COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, COUNTY, & MUNICIPAL EMPLOYEES, LOCAL UNION NO. 1971	:	
v.	:	Case No. PERA–C-98-328-E
PHILADELPHIA OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT	:	

FINAL ORDER

On October 21, 1999, the City of Philadelphia (City), Office of Housing and Community Development (OHCD) filed timely exceptions, and a memorandum of law in support thereof, with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO) entered on October 1, 1999. In the PDO, the examiner concluded that the OHCD engaged in unfair labor practices in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA). The American Federation of State, County & Municipal Employees, Local Union No. 1971, (Union) filed a memorandum of law in response to the OHCD's exceptions on November 12, 1999. After a thorough review of the exceptions and all matters and responses thereto, the Board makes the following:

AMENDED AND ADDITIONAL FINDINGS OF FACT

28. After Mr. Brown had finished speaking, Mr. Kromer orally responded to Mr. Brown's presentation and distributed copies of the bargaining proposal OHCD planned to submit to AFSCME at the May 8th meeting. The proposal was distributed to council members and to the public attending the hearing. (N.T. 32, 65-66; Complainant Exhibit 5).

29. Mr. Kromer also distributed the proposals directly to those bargaining unit employes present at the proceedings. Mr. Kromer drafted and prepared copies of OHCD's written proposals in advance of the City Council Hearing, and he did not disclose said proposals to the Union leadership until the City Council Hearing. (N.T. 37, 73-75).

35. Mr. Kromer addressed the audience at the City Council Hearing, which included Union members, and stated the following:

> There has been a State-appointed mediator who has been assigned to both parties.
>
> . . . .
>
> During the most recent sessions, the mediator expressed some criticism of the conduct of Mr. Brown . . . .
>
> . . . .
>
> Some people have suggested that we release the 3 percent pay increase and that we implement that. Well, we tried something similar twice before, and it didn't work. We released the so-called signing bonus of the $1100 as a good-faith effort, expecting that

that would be a catalyst to lead to some progress in negotiations. We didn't achieve the progress in the negotiations.

We approved have [sic] Veteran's Day holiday without any substantial movement in the union.

I don't really know of any effective labor relations negotiator who gives away the economics of the contract and then expects to negotiate an appropriate agreement. It just doesn't make sense.

We've got to work together. I'm committed to doing that. I think Friday's session can be very productive, and I think that we can conclude discussion on the major issues on Friday if we're both committed to doing that. And to do that, we've got to negotiate.

. . . .

. . . I wanted to take this opportunity to give you a preview of the approach that we will propose to the mediator, which the union had recommended, on Friday just so that you'll have some advance notice of the approach that we intend to take based on my thinking after our meeting.

. . . .

And then, finally, we think that the layoff language that the mediator herself has drafted is a sensible approach to changing the layoff language. And with one moderate revision, we propose adoption of that language. Those four components of the proposal really would clear the table of some very substantive issues and, I think, enable us to move ahead. (City Council Hearing Transcript, 193-98).

36. After the City Council Hearing, the Union members articulated a lack of certainty about whether the Union was being truthful with them; they were confused about the status of negotiations and the Union's posture in the negotiations. (N.T. 39-40).

DISCUSSION

The Union is certified as the exclusive bargaining representative for thirty-three non-professional employes employed by the OHCD. The Union and the OHCD entered into a comprehensive Collective Bargaining Agreement (CBA) that was effective from July 1, 1992 through June 30, 1996. The parties engaged in at least 29 negotiation sessions since the expiration of the 1992-96 CBA. In the three-plus years since negotiations began, the OHCD and the Union have been unable to resolve their differences and negotiate a new agreement. Although the Union and the OHCD agreed to certain wage modifications, the parties are presently operating under the status quo as generally set forth in the 1992-96 CBA.

