

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED STEELWORKERS OF AMERICA :
 :
 v. : Case No. PERA-C-04-7-W
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 FORD CITY BOROUGH :
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 FORD CITY BOROUGH :
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 v. : Case No. PERA-C-04-313-W
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 UNITED STEELWORKERS OF AMERICA :

FINAL ORDER

On April 7, 2005, the United Steel Workers of American (Union) filed timely exceptions with the Pennsylvania Labor Relations Board to a Proposed Decision and Order (PDO), issued March 24, 2005. On April 13, 2005, Ford City Borough (Borough) also filed timely exceptions to the PDO. The Examiner consolidated the Union's charge (PERA-C-04-7-W) and the Borough's charge (PERA-C-04-313-W) for hearing and disposition. In the PDO, the Examiner sustained the Union's charge and concluded that the Borough violated Section 1201(a)(1) and (5) of the Public Employe Relations Act(PERA) by failing to negotiate at reasonable times and provide requested information. The Examiner also sustained the Borough's charge and concluded that the Union violated Section 1201(b)(3) of PERA by refusing to negotiate with the Borough during the pendency of the Union's charge. On May 2, 2005, the Union timely filed a brief in support of its exceptions in compliance with an extension granted by the Board Secretary. On May 3, 2005, the Borough timely filed a brief in support of its exceptions also in compliance with an extension granted by the Board Secretary.

After a thorough review of the exceptions and the record, the Board makes the following:

AMENDED FINDING OF FACT

11. By letter dated February 18, 2004, the Borough Council President, Steven Kozuch, informed Mr. Wolfe of the following:

[O]n Monday, February 9, 2004, a meeting was held at the Ford City Borough Office. This meeting was a continuation of ongoing labor negotiations between the Borough of Ford City and the Non-Uniformed Employees whom you represent. As you may recall, the Borough offered at the conclusion of that meeting, to meet yet again in a continuing effort to negotiate a contract with the Non-Uniformed Employees. At that time, you stated that you saw no need to meet again and that you were recommending that your members reject the offer made by the Borough and were recommending that they strike.

The Borough has received no further communication from you. In an effort to protect the health and safety of our citizens should your members choose to strike, the Borough has entered into discussions and sought costs from several waste management firms to insure the continued health and safety of these citizens.

It appears that using an outside waste hauler may lead to significant savings for the Borough. We would like to meet with you to discuss this issue and to give you the opportunity to respond.

(Union Exhibit 13).

DISCUSSION

On June 27, 2003, the Union requested bargaining in anticipation of the December 31, 2003 expiration of the parties' collective bargaining agreement. In early November

2003, Union representative and chief negotiator David Wolfe and Borough Council member Homer Pendleton tentatively scheduled negotiations for seven dates in November and four dates in December, 2003. Mr. Wolfe also gave to Mr. Pendleton a copy of the Union's proposals for a three-year successor collective bargaining agreement. Mr. Pendleton cancelled each scheduled negotiation session as it approached.

On December 18, 2003, the parties held their first negotiation session. At this time, the Borough's negotiator and spokesperson, John Rudosky,¹ represented that the Borough's pension fund was underfunded. The Union negotiator, Mr. Wolfe, requested the summary plan description for the pension plan, for actuarial reports of the pension plan for the previous five years and for ERISA forms known as 5500's to verify the Borough's claims of underfunding. Mr. Wolfe also asked for the summary plan description for the Borough's health plan and indicated that a previous quote by the Steelworkers Health and Welfare Fund was no longer viable because the Borough had included non-bargaining unit members in the census upon which the quote was based. Mr. Rudosky presented proposals by the Borough to change various provisions of the expiring collective bargaining agreement. The parties agreed to meet again on December 23, 2003, however, the Borough later cancelled.

On December 30, 2003, the parties again participated in negotiations. On January 8, 2005, the Union filed an unfair practice charge. On January 20, 2004 and February 9, 2004, the parties held more bargaining sessions. During the February 9, 2004 session, Mr. Rudosky stated that the Borough's proposals were its best offer, to which Mr. Wolfe responded that he would be recommending a strike. Subsequently, the parties exchanged letters, during which time the Union did not agree to bargaining sessions. Rather, the Union proposed waiting for its unfair practice charge to be resolved.

