COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICE UNION LOCAL 668 SERVICE EMPLOYEES IUNTERNATIONAL UNION	:	
v.	:	Case No. PERA-C-09-217-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE ERIE CAO	:	

PROPOSED DECISION AND ORDER

On June 15, 2009, the Pennsylvania Social Services Union, SEIU Local 668 (PSSU), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Commonwealth of Pennsylvania, Department of Public Welfare, Erie CAO, Anita Locanto, Executive Director (Commonwealth), violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) when Ms. Locanto sent an email to members of the bargaining unit on May 22, 2009. On June 26, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on October 20, 2009. On October 2, 2009, the hearing examiner, upon the request of the Commonwealth and over the objection of PSSU, continued the hearing. On January 20, 2010, the hearing examiner held the hearing and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. Each party made a closing argument. Neither party reserved the right to file a brief. On March 1, 2010, the notes of testimony from the hearing were filed with the Board.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. The Board has certified PSSU as the exclusive representative of a bargaining unit that includes employes of the Commonwealth at the Erie County Assistance Office (Erie CAO). (Case No. PERA-R-1278-C)

2. On May 20, 2009, the parties held a meet and discuss session about scheduling at the Erie CAO. (N.T. 7, 24-25, 31, 36-37)

3. On May 22, 2009, the executive director of the Erie CAO (Ms. Locanto) sent the following email to members of the bargaining unit:

> "We recently held a 'Meet and Discuss' session with your local union representatives to bring some problems that we have observed with the current methods of 1) approving annual leave for the request period and 2) work schedules. We will meet with your representatives again in about two weeks to get their input into solving these problems. I would like all of you to know what issues we have discussed with your union representatives. If you have ideas on how these issues might be resolved, please submit them to you union representatives within the next two weeks.
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> • Problem # 1 – AWS schedules and reversion – Caseworkers on 4/5 or 9/10 AWS schedules are being required to revert due to leave approvals of other (sometimes less senior) employees. Your AWS agreement (section III paragraph 5) calls for employees to revert to a 5/5 schedule for a number of reasons such as hearings, training, civil leave, etc. However, the agreement does not call for employees to revert due to another employee's absence due to approved leave.
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> • Problem # 2 – There is confusion among Caseworkers about the past and current process of approving leave for the request period prior to approving

work schedules. When an employee has been approved leave in ESS for a day that later becomes an unscheduled day (a Monday of Friday), they must cancel their leave approval in order to have their work schedule approved. In researching this problem with Headquarters, we were told that we are the only CAO in the Commonwealth with this problem because no other CAO completes leave approvals prior to approving and entering work schedules.

• Problem # 3 – Because our leave request periods cover April of one year through March of the next year, employees may have a problem in entering leave for the January through March period. ESS does not permit entering personal leave or anticipated leave after December 31st of the current year. There is no local Leave Agreement and the leave request period could be changed to a different time.

• Problem # 4 – The current practice of submitting leave is to submit requests for a 12-month period. Some employees have indicated that they cannot plan for vacations that far in advance. There is no local Leave Agreement that requires submitting requests for a twelve month period. Other bargaining unit contracts, including AFSCME (our Clerical employees), specify leave approval periods to occur twice a year.

• Problem # 5 – Our current and past practices have intermixed leave and work schedules. These are two different processes that need to be kept separate.

I am sharing this information with you so that you are aware of the issues we are currently discussing with your labor representatives."

(N.T. 6-7, 32; Union Exhibit 1)