On May 6, 1998, the City Council held a public hearing to approve a budget plan allocating expenditures for public housing and community development among various City agencies and authorities. The City is required to approve and submit such a plan to the federal government to receive federal funding. John Kromer, the director of the OHCD and part-time negotiator with the Union, was present at the hearing; he gave the first presentation regarding the status of community development and the associated public funding. The Union president, Jeffrey Brown, and approximately 100 AFSCME members from various bargaining units were also present. Mr. Brown gave a public presentation at the City Council hearing. During this presentation, Mr. Brown argued that the budget plan could result in the loss of approximately 16 jobs from the Philadelphia housing agencies. Mr. Brown requested that Council members appropriate sufficient funds to the City's housing agencies to avoid potential layoffs of the

employes employed by those agencies. Mr. Brown argued that these employes are essential to the administration of the funding for housing development and many live in the communities targeted for development. According to Mr. Brown, the status quo of his bargaining unit under the 1992-96 CBA would not protect his bargaining unit from the potential layoffs that could occur under the proposed budget plan. In an effort to expedite an agreement after two years of bargaining, Mr. Brown asked the City Council to delay its approval of the budget. When Mr. Brown finished his presentation, Pete Matthews, president of AFSCME District Council 33, gave a presentation in support of Mr. Brown.

Mr. Kromer then responded by apprising the council members and the audience of the next scheduled collective bargaining session between the OHCD and the Union, which was two days later on May 8, 1998. In his response, Mr. Kromer apprised the audience of his rendition of past negotiations as well as his plans for the upcoming negotiation session. Mr. Kromer also distributed a written proposal articulating a clear change in OHCD's bargaining position regarding several issues that were the primary subjects of disagreement between the Union and the OHCD during two years of bargaining. This proposal had not previously been presented to the Union's negotiating team in collective bargaining. Mr. Kromer disseminated this document to City Council Members, Union members, and Mr. Brown. The next day, May 7, 1998, Mr. Kromer distributed the document to employes at the OHCD including both Union and non-union employes. At the May 8, 1998 bargaining session, OHCD presented the same written proposal to the Union negotiators that it previously distributed to Union members. There were no further negotiating sessions since May 8, 1998, and the parties had not entered into a new agreement as of the closing of the record.

The Hearing Examiner concluded that the act of disseminating contract proposals directly to Union members and Union leadership at the City Council hearing, which communicated a substantial change in OHCD's previous bargaining position, prior to informing Union leaders of these changes, constituted bad faith direct dealing. The OHCD specifically excepts to findings of fact numbers 25 through 29 inclusively asserting that these findings are "erroneous, incomplete, or both." The OHCD also excepts to the Hearing Examiner's conclusion that the distribution of the OHCD's bargaining proposal constituted bad faith bargaining. In support of this position, the OHCD specifically argues that the examiner erred as a matter of law when he viewed the effect of OHCD's contract proposal distribution as an attempt to undermine the unity of the bargaining unit and that there is no precedent providing authority for the examiner to draw that conclusion from the facts of this case.

A review of the findings of fact, numbers 25 through 29, reveals that the hearing examiner found that Mr. Kromer made a presentation at the City Council hearing on May 6, 1998, which was followed by a presentation by Mr. Brown. During his presentation, Mr. Brown requested that the City Council delay its passage of the budget until his bargaining unit procured a collective bargaining agreement from OHCD. Following Mr. Brown's presentation, Mr. Kromer distributed copies of a new bargaining proposal, which OHCD planned to submit to Union negotiators during the May 8 th 1998 bargaining session. This proposal was distributed to City Council members, bargaining unit members and members of the public attending the hearing. After conducting a thorough review of the record in this case, the Board concludes that these findings are indeed supported by substantial credible

evidence and shall remain final and conclusive. None of the OHCD's exceptions to these findings of fact either challenge or conflict with the substance of any of these findings. Most of OHCD's exceptions focus on claims or events that are unrelated to findings 25 through 29. These exceptions criticize the purpose of Mr. Brown's attendance and his behavior at the City Council hearing. However, this Board is only required to make findings of the ultimate facts upon which the order is based. The Board is not required to set forth conflicts in evidence or relate any facts which are contrary or irrelevant to the findings made. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975).