On April 7, 2004, the Borough implemented a policy prohibiting sexual harassment. On April 20, 2004, the parties held their next negotiation session, and two mediators were present. Mr. Rudosky gave to Mr. Wolfe one of the requested actuarial reports for the pension fund. On April 26, 2004, the parties held their next negotiation session. Mr. Rudosky presented counter-proposals. At the end of the session, Mr. Rudosky withdrew one provision/sentence of an entire counterproposal in a manner consistent with the bargaining practices of both parties throughout negotiations. On April 29, 2004, the parties held their next negotiation session. Mr. Wolfe agreed to submit the Borough's proposals to the Union's membership for a ratification vote. Later that day the Union's counsel informed the Borough that the membership had voted to reject the proposals. On May 4, 2004, the parties held their next negotiation session. At the end of the session, Mr. Rudosky again withdrew proposals. On May 17, 2004, the parties held their next negotiation session. Mr. Rudosky agreed to take the Union's proposals to the Borough Council for a ratification vote. By letter dated May 19, 2004, the Borough rejected the Union's proposals. As of June 23, 2004, the Borough had not provided the Union with the summary plan descriptions for the health and pension plans, the ERISA forms known as 5500's or the remaining requested actuarial reports for the pension plan. On June 28, 2004, the Union filed an amended charge. On July 1, 2004, the Borough filed its unfair practice charge against the Union.

BOROUGH'S EXCEPTIONS

In its exceptions, the Borough contends that Findings of Fact Nos. 3 and 5 are in error. The Borough claims that the Examiner's discussion on pages 6 and 7 of the PDO, regarding the Borough's delay of negotiations, is in error. Findings of fact must be supported by substantial, legally competent evidence. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942); State System of Higher Education v. PLRB, 737 A.2d 313, 315, n.6 (Pa. Cmwlth. 1999); Teamsters Local 429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000); Manuel Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1997). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Kaufman, supra (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)).

¹ Mr. Rudosky was elected to the Ford City Borough Council in November 2003 and did not assume the office of Council member until January, 2004.

Finding of Fact No. 3 provides, in relevant part, that Borough and Union representatives "[i]n early November 2003 . . . tentatively scheduled negotiations for November 17, 18, 19, 24, 25, 26 and 28, 2003, and December 10, 12, 18 and 22, 2003. Mr. Wolfe also gave to Mr. Pendleton a copy of the Union's proposals for a three-year successor collective bargaining agreement." (F.F. 3; PDO at 2). Finding of Fact No. 5 provides that "[a]s each of the negotiation sessions scheduled for November 17, 18, 19, 24, 25, 26 and 28 and December 10 and 12 approached, Mr. Pendleton cancelled them." (F.F. 5; PDO at 2).

A review of the record reveals that Findings of Fact Nos. 3 and 5 are supported by substantial evidence. Also, Findings 2, 3 and 5 taken together support the conclusion that the Borough delayed negotiations with the Union between June and December 2003. Our Supreme Court has held that the bargaining timetable set forth in PERA is mandatory. City of Philadelphia v. PLRB, 531 Pa. 489, 614 A.2d 213 (1992). Moreover, the Commonwealth Court has recognized that the mandatory timetables established in Article VIII of PERA "nowhere address or limit the public employer's duty to negotiate; that is, 'to meet at reasonable times and confer in good faith with respect to wages, hours and other terms and conditions of employment.'" Richland Sch. Dist. v. PLRB, 454 A.2d 649 (Pa. Cmwlth. 1983)(quoting 43 P.S. § 1101.701). In PLRB v. Reynolds Sch. Bd., 3 PPER 228 (Nisi Decision and Order, 1973), the Board concluded that an employer bargained in bad faith by waiting to commence bargaining for two months after receiving the union's bargaining request where there was nothing in the record to excuse or explain the delay. Although the Borough argues in its brief that it had no obligation to bargain with the Union until it received the Union's first written bargaining proposal, in IAFF, Local 1038 v. Allegheny County, 28 PPER ¶ 28116 (Final Order, 1997), the Board stated that "a refusal to bargain occurs where a bargaining demand is made and no response occurs within a reasonable amount of time." 28 PPER at 255. The Union first expressed, in writing, its interest in bargaining a new collective bargaining agreement in June 2003. (F.F. 2). The Borough did not respond to this request for several months, which constitutes a refusal to bargain within the meaning of Reynolds. The Borough did not schedule bargaining sessions until November 2003. As those dates between mid-November and mid-December 2003 presented, the Borough cancelled each session, and the parties held their first bargaining session on December 18, 2003.

