

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING :
ENGINEERS LOCAL 542 :
 :
 : CASE NO. PERA-C-12-177-E
v. :
 :
NORTHAMPTON TOWNSHIP :

AMENDED PROPOSED DECISION AND ORDER¹

On June 7, 2012, the International Union of Operating Engineers, Local 542 (Union), filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Northampton Township (Township) violated Section 1201(a)(3) (5) and (9) of the Public Employe Relations Act (PERA). The Union specifically alleged that the Township refused to give unit employes their annual wage increases because they voted for the Union. The Union also alleged that the Township refused to provide dates for collective bargaining.

On July 5, 2012, the Secretary of the Board issued a complaint and notice of hearing designating a hearing date of February 8, 2013, in Harrisburg. At the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Township is a public employer within the meaning of Section 301(1) of PERA. (N.T. 3).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 3).
3. Robert Pellegrino is the Township Manager and lead collective bargaining negotiator for the Township. (N.T. 96-97, 110-118).
4. Frank Bankard was the Union's head organizer for the employes at the Township. He began organizing the unit employes in November 2011. In early 2012, a mail-ballot election was held. The Board issued a Nisi Order of Certification on February 15, 2012. (N.T. 10-12; Employer Exhibit 2; PERA-R-11-416-E).
5. In the fall of every year, Township Manager Pellegrino prepares a budget for the following calendar year, which is also the fiscal year, with the help of his financial staff, and presents the budget to the Board of Supervisors at a public meeting for its adoption. (N.T. 97-98).
6. The Township's budget is a financial spending plan. It is not a guarantee of expenditures or a contractual obligation. (N.T. 98-99).
7. In the fall of 2011, The Township budgeted for a three-percent wage increase for all employes. The Township did not give the police officers or the fire officers any wage increases during negotiations, even though those increases were included in the budget. The police interest arbitration award did not provide for a police wage increase and the Township did not give the officers any wage increase, although it was budgeted. (N.T. 99-100; Complainant Exhibit 2 at 3).

¹ Only the issuance date has been changed by this Amended Order.

8. On February 20, 2012, Mr. Bankard sent a letter to Mr. Pellegrino seeking information for collective bargaining and requesting that the Township refrain from changing terms and conditions of employment. (N.T. 12-14, 105-106; Complainant Exhibit 1).
9. Mr. Bankard's letter requested, in relevant part, the following information:
 1. A list of current employees including their names, dates of hire, rates of pay, job titles, licensing or certifications, last known address, phone number, date of completion of any probationary period, and any records of discipline.
 2. A copy of all current personnel policies, practices, pay-scales, procedures and any changes or copies of personnel policies that have been changed going back three years to date on this topic.
 3. A copy of any fringe benefit plans (including the plan document and summary plan description) as in pensions, profit sharing, severance, stock incentive, 401K plan, vacation pay, bereavements, holidays, health and welfare, sick leave, personnel leave, training, legal services, child care or any other plans or benefits provided to our represented employees.

Please provide this information within 10 business days of the date of this letter. The Union would like to start bargaining after receipt of this information and suggest the second week of March [2012].

(Complainant Exhibit 2).

10. In the letter, Mr. Bankard also states that "we want to stress and place emphasis that [] no changes to any conditions of employment should be done without first notifying the [U]nion and giving the Union the opportunity to bargain any proposed change." (Complainant Exhibit 1).
11. After the first pay in March 2012, Mr. Bankard received a telephone call from a township employe in the unit that they did not receive a pay increase. (N.T. 21).
12. The parties met for negotiations on March 12, 2012. At the March 12, 2012, negotiation session with Mr. Pellegrino, Mr. Bankard asked Mr. Pellegrino why the bargaining unit employes had not received the three-percent wage increase that was already budgeted. Mr. Pellegrino responded that the Township was not giving any wage increases because wages were the subject of collective bargaining and that the Township was not obligated to give any wage increases just because those increases were included in the budget. (N.T. 101).
13. Mr. Pellegrino did not say to Mr. Bankard or anyone else that the bargaining unit employes were not receiving the wage increase because they joined or voted for the Union. He stated that the Township was not obligated to give the increases because of ongoing negotiations. (N.T. 102).
14. The parties met for negotiations on March 12th, April 3rd, June 4th, and June 12th, 2012. The parties have met many times since June 2012. After the March 12, 2012, meeting, the parties scheduled a meeting for April 3, 2012. After the April 3, 2012, meeting, the parties scheduled a meeting in June 2012. (N.T. 18-19, 105-106; Employer Exhibit 2).
15. Every time Mr. Bankard attempted to contact Mr. Pellegrino via telephone or e-mail, Mr. Pellegrino took the call or responded to the e-mail. The parties were always cordial in attempting to schedule meeting dates. (N.T. 105, 107-108).