After limiting its exceptions to a challenge against findings numbered 25 through 29, the OHCD argues, in paragraph number 9 of its exceptions, that "[I]t is not true, as implied in the Findings of Fact and as explicitly represented on page 4 of the Proposed Decision and Order, that Kromer distributed the proposal to Brown *after* distributing it to bargaining unit members." (Respondent's Exceptions to Proposed Decision and Order, ¶ 9). The Board's review of the record in this matter reveals that there was conflicting evidence regarding whether Mr. Kromer distributed the subject written proposal to Mr. Brown before or after distributing it to Union members. Both Mr. Brown and Mr. Kromer testified at the hearing in this matter. During his direct examination, Mr. Brown testified in the following manner:

> Q. And when was the very first time you were apprised of the fact, you as the CEO of the union and chief negotiator were apprised of the fact that this was OHCD's position?
>
> A. At City Council public hearing, after John Kromer distributed to City Council and the audience [which included Union members] and then gave me a copy.

(Hearing Transcript, 37). However, Mr. Kromer remembered the events differently and testified on direct examination to the following:

> Q. Did you give Mr. Brown a copy of C-5 [the subject proposal]?
>
> A. I gave him the first copy I distributed.

(Hearing Transcript, 69). In PLRB v. Stairways, Inc., 10 PPER ¶ 10098 (Final Order, 1979), this Board stated the following:

> In many cases there exists on the record substantial evidence which would support the cases advanced by both parties on contested points of fact and it is the trial examiner's function in the first instance and the Board's on exceptions to resolve conflicts in the record consistent with its observations of the witnesses and the record as a whole. It is not enough as the Employer herein argues that there exist substantial evidence to support *its* interpretation of the conflicts in the record.

Id. at 160. The hearing examiner has exclusive province over credibility and the evidentiary weight given to each witness; he is free to accept or reject any witness' testimony in whole or in part. AFSCME, District Council 84, AFL-CIO v. Commonwealth of Pennsylvania, 18 PPER ¶ 18028 (Final

Order, 1986). Thus, after observing the demeanor of these two witnesses, the examiner was entitled to determine credibility and resolve this conflict in favor of Mr. Brown. However, for purposes of the Board's analysis of the remaining issues presented by the OHCD's exceptions, the OHCD's new bargaining proposal was distributed, for all practical intents and purposes, to Union members and the Union's negotiator simultaneously.

The OHCD's second set of exceptions challenges the examiner's authority to draw inferences from his findings of fact that yield the conclusion that the effect of distributing OHCD's next bargaining position directly to Union members at a public hearing operated to undermine the Union and fragment the unity of the bargaining unit. The Supreme Court of Pennsylvania has long recognized and sanctioned the power of this Board not only to determine the facts in controversy, but also to draw reasonable inferences and conclusions therefrom. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). Accordingly, a review of the record, the examiner's findings, and the applicable law governing the acceptable parameters of an employer's direct dealing with his employes, there is strong support for the reasonableness of the examiner's inferences and conclusions.

Section 701 of PERA states that "[c]ollective bargaining is the performance of the mutual obligation of the public employer and the *representative* of the public employes to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment." 43 P.S. § 1101.701 (emphasis added). The nature and extent of a union's representation of bargaining unit employes is further explained by Section 606, which provides that "[r]epresentatives selected by public employes in a unit appropriate for collective bargaining purposes shall be the *exclusive* representative of all the employes in such unit to bargain on wages, hours, terms and conditions of employment." 43 P.S. § 1101.606 (emphasis added). Therefore, PERA statutorily mandates that an employer's bargaining obligation is with the duly elected, certified union and its negotiating officials, not directly with the employes, either collectively or individually. The exclusivity provision of Section 606 is necessary to ensure the proper functioning of the collective bargaining process. The paramount importance of the exclusive representative in negotiations is underscored in Section 1201(a)(5), which makes it an unfair labor practice for an employer to "[r]efus[e] to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit." 43 P.S. § 1101.1201(a)(5). An employer engages in an unfair practice when it bypasses the exclusive bargaining representative and deals with the employes. Association of Mifflin County Educators v. Mifflin County School Dist., 21 PPER ¶ 21127 (Final Order, 1990). Accordingly, this Board has stated the following:

> To afford public employes the full benefit and protection of the collective bargaining rights guaranteed to them by the Act, it is necessary to insulate them from any efforts by the public employer, direct or indirect, to undercut the authority of the employes' duly selected representative, or fragment the unity of the bargaining unit. Any such action by the public employer is considered to be an unfair practice.