The Borough also argues that, because most of the Borough Council members are employed full time, "it would not be logical to conclude that the Borough Council would be able to schedule negotiating sessions on all the dates testified to by Mr. Wolfe." Borough Brief at 4.² However, the Borough has not offered any evidence on the record to contradict the testimony of Mr. Wolfe that the Borough indeed scheduled those dates in November and December of 2003 for negotiation. The Borough also has not offered record support for its bald assertion that scheduling the dates in that manner "would not be logical" due to the employment schedules of the Borough Council members, when it is certainly within contemplation to meet in the evenings, as the Board has repeatedly observed as a common practice throughout the Commonwealth among local government officials holding full-time employment elsewhere. Further, even after negotiations belatedly commenced, the record does not show that the employer negotiated with all Borough Council members present, nor does the law require that all elected officials comprising the governmental employer be present for negotiations.

The Borough claims that the testimony of Mr. Wolfe is in conflict with the documents that Mr. Wolfe himself prepared regarding the scheduling of dates for bargaining sessions. The Borough further argues that, due to this conflict and "on the basis of credibility, it should be found that none of the negotiating sessions were scheduled." The Borough, however, does not designate any specific documentation in this record to support its position that the documentation prepared by Mr. Wolfe contradicts his testimony concerning the scheduling of dates in November and December of 2003. Also, after reviewing the record, the Board does not find such a conflict to exist. Moreover, assuming for purposes of this argument only that a conflict exists, the Board has long held the view that the examiner's function is to resolve conflicts in evidence, make findings of fact from conflicting evidence and draw inferences from those findings of fact. AFSCME, District Council 88 v. Warminster Township, 31 PPER ¶ 31156 (Final Order,

² Those dates are November 17, 18, 19, 24, 25, 26 and 28, 2003 and December 10, 12, 18 and 22, 2003. (F.F. 3).

2000). Also, because the hearing examiners are present to observe the demeanor of the witnesses, the Board strictly adheres to its long-standing policy that it will not disturb the credibility determinations of its hearing examiners absent the "most compelling of circumstances." AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). Other than an unsupported assertion that there is a conflict, the Borough has not offered any compelling circumstances, as required, to justify reversing the Examiner's credibility determinations.³

Moreover, the Borough has not offered any legal authority supporting its position that a written proposal from the Union was necessary to trigger its bargaining obligation or that "the normal practice engaged in by parties to union labor negotiations throughout the Commonwealth of Pennsylvania [is that] no negotiations begin until a written Proposal is first received by the municipality from the Union." (Borough Brief at 3). Indeed the law supports the opposite conclusion. Spring Arbor Dist. Co., 312 N.L.R.B. 710, 145 L.R.R.M. 1175 (1993)(stating that it has long been held that a valid request to bargain need not be made in any particular form or words so long as the request clearly indicates the desire to negotiate); Landers Dump Truck, Inc., 192 N.L.R.B. 207, 77 L.R.R.M. 1729 (1971) (same); Frick, Vass & Street, Inc., 270 N.L.R.B. 459, 116 L.R.R.M. 1098 (1984)(oral requests to bargain a new contract without specific proposals are sufficient). Neither has the Borough offered any factual support on this record that the "normal practice" of the parties in this case is not to respond to negotiation requests until the Union presents its first written proposal. We conclude that complying with the "good-faith" requirements of PERA, at a minimum, requires employers to respond to the solicitation to bargain within a reasonable time. The Union's letter stated as follows: "We hereby give you notice of our desire to meet and confer with you at such early time and suitable place as may be mutually convenient." (Union Exhibit 2). The letter further stated that "[w]e await your suggestion as to time and place of meeting." (Union Exhibit 2). Indeed, the record shows and the Examiner found that the Borough scheduled negotiation sessions without having in its possession bargaining proposals from the Union.

