotiates in good faith with the Union to agreement or impasse concerning changes in or the cessation of that program. In addition the Bureau will be required to make its bargaining unit employees whole for their loss of the three floating holidays during the 1992 holiday season by paying each such employee 3 days' pay plus interest as computed in *New Horizons for the Retarded*, supra.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended¹⁷

¹⁷If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, the Legal Aid Bureau, Inc., Baltimore, Maryland, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Unilaterally making changes in the health insurance or paid holiday benefits it provides to employees in the following bargaining unit, which is an appropriate unit for purposes of collective bargaining, without bargaining collectively with the National Organization of Legal Service Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 2320, AFL-CIO.

All full-time and regular part-time non-professional legal assistants, paralegals and professional employees, including managing attorneys, staff attorneys, law graduates, librarians and social workers employed by the Employer, but excluding the executive director, deputy executive director, chief attorneys, office managers, clerical workers and supervisors as defined in the Act.

(b) Unilaterally shifting significant amounts of bargaining unit work out of the unit by having supervisors perform work previously performed by members of the unit.

(c) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Until the Bureau negotiates in good faith with the Union to agreement or impasse, cease having supervising attorneys perform bargaining unit work.

(b) Rescind the \$1 million lifetime health insurance cap.

(c) In the event any member of the bargaining unit has suffered monetary loss by reason of the Bureau's imposition of the health insurance cap, make such employee whole in the manner set forth in the remedy section of the decision.

(d) Reinstate the floating holiday program and make its bargaining unit employees whole for their loss of floating holidays in 1992, in the manner set forth in the remedy section of the decision.

(e) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(f) Post at all of its facilities copies of the attached notice marked “Appendix.”¹⁸ Copies of the notice, on forms provided by the Regional Director for Region 5, after being signed by a representative of the Respondent, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other materials.

¹⁸If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading “Posted by Order of the National Labor Relations Board” shall read “Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.”

(g) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT make changes in the terms of the health insurance we provide to employees in the bargaining unit represented by the National Organization of Legal Service Workers, International Union, United Automobile, Aerospace and Agricultural Implement Workers of America, Local 2320, AFL-CIO (the NOLSW) without first bargaining with the NOLSW. The bargaining unit consists of the following employees of the Legal Aid Bureau:

All full-time and regular part-time non-professional legal assistants, paralegals and professional employees, including managing attorneys, staff attorneys, law graduates, librarians and social workers employed by the

Legal Aid Bureau, but excluding the executive director, deputy executive director, chief attorneys, office managers, clerical workers and supervisors as defined in the Act.

WE WILL NOT make changes in the paid holiday benefits we provide to employees in the bargaining unit without first bargaining with the NOLSW.

WE WILL NOT, without first bargaining with the NOLSW, shift work out of the bargaining unit by having supervisors perform work previously performed by members of the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the exercise of the rights guaranteed them by Section 7 of the Act.

WE WILL, until we negotiate in good faith with the NOLSW to agreement or impasse, cease having supervising attorneys perform bargaining unit work.

WE WILL rescind the \$1 million lifetime cap we imposed on the health insurance benefits of members of the bargaining unit.

WE WILL, in the event any member of the bargaining unit has suffered monetary loss by reason of the Bureau's imposition of the health insurance cap, make such employee whole, with interest.

WE WILL reinstate the floating holiday program and make bargaining unit employees whole for their loss of floating holidays in 1992 by paying each of them the equivalent of 3 days' pay, with interest.

LEGAL AID BUREAU, INC.