PLRB v. Northern Bedford School Dist., 7 PPER 194, 195 (Nisi Decision and Order, 1976).

However, an employer has a protected right to free speech. PLRB v. Portage Area School Dist., 7 PPER 325 (Nisi Decision and Order, 1976). Consequently, although an employer's communication with its employes must not undermine the union's status with its members, City of Lancaster, 2 PPER 132 (Decision of PLRB, 1972), "there is no absolute prohibition against employers communicating with their employes during negotiations." Portage, 7 PPER 326. In PLRB v. Dallastown Area School Dist., 7 PPER 245 (Final Order, 1976), this Board held that, where an employer distributes a memorandum to its employes during the course of negotiations, which refers to matters that are the subject of such negotiations, the employer has committed an unfair labor practice. Id. In Philadelphia Federation of Teachers, Local #3 v. Philadelphia School Dist., 25 PPER ¶ 25049 (Proposed Decision and Order, 1994), it was determined that an employer exceeds the limits of free speech in labor relations and engages in unlawful direct dealing with its employes when it presents its employes with a new, specific proposal at a staff meeting when the proposal concerned a matter that was the subject of negotiations between the employer and the union negotiators. Such direct dealing undermines the status of the union, as exclusive bargaining representative, and undermines the employes' confidence and trust in the union. Id. In PLRB v. West Chester School Board, 3 PPER 75 (Nisi Decision and Order, 1973), the Board determined that an employer memorandum, which was disseminated to employes and referred to negotiated matters over which the parties were at impasse, circumvented the collective bargaining process. The Board reasoned that the communication could not possibly disclose or inform bargaining unit members of the full context of negotiations, discussions, and arguments defining the respective positions of the parties and the reasons for those positions. Id. at 76.

Moreover, the National Labor Relations Board (NLRB) has resolved the issue of an employer's communication with its employes under facts analogous to those of the instant case. In Detroit Edison, 310 NLRB 564, 144 LRRM 1095 (1993), the employer had negotiated the phase-out of certain senior plant operator positions. In order to procure a new contract, the issue was excluded from "main-table" negotiations. However, while the bargaining unit representative was subsequently on vacation at his home, the plant supervisor presented him with a memorandum from the employer addressing new proposals concerning job security and a plant reduction or closure. This memorandum was distributed to the employes a few days later without the unit representative's involvement, or consent, and without having been bargained. The NLRB, in Detroit Edison, held that, under these circumstances, "the [u]nion was not afforded any meaningful opportunity to consider the . . . proposal before it was communicated directly to employees because the evidence fail[ed] to show that the sweetened proposal was previously offered by the [employer] in negotiations with the [u]nion." Id. at , 144 LRRM at 1095. Accordingly, an employer engages in direct dealing and bypasses the exclusive bargaining representative when a bargainable matter is not first presented to the union representative in a bargaining atmosphere where the union negotiator has a meaningful opportunity to consider the proposed matter in the context of bargaining without external influences or reactions from employes, who may not be privy to the full panoply of issues relevant to the proposal or the negotiations in general.

This Board finds the NLRB's analysis in Detroit Edison to be persuasive and adopts that analysis herein. An employer is not necessarily within its protections merely because it communicated a new bargaining

proposal to the union leadership before its employes. The Board, therefore, must conduct a qualitative analysis of the circumstances surrounding an employer's communication with the exclusive bargaining representative and employes. In this case, the OHCD distributed a memorandum containing its new bargaining position on a matter over which the parties contentiously disagreed during bargaining. This memorandum was simultaneously distributed to the Union's negotiator and Union members at a City Council hearing. Consequently, the OHCD's new bargaining position was revealed simultaneously to the employes and their bargaining representative. This Board concludes that the OHCD failed to communicate its new bargaining position to Mr. Brown, the Union representative, in a bargaining atmosphere as required by Section 1201(a)(5), where he could have been afforded a meaningful opportunity to consider the proposal, within the meaning of Detroit Edison, before the proposal was communicated to Union members. Mr. Brown did not have an opportunity to contemplate the OHCD's proposal without being influenced by the initial impressions and external pressures from Union members. As this Board stated in Dallastown, *supra*, "[t]his type of conduct emasculates the statutory authority of the exclusive representative to function on behalf of its members which an employer must recognize and frustrates the bargaining process and for this reason violates the good faith requirement of section 1201(a)(5)." Id. at 245. Therefore, the OHCD unlawfully bypassed its employes' exclusive bargaining representative in this case by directly dealing with its employes concerning a new bargaining proposal.