The Borough excepts to the Examiner's finding and conclusion that it failed to provide information requested by the Union. The Borough claims that the Union failed to meet its obligation to specify the exact information sought, the significance of the information sought and its unavailability elsewhere. The Borough cites no authority, and the Board has located none, supporting the Borough's proposed standard that the Union has the exacting burden to prove that (1) information requests must be specific and exact; (2) the requested information must be significant; and (3) the requested information was not available anywhere else. Rather, the Commonwealth Court has long followed the more liberal standard articulated by the United States Supreme Court in National Labor Relations Board v. ACME Industrial Co., 385 U.S. 432, 87 S.Ct. 565 (1967) and by the National Labor Relations Board in Transport of New Jersey, 233 N.L.R.B. 694, 97 L.R.R.M. 1204 (1977). Commonwealth of Pennsylvania, Department of Corrections, SCI Muncy (Muncy) v. PLRB, 541 A.2d 1168 (Pa. Cmwlth. 1988). The Muncy Court opined that "[t]he Board must make the initial determination as to whether a request for information is relevant." Id. at 1170. "In determining whether a union has made a request for relevant information, a liberal standard has been adopted. In order to succeed in its request for information, a party need only show that its request is factually relevant." Id. In adopting the National Board's position in Transport of New Jersey, the Muncy Court noted that "an employer has a duty to furnish a union information relevant and necessary to enable it to intelligently carry out its statutory obligations and that under the standard of relevancy, it is sufficient that the union's request for information be supported by a showing of probable or potential relevance." Id. at 1171 (emphasis added; accord, Commonwealth of Pennsylvania v. PLRB, 527 A.2d 1097 (PA. Cmwlth. 1987)). Accordingly, the Borough's proposed standard for evaluating an employer's statutory obligation to satisfy a union's information request is contrary to the law in the Commonwealth.

³ Also, it is within the province of the fact-finder to accept or reject the testimony of any witness, in whole or in part. Killian v. Workmen's Compensation Bd. of Review, 434 A.2d 906 (Pa. Cmwlth. 1981). Accordingly, although there is no conflict on this record, the Examiner could have lawfully credited Wolfe's testimony over any prepared documents that allegedly could have been in conflict.

The record shows that the parties were specifically bargaining over, inter alia, health and pension matters. (F.F.6). During the December 18, 2003 bargaining session, the Union representative asked the employer representative "for the summary plan description for the pension plan, for actuarial reports of the pension plan for the previous five years and for ERISA forms known as 5500's." (F.F. 6). The record also shows that the Union "asked for the summary plan description for the Borough's health plan." (F.F. 6). The Board concludes that the requested information regarding health and pension benefits is, at a minimum, probably or potentially relevant within the meaning of Muncy, supra, ACME, supra and Transport of New Jersey, supra. Therefore, the Borough was statutory obligated to provide the Union with that information to enable the Union to adequately bargain those issues during contract negotiations. The record demonstrates, as found by the Examiner, that "[a]s of June 23, 2004, the Borough had not provided the Union with the summary plan descriptions for the health and pension plans, with the ERISA forms known as 5500's or with any other actuarial reports for the pension plan." (F.F. 26). Accordingly, the Borough failed to meet its statutory obligation to provide requested and potentially relevant information during bargaining.

The Borough also argues that it "made copies of requested information available to the Union, not just access," Borough's Exceptions ¶ 2, as the Examiner concluded. The duty to provide information emanates from the statutory duty to bargain in good faith. PNA v. Commonwealth of Pennsylvania, Department of Public Welfare, 17 PPER ¶ 17125 (Final Order, 1986). A public employer's duty to provide requested information to a Union is based on the premise that a Union would be unable to fulfill its statutory obligation as exclusive employee representative in bargaining and other matters without that information. Consequently, no meaningful bargaining would occur. Id. An unreasonable or inexcusable delay in providing relevant information is a violation of an employer's statutory obligation to bargain in good faith. North Hills Educ. Ass'n v. North Hills Sch. Dist., 29 PPER ¶ 29063 (Final Order, 1998).