DISCUSSION

PSSU has charged that the Commonwealth committed unfair practices under sections 1201(a)(1) and (5) of the PERA when the executive director of the Erie CAO (Ms. Locanto) sent an email to members of the bargaining unit on May 22, 2009. As set forth in the specification of charges, PSSU alleges that in sending the email without PSSU's "knowledge or permission" Ms. Locanto "bypassed the Union's elected representatives and attempted to deal directly with the Union membership." More specifically, PSSU alleges that Ms. Locanto (1) "impugn[ed] the efficacy of the Union when she advised the local membership, 'I would like all of you to know what issues we have discussed with your representatives;'" (2) "directly solicited them by writing, 'If you have ideas on how these issues might be resolved, please submit them to your union representatives'" within two weeks; (3) "implie[d] that the Union's labor-management team has failed to seek input from its own membership when she tells the Union members that she [wa]s sharing information with them so they [we]re aware of the issues being discussed with the Union representatives;" (4) materially misrepresented the Union's meet and discuss procedures; (5) "continued her direct dealing with the Union membership when she advise[d] them, 'Our current and past practices have intermixed leave and work schedules. These are two different processes that need to be kept separate;'" (6) "further disparage[d] the Union's contract by telling the Union's members that other contracts, including AFSCME['s], provide for better leave approval systems" and (7) "did not give an objective account of the Union's position on these leave issues."

The Commonwealth contends that the charge should be dismissed for lack of proof because Ms. Locanto's email may be searched in vain for any evidence of direct dealing on her part.

In Philadelphia Office of Housing and Community Development, 31 PPER ¶ 31055 (Final Order 2000), the Board explained the applicable law as follows:

"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.

* * *

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."

Id. at 134-135.

In Chester County Intermediate Unit No. 24, 35 PPER 110 (Final Order 2004), the Board further explained as follows:

> "Ordinarily, rights of free speech remain operational during periods of negotiation between the parties. For example, the Board has held since the inception of PERA that parties negotiating a collective bargaining agreement normally remain free to communicate with the media. Southeast Delco Education Association v. Southeast Delco School District, 27 PPER ¶ 27258 (Final Order, 1996); PLRB v. Bethlehem Area School District, 3 PPER 108 (Nisi Decision and Order, 1973). The law is equally well established that an employer is not precluded from communicating, in noncoercive terms, with employes during negotiations, so long as such communications are not an attempt to negotiate directly with bargaining unit members. The fact that an employer posts at its website information regarding the status of negotiations for consumption by any person who visits the site does not, standing alone, violate this standard. Id.; PLRB v. Portage Area School District, 7 PPER 325 (Nisi Decision and Order, 1976).
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> However, an employer's expression may not include actual or veiled threats of reprisal or promise of benefit directed to the employes for their participation in protected activities and may not constitute an attempt to circumvent the bargaining representative and negotiate directly with employes. PLRB v. Williamsport School District, 6 PPER 57 (Nisi Decision and Order, 1975).
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> Additionally, a party to collective bargaining negotiations is precluded from deliberately misrepresenting the position of its bargaining counterpart to gain an advantage in the bargaining process. See Southeast Delco Education Association, PSEA/NEA v. Southeast Delco School District, *supra*; Forest Hills School District, 2 PPER 203 (Nisi Decision and Order, 1972). To constitute a failure to negotiate in good faith, the alleged factual mischaracterization must be analyzed in light of the totality of the circumstances surrounding the negotiations. See Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). "

Id. at 345.

A close review of the record does not show that Ms. Locanto engaged in direct dealing when she sent the email. Notably, the record shows that the parties held a meet and discuss session about the subject matter of the email (scheduling) two days before Ms Locanto sent the email (findings of fact 2-3), so it is apparent that she only sent the email after PSSU had a meaningful opportunity to consider any proposals about scheduling. Moreover, the record shows that her email was not coercively phrased. Furthermore, the record does not show that she misrepresented PSSU's position. Accordingly, the charge must be dismissed for lack of proof.

None of the allegations set forth in PSSU's specification of charges has merit. First, in writing "I would like all of you to know what issues we have discussed with your representatives" (finding of fact 3), Ms. Locanto did not threaten a reprisal or promise a benefit, so what she wrote was not coercively phrased but rather was a legitimate exercise of free speech on her part. Second, in writing "If you have ideas on how these issues might be resolved, please submit them to your union representatives" within two weeks, id., she invited members of the bargaining unit to contact PSSU, not her. Third, in writing "I am sharing this information with you so that you are aware of the issues we are currently discussing with your labor representatives," id., she did not threaten a reprisal or promise a benefit, so again what she wrote was not coercively phrased but rather a legitimate exercise of free speech on her part. In addition, the record does not show that she misrepresented the issues under discussion with PSSU.