16. There were eight weeks between the April 3, 2012, meeting and the June 4, 2012, meeting. During May 2012, Mr. Pellegrino was away for one full week with the Township Board of Supervisors at a conference. He was busy with a back log of work when he returned. (N.T. 105-106).
17. On March 26, 2012, Mr. Bankard e-mailed Mr. Pellegrino asking for bargaining dates. The same day, Mr. Pellegrino responded as follows: "We can meet next week if you like. I will not have a draft agreement prepared, but we can certainly discuss the issues. Tuesday anytime and Wednesday morning are open right now." (Employer Exhibit 1).²
18. Mr. Pellegrino's mom was terminally ill between February 2012, and October 2012, when she passed, which detracted from many of his Township duties.
19. At no time did Mr. Bankard indicate to Mr. Pellegrino that he was unhappy with the schedule of bargaining sessions being held. Mr. Pellegrino had no notice that the Union believed that he was not scheduling enough bargaining sessions. (N.T. 107).
20. Mr. Pellegrino has to coordinate the schedules of three other people besides him for negotiation sessions. (N.T. 110).

DISCUSSION

The Union charged the Township with violating Section 1201(a)(9) of PERA. That cause of action makes it an unfair practice for an employer to "[r]efuse[] to comply with the requirements of 'meet and discuss.'" 43 P.S. § 1101.1201(a)(9). The Township has an obligation to bargain with the Union over terms and conditions of employment for the unit employees. It does not have a "meet and discuss" obligation here. Therefore, the cause of action under clause (9) of Section 1201(a) is dismissed.

1. Wage Increase

The Union argues that the Township violated its bargaining obligation and retaliated against unit employees for voting for the Union by refusing to give them a three-percent wage increase in March 2012, after the Township Board of Supervisors voted in November 2011 to give employees the wage increase.

In *International Brotherhood of Electrical Workers, Local 743 v. Upper Leacock Township*, 43 PPER 72 (Final Order, 2100), the Board affirmed the dismissal of a charge alleging that Upper Leacock Township refused to grant wage increases to bargaining unit employees while negotiating an initial contract. The township gave those wage increases in March of every year and gave them to non-bargaining unit employees in March 2011. The Board noted that the Board Secretary relied on *Pennsylvania State Park Officers Association v. PLRB*, 854 A.2d 674 (Pa. Cmwlth. 2004), *appeal denied*, 871 A.2d 194 (2005), in ruling that "maintenance of the *status quo* during contract negotiations does not include the continuation of periodic wage adjustments." *Upper Leacock*, 43 PPER at 261.

The Union attempts to distinguish *Upper Leacock* and argues that, once the Township Supervisors voted to give all employees a three-percent wage increase in November, the approved increase became the *status quo* because the employees believed they would receive those increases when they voted for the Union. (Union's Post-hearing Brief at 4-5). The Union seems to argue that, unlike the longevity increases at issue in *State Park Officers*, which were contained in an expired contract that was subject to renegotiation, the Board of Supervisors' vote for the wage increases in November 2011, for fiscal 2012, reset the financial terms of employment for 2012, before wages were subject to negotiation and thereby created a new baseline for wages, as if those wages had already begun to be paid before certification.

² There are many post-charge bargaining sessions and communications involving the parties. I will limit my factual and legal analysis to pre-charge conduct.

However, the facts of *Upper Leacock* are on all fours with the facts *sub judice*. The Township of Upper Leacock granted wage increases every March. It voted for those increases when it adopted the budget every fall. It voted for the increase at issue before the union in that case was certified on January 20, 2011, and the Township withheld those increases while it negotiated an initial contract with the union, in March of 2011. On those analogous facts, the *Upper Leacock* Board notably opined as follows: "the Union through its unfair practice charge effectively seeks to obtain the very wage increases under negotiation. Such a result would be inconsistent with *State Park Officers Association, supra*, and other Board decisions cited above." *Upper Leacock*, 43 PPER at 262. Indeed, under Pennsylvania law, conferring a benefit upon employees, such as wage increases, during contract negotiations may constitute an unfair practice. *Millcreek Township School District v. PLRB*, 631 A.2d 734, 738 (Pa. Cmwlth. 1993) (holding that even unintentional grants of benefits undermines the role of the union as sole representative of employees).