Other than one actuarial report that Rudosky gave to Wolfe at the April 20, 2004, bargaining session, however, the record does not support the Borough's argument. The record is devoid of evidence that the Borough prepared "copies" of any documents pertaining to the remaining information requested by the Union (i.e. summary plan description for the pension plan, remaining actuarial reports for the pension plan for the previous five years, ERISA forms known as 5500's, and summary plan description for the Borough's health plan). The Borough offered access only to the requested financial, records, budget documents and Borough minutes, at the cost of \$.50 per sheet, to the Union's accountant. For this reason, the Examiner properly concluded that the Borough unlawfully refused to provide the requested information regarding the Health and Pension plans, except for one actuarial report, and recognized that the Borough provided access to the Union to retrieve the records pertaining to the Borough's finances, budget and minutes.⁴

In its brief, the Borough concedes that the Union requested information, which the Borough failed to provide. The Borough, however contends that after it received an oral request from Mr. Wolfe for the summary plan description for the pension plan, the actuarial reports for the pension plan for the previous five years, the ERISA forms known as 5500's and the summary plan description for the Borough's health plan, the Union submitted a written request for additional information, i.e., the letter from the Union accountant requesting financial data, budget records, and Borough minutes. The Borough argues that "[i]t is reasonable to conclude, therefore, that the information contained in this letter superceded any other oral request for information." (Borough Brief at 7).

However, the Borough did not establish on this record that indeed the Borough believed that the second request in the form of a letter from the Union accountant superceded Mr. Wolfe's previous oral request. The Borough failed to elicit testimony from its witness that the Borough in fact believed that the second request superceded the first. Further, the Borough did not provide any support for its assumption that, where separate requests for information are submitted by two different people from the same

⁴ The Examiner did not order the Borough to provide copies of documents or access to the Union regarding the information requested by the Union accountant because he did not conclude that the Borough behaved or responded unlawfully to that request. Accordingly, the accountant's request for information is not an issue here.

Union during contract negotiations, the second request is intended to rescind the first request. Additionally, the Borough has not provided any legal authority for this proposition. The Borough simply has not established that it was justified in ignoring any information requests. Rather than making "assumptions", the Borough could easily have sought clarification from its bargaining counterpart by contacting either Mr. Wolfe or the accountant, Mr. Behr, or both in the fulfillment of its statutory obligations and the spirit of good-faith bargaining.

The Borough also contends that the "requested information was not of significance in the negotiations, as the negotiations continued for several months without the requested information being mentioned again." (Borough Brief at 9). However, the Borough's unilateral, subjective determination concerning the relevance or significance of the requested information is not a defense or justification for refusing to comply with the Union's request for the information. As previously concluded herein, the subjective "significance" of requested information to the employer during bargaining is not a relevant inquiry in determining the union's entitlement to the information or the employer's obligation to provide the requested information.

Moreover, the Borough's argument is fallacious. The fact that the Union was forced to continue negotiating without the requested information does not mean that the requested information was not relevant or probative (or for that matter "significant"). One reason why there is no new contract is that the Union has been unable to assess the condition of the pension, which the Borough claimed was underfunded, the health care plan and the Borough's finances owing in part to the Borough's failure to provide information to enable the Union to make an informed decision about concessions regarding pension and health care contributions and wages.