Fourth, the record does not show that she materially misrepresented PSSU's meet and discuss procedures. Fifth, in writing "Our current and past practices have intermixed leave and work schedules. These are two different processes that need to be kept separate," id., she was stating a position, not soliciting proposals. Sixth, in writing "Other bargaining unit contracts, including AFSCME (our Clerical employees), specify leave approval periods to occur twice a year," id., she was stating a fact as she saw it, not soliciting proposals. In addition, the record does not show that she misrepresented what other contracts specify regarding leave approval periods. Seventh, the record does not show that she gave any account of PSSU's position on any leave issues, much less a non-objective one.

In its closing argument, PSSU cited a host of direct dealing cases as controlling authority. All of them were distinguished on the facts by former hearing examiner, now deputy chief counsel, Peter Lassi in City of Philadelphia, 31 PPER ¶ 31138 (Proposed Decision and Order 2000), where he dismissed a similar direct dealing charge, explaining as follows:

> "In Warwick [School District, 4 PPER 146 (Nisi Decision and Order 1974)], the Board found an unfair practice because the employer attempted to adjust a grievance with an individual employe without the presence of the employe bargaining representative. Specifically, in that case, where the union had filed a grievance over the school district's failure to provide employes with tuition reimbursement, the district superintendent met privately with an employe and communicated a proposal whereby the employe would receive tuition reimbursement in exchange for withdrawal of the union's grievance and waiver of its right to file an unfair practice charge over the matter.
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> In contrast, the record here reveals no attempt by the City to directly negotiate with employe Hurt over the matter raised in the Union's grievance. Rather, the City's communication only seeks information. Therefore, Warwick is distinguished on the facts.
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> The other cases cited by the Union are also not on point because they either involved attempts to directly negotiate with employes or employer communications during contract negotiations which did not give an objective account of the status of those negotiations. Mercer County, 29 PPER ¶ 29166 (Proposed Decision and Order, 1998); Radnor Township Education Association, 27 PPER ¶ 27244 (Proposed Decision and Order, 1996); Commonwealth, Department of Transportation, 18 PPER ¶ 18212 (Proposed Decision and Order, 1987); New Castle Area School District, 21 PPER ¶ 21062 (Proposed Decision and Order, 1990); Lehigh County, 11 PPER ¶ 11115 (Nisi Decision and Order, 1980); Jefferson-Morgan School District, 9 PPER ¶ 9056 (Nisi Decision and Order, 1978); Northern Bedford School District, 7 PPER 194 (Final Order, 1977); Baldwin-Whitehall School District, 2 PPER 165 (Nisi Decision and Order, 1972).
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> This case is instead controlled by prior cases where allegations of direct dealing were dismissed because the communications alleged to be unfair practices did not contain bargaining proposals or otherwise reveal an attempt to negotiate. See, e.g., Housing Authority of City of Pittsburgh, 21 PPER ¶ 21076 (Final Order, 1990); Community College of Philadelphia, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989); Centennial School District, 9 PPER ¶ 9085 (Nisi Decision and Order, 1978); City of Lancaster, 2 PPER 132 (Nisi Decision and Order, 1972). The same result must obtain here."

Id. at 333.

Given the facts of record, the cases cited by PSSU are distinguishable on the facts here as well.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes:

1. The Commonwealth is a public employer under 301(1) of the PERA.

2. PSSU is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. The Commonwealth has not committed unfair practices under sections 1201(a)(1) and (5) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fifth day of March 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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March 10, 2010

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF PUBLIC WELFARE, ERIE CAO
Case No. PERA-C-09-217-E

By voice mail message yesterday, Mr. Herbster brought to my attention a typographical omission on page 7 of my proposed decision and order, to wit, the word “not” is missing from in between the words “has” and “committed” in conclusion number 4.

Enclosed is a copy of page 7 correcting the omission.

Please discard the page 7 you received with the my proposed decision and order and substitute the enclosed page 7 in its stead.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: KATHY JELLISON
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