Finally, a thorough review of the record in this matter reveals that Mr. Brown did not initiate bargaining at the City Council hearing. At the City Council Hearing, Mr. Brown did in fact make a statement concerning the Council's adoption of the proposed budget and its concomitant appropriations. The adoption of a budget is a managerial prerogative, as expressly provided in Section 702 of PERA. Mr. Brown was not bargaining over mandatory subjects of bargaining with the City Council. He was entitled to attend the public hearing and provide his opinion to influence the Council's decision on the budget, which is a managerial prerogative. After this statement, Mr. Kromer distributed a memorandum that communicated the OHCD's position on mandatory subjects of bargaining. This response, which was previously printed and copied, was obviously well prepared in advance of the City Council Hearing. Additionally, at or near the time he distributed the memorandum, Mr. Kromer stated the following:

> I wanted to take this opportunity to give you a preview of the approach that we will propose to the mediator, which the union had recommended, on Friday just so that you'll have some advance notice of the approach that we intend to take based on my thinking after our meeting.

(City Council Hearing Transcript, 197). After summarizing the OHCD's position on the four issues presented, Mr. Kromer concluded in the following manner:

> finally, we think that the layoff language that the mediator herself has drafted is a sensible approach to changing the layoff language. And with one moderate revision, we propose adoption of that language. Those four components of the proposal really would clear the table of some very substantive issues and, I think, enable us to move ahead.

(City Council Hearing Transcript, 198). The above-quoted language clearly supports the inference that Mr. Kromer intended to advance OHCD's bargaining position through the act of bypassing Union negotiators and appealing directly to Union members. Mr. Kromer's tactic of referring to OHCD's adoption of the mediator's language was an attempt to demonstrate directly to Union members that OHCD was a flexible party ready to compromise and that the reason why there is no contract is because of the Union officials. As noted in finding of fact number 35, Mr. Kromer's statement that "During the most recent sessions, the mediator expressed some criticism of the conduct of Mr. Brown," undermined the employes' perception of the effectiveness of their negotiator. Also, after informing the audience at the City Council Hearing that the parties reached agreement on wage increases, even though there were other matters that remained at issue, Mr. Kromer stated that he did not "really know of any effective labor relations negotiator who gives away the economics of the contract and then expects to negotiate an appropriate agreement. It just doesn't make sense." (City Council Hearing Transcript, 196). Mr. Kromer publicly embarrassed the union leadership causing the employes to doubt the trust that they placed in their union negotiators to be able to effectively negotiate an agreement that represents the interest of those employes. These statements go beyond the OHCD's right to exercise free speech with truthful summarization of the status of negotiations; they effectively undermine the Union's role in collective bargaining. Although some of these statements permissibly relate to the history of bargaining, the above-quoted language, indicating that OHCD was proposing the adoption of the mediator's language regarding layoffs, is clearly a bargaining proposal that was previously undisclosed to the Union representative. Therefore, Mr. Kromer engaged in unlawful direct communication, beyond the limits of free speech, when he revealed OHCD's newest bargaining position to its employes and the union leadership at the City Council hearing.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order, as amended herein, final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed, and the Proposed Decision and Order, as amended herein, is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-eighth day of March, 2000. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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v.	:	Case No. PERA–C-98-328-E
PHILADELPHIA OFFICE OF HOUSING AND COMMUNITY DEVELOPMENT	:	

AFFIDAVIT OF COMPLIANCE

The Philadelphia Office of Housing and Community Development hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (5) of PERA to wit: that it has ceased and desisted from interfering with, restraining or coercing employes in the exercise of their guaranteed Article IV rights; that it has ceased and desisted from refusing to bargain collectively in good faith with its employes' exclusive bargaining representative including but not limited to discussing the proposed terms disseminated at the May 6, 1998 City Council Hearing; that it has posted the proposed decision and order and final order as directed; and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____
Signature of Notary Public