UNION'S EXCEPTIONS

In its exceptions, the Union contends that Finding of Fact No. 19 and the analysis on page 7 of the PDO regarding the unilateral implementation of a sexual harassment policy are erroneous and not supported by substantial evidence. The Union contends that the Examiner ignored evidence regarding the policy. Finding of Fact No. 19 provides the following: On April 7, 2004, the Borough implemented a policy prohibiting sexual harassment. (Borough Exhibit 4)." (F.F. 19). The Board concludes that the record contains substantial, competent evidence to support Finding of Fact No. 19 that the Borough indeed implemented a sexual harassment policy on April 7, 2004. The Board also agrees with the Examiner's analysis and conclusion that the Borough's unilateral implementation of the sexual harassment policy was lawful. The Examiner noted that the Board has previously held that a public employer possesses a managerial prerogative to implement a sexual harassment policy that identifies and describes the nature of the prohibited conduct and is not vague or overbroad. Fraternal Order of Police, Lodge No. 9 v. City of Reading, 29 PPER ¶ 29146 (Final Order, 1998). The Board, in City of Reading, opined the following:

[A public employer's] effort to eradicate hostile work environments consistent with law to make government more efficient and effective, enhances the public's perception of the integrity of government, provides a guideline for determining the scope of appropriate and proper action and behavior of public employes and increases public confidence in the effectiveness of government and its employes. We therefore find that the [sexual harassment policy] in question does not bear a rational relationship to employes' duties but rather constitutes an appropriate exercise of managerial authority including the direction and supervision of personnel.

City of Reading, 29 PPER at 345. The Borough's sexual harassment policy (Borough Exhibit 4) specifically identifies the type and nature of the conduct prohibited by the Borough and "sets forth commonly understood examples of offensive behavior which employers have the right to discourage in the workplace and identifies categories of discrimination sought to be avoided." City of Reading, 29 PPER at 344. The Examiner properly relied on City of Reading in concluding that the Borough's unilateral implementation of the sexual harassment policy was a matter of managerial prerogative.

Furthermore, the Examiner did not ignore evidence. He was required to set forth only those facts that were necessary to support his decision. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). The Examiner's function is to resolve conflicts in evidence, make findings of fact from conflicting evidence and draw inferences from those findings of fact. AFSCME, District Council 88 v. Warminster Township, 31 PPER ¶ 31156 (Final Order, 2000), and it is not sufficient to argue that there is substantial evidence to support a contrary finding where the Examiner credited conflicting evidence. Id. After reviewing the record and the PDO, the Board concludes that the Hearing Examiner indeed made those findings that were necessary to support his conclusions and that he did not ignore evidence. Rather he found as fact that which he credited which in turn led to his conclusions of law.

In its brief, the Union argues that this case is distinguishable from City of Reading, supra, because the Borough's purpose of implementing the sexual harassment policy in this case was to comply with requirements imposed by its insurance carrier rather than to eradicate a hostile work environment as in City of Reading. (Union's Brief at 3-4). The Union additionally suggests that the Borough behaved unlawfully by implementing the policy on April 7, 2004, even though the insurer did not require the policy to be in place until May 6, 2004, and by ignoring the Union's request for insurance documents to prove that the carrier required the sexual harassment policy.

A fair reading of City of Reading indicates that the employer in that case enacted a sexual harassment policy to eradicate an existing problem. Also, there is no evidence in this case that an existing, hostile environment existed. However, contrary to the Union's argument, we do not believe "[t]hat this is a very important [or determinative] distinction." (Union's Brief at 4). In affirming the examiner's dismissal of the charge, the Board, in City of Reading, emphasized, not only that the sexual harassment policy at issue sought to bring integrity and efficiency into government operations by eradicating behavior, but also that the policy served to guide acceptable behavior prospectively. In this regard, the Reading Board relied on Council 13, AFSCME v. PLRB (Code of Conduct), 479 A.2d 683 (Pa. Cmwlth. 1984). In Code of Conduct, the Commonwealth Court affirmed the Board's determination that the employer's code of conduct constituted a managerial prerogative because the "purpose of the public sector employer is to serve the public interest in the most efficient and effective way," id. at 686, while striking the proper balance with the public employer's obligation to bargain over wages, hours, and working conditions under PLRB v. State College Area Sch. Dist., 461 Pa. 494, 337 A.2d 262 (1975).

Accordingly, the sexual harassment policy implemented by the Borough is a code of conduct, specific to preventing hostile work environments and sexual harassment, which improves public perception of the efficiency and integrity of local government operations which the Commonwealth Court and the Board have consistently held to be legitimate managerial concerns that outweigh any impact on employees terms and conditions of employment. The efficiency in government operation is in the interest of the public served by those operations and, therefore, is a legitimate interest of the public employer. Code of Conduct, 479 A.2d at 686. The Board properly relies on precedent and need not apply the balancing test to determine whether a matter is a mandatory subject of bargaining unless the proponent establishes sufficient facts of record warranting a departure from precedent. Teamsters, Local 77 & 50 v. PLRB, 786 A.2d 299 (Pa. Cmwlth. 2001); Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002).

The Union next argues that the Examiner erred in concluding that the Borough did not engage in surface bargaining or employ dilatory tactics in bad faith. The Union contends this conclusion ignores record evidence. The Board adopts the Examiner's analysis and conclusion regarding the surface bargaining issue and dismisses this exception. As noted by the Examiner, the Board examines the totality of the circumstances to determine whether a party has engaged in unfair practices by bargaining in bad faith. Commonwealth Bar Ass'n v. Commonwealth of Pennsylvania, Public Utility Comm'n, 35 PPER 113 (Final Order, 2004). "'Good faith' in collective bargaining cases means that the parties must make `a serious effort to resolve differences and reach a common ground.'" Upper Moreland Twp. v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997) (quoting Appeal of Cumberland Valley Sch. Dist., 483 Pa. 134, 142, 394 A.2d 946, 950 (1978)). A party does

not commit a statutory violation simply by refusing to compromise or make concessions or counterproposals on particular subjects being negotiated, Morrisville Sch. Dist. v. PLRB, 687 A.2d 5 (Pa. Cmwlth 1996); PLRB v. Commonwealth of Pennsylvania, State Liquor Control Bd., 367 A.2d 805 (Pa. Cmwlth. 1977), or by withdrawing a proposal. Northern Bedford County Sch. Dist., 26 PPER 26199 (Final Order, 1995). Indeed, Section 701 of PERA provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession." 43 P.S. § 1101.701.

As the Examiner stated, "[t]he record shows, however, that the Borough agreed to some of the Union's proposals and made a number of proposals of its own." (PDO at 8). Although the Borough did commit unfair practices in cancelling numerous bargaining sessions and failing to provide requested information, the totality of its behavior has not manifested intransigence or a "demonstrated unreasonableness, or displayed a single-minded purpose to thwart the public policy." PLRB v. Homer-Center Sch. Dist., 12 PPER § 12169 (Final Order, 1981), such that the Borough engaged in surface bargaining.

The Union argues in its brief that, at the April 26, 2004 bargaining session, the Borough "announced at the end of the meeting that management was withdrawing all of its proposals." (Union Brief at 17)(emphasis omitted). However, the record does not support the Union's position. Union Exhibit 23 and the pages 108 through 113 of the notes of testimony, as cited by the Examiner, and Mr. Rudosky's testimony taken as a whole clearly establishes that the Borough and the Union were both proposing and withdrawing individual provisions contingent upon the concessions and proposals made by the other side and that, at the end of the April 26, 2004 bargaining session, the Borough withdrew one provision/sentence of an entire counterproposal in a manner consistent with the bargaining practices of both parties throughout negotiations.⁵ Accordingly, the Borough's withdrawal of the provision on April 26, 2004, did not constitute bad-faith or surface bargaining within the meaning of Morrisville, supra or Upper Moreland, supra.

Also, the Examiner did not ignore any evidence of surface bargaining. On page 8 of the PDO, the Examiner expressly stated that "even assuming without deciding that all of the points raised by the Union are supported on the record, under the totality of the circumstances, there is no support for the Union's contention." (PDO at 8-9). Accordingly, the Examiner's conclusion assumes as true all the Union's claimed support for its allegations of surface bargaining, and he thereby ignored nothing for purposes of his conclusion.

The Union further contends that Findings of Fact Nos. 11-18 are not supported by substantial evidence of record and that those findings omit other evidence of record. The Union maintains that the Examiner's analysis and conclusion that the Union committed an unfair practice by refusing to negotiate at reasonable times and places is erroneous. A review of the record reveals that Findings of Fact Nos. 11-18 are supported by substantial evidence and taken together support the conclusion that the Union refused to negotiate at reasonable times and places between the parties' February 9, 2004 and April 20, 2004 contract negotiations. The Board holds unions and employers to the same standard to make a reasonable effort to meet at reasonable times and places and bargain in good faith. Therefore, Reynolds, supra, which was applicable in determining that the Borough unlawfully refused to bargain by failing respond to negotiation requests and participate in negotiations for several months, is equally applicable to the Union's conduct.

The documents offered into evidence by the Union establish that, at the conclusion of the parties' negotiation session of February 9, 2004, the Borough requested that the parties schedule another negotiation session, but the Union representative, Mr. Wolfe, stated that he "saw no need to meet again and that [he was] recommending that [his] members reject the offer made by the Borough and [was] recommending that they strike." (F.F. 11; Union Exhibit 13). After the Union gave notice to the Borough that it did not want to negotiate, the Union indicated to the Borough that it would negotiate the garbage subcontracting issue only. The Union also emphasized that the Union had filed charges against the Borough, that a hearing date had been scheduled and, in Mr. Wolfe's opinion, "that [the parties] should permit the process to run its course." (F.F. 12; Union Exhibit

⁵ The withdrawn sentence provided as follows: "Vacation pay will be paid in the first pay of the month of December for that calendar year." (Union Exhibit 23).

14). Again, by letter dated March 8, 2004, after not receiving any dates or positive effort to negotiate from the Union, the Borough Council President, on behalf of the Borough stated that "[w]e reiterate our willingness to meet in a continuing effort to negotiate a contract." (F.F. 13; Union Exhibit 29). The letter again requested that the Union come forward to schedule dates for negotiations. (Union Exhibit 29). After receiving multiple requests from the Borough to schedule negotiation sessions, Mr. Wolfe from the Union wrote a letter to the Borough Secretary, Lisa Bittner, stating that the "so-called willingness to negotiate a contract is just another lie." (F.F. 14; Union Exhibit 17). By letter dated March 16, 2004, the Borough Council President again requested that Mr. Wolfe contact him to schedule negotiation sessions. By letter dated March 22, 2004, Mr. Wolfe provided dates that he was available for bargaining. (F.F. 16). The Borough agreed to meet on several of the dates offered and suggested that the parties meet at the neutral site of the Christ Prince of Peace Church. Mr. Wolfe, however, responded that he would not meet in the "house of the Lord" to negotiate with the Borough. (F.F.18). Eventually, the parties met on April 20, 2004. Therefore, the Union rebuffed the Borough's efforts to meet and negotiate for approximately two months from the middle of February until the middle of April 2004. The Union's conduct constitutes a refusal to make a reasonable effort to meet at reasonable times and places to bargain in good faith, within the meaning of Reynolds, supra. Accordingly, the Examiner's conclusion, that the Union engaged in unfair practices in violation of Section 1201(b)(3) of PERA, is supported by the findings and the record, and the Examiner did not ignore evidence or omit necessary findings.

After a thorough review of the exceptions filed by the Borough and the Union and all matters of record, the Board shall dismiss the Borough's and the Union's exceptions and sustain the Proposed Decision and Order of the Hearing Examiner.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Borough and the exceptions filed by the Union to the Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Proposed Decision and Order is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this twenty-first day of February, 2006. 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

UNITED STEELWORKERS OF AMERICA

v.

FORD CITY BOROUGH

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Case No. PERA-C-04-7-W

AFFIDAVIT OF COMPLIANCE

The Borough hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act, that it has provided the Union with the summary plan descriptions for the health and pension plans, the ERISA forms known as 5500's and the actuarial reports for the pension plan that have not been provided, that it has posted the proposed decision and order as directed and that it has served a copy of this affidavit on the Union.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
The day and year aforesaid

Signature of Notary Public

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FORD CITY BOROUGH

v.

UNITED STEELWORKERS OF AMERICA

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Case No. PERA-C-04-313-W

AFFIDAVIT OF COMPLIANCE

The Union hereby certifies that it has ceased and desisted from its violation of Section 1201(b)(3) of the Act and that it has served a copy of this affidavit on the Borough.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year aforesaid

Signature of Notary Public