Moreover, the Board, in *Upper Leacock*, emphasized that Pennsylvania law in this area is different from federal law in that this Board follows the static, as opposed to the dynamic, *status quo*. Consequently, the Board held that even where a township announces its intention to issue wage increases to bargaining unit members, "[t]his Board and our courts have consistently adhered to the static status quo, which freezes wages pending negotiation of a collective bargaining agreement." *Upper Leacock*, 43 PPER at 262.

Furthermore, the factual premise for the Union's argument is not supported by the record. The Township Board of Supervisors did not promise or vote for a wage increase. The Board of Supervisors voted to adopt a budget which made allowance for wage increases for all employees. In the fall of every year, Township Manager Pellegrino prepares a budget for the following calendar year, which is also the fiscal year, and presents the budget to the Board of Supervisors at a public meeting for its adoption. The Township's budget is a financial spending plan. It is not a guarantee of expenditures or a contractual obligation. If an unforeseen or emergency expenditure should arise, the Township is entitled to eliminate planned expenditures for some line items and use that money for the unforeseen expense. When the Township votes to adopt a budget that includes plans for wage increases, it is not a contractual obligation or guarantee that the Township must issue a three-percent wage increase even if it may have done so every year. *Upper Leacock, supra*. Should fuel prices or road repairs unexpectedly double, the Township is entitled to forego the planned wage increases to cover those unexpected cost increases, unless contractually obligated.

In the fall of 2011, The Township budgeted for a three-percent wage increase for all employees. The Township did not give the police officers or the fire officers any wage increases during negotiations with those bargaining units, even though those increases were included in the budget. The police interest arbitration award did not provide for a police wage increase and the Township did not give the officers any wage increase, although it was budgeted.

Additionally, the Union did not meet its burden of establishing a *prima facie* case of discrimination to support its retaliation claim. This record is devoid of substantial, credible evidence demonstrating the requisite nexus between the Township's refusal to give a three-percent wage increase in March 2012, and the employees' support for the Union or participation in other protected activities.³ Contrarily, Mr. Pellegrino credibly explained that the three-percent wage increase was withheld because the law required him to maintain the *status quo* and not provide the very wage increases that were the subject

³ I have resolved any and all conflicts in testimony between Mr. Pellegrino and Mr. Bankard in favor of Township Manager Pellegrino. I based this determination on Manager Pellegrino's appearance, general bearing, conduct on the stand, demeanor, manner of testifying, candor, frankness and certainty with respect to facts. *Mid Valley Education Ass'n v. Mid Valley School District*, 25 PPER ¶ 25138 (Final Order, 1994) (citing *Kiskiminetas Township*, 25 PPER ¶ 25007 (Proposed Decision and Order, 1993)). Specifically, I find that Mr. Pellegrino did not make any anti-union statements with respect to the wage increases during the March 12, 2012, bargaining session and I credit Mr. Pellegrino's testimony that he explained that the Township was not under any obligation to provide the wage increases during contract negotiations and that he did not state that the wage increases were being withheld because the employees voted for the Union.

of negotiations. Indeed, the substantial, credible evidence of record establishes clearly that the Township's withholding of the wage increase was motivated by its compliance with this Board's collective bargaining laws and not the employees' protected activity.

2. Failure to Meet for Negotiations

The Union next argues that the Township failed to schedule and meet for a sufficient number of bargaining sessions for the initial contract. The Union specifically argues as follows:

The first negotiation session took place on April 3, 2012, almost two months after the Union was certified. The second negotiation took place June 4, 2012, two months later. The Union insisted that they would meet at any time and any place and offered many dates to bargain. It was the township that refused to meet at reasonable times and places. Two bargaining sessions within four months is hardly a reasonable amount of meeting.

(Union's Post-hearing Brief at 6-7).

The record, however, does not support the Union's argument, and it contains many additional facts that militate against concluding that the Township refused to meet at reasonable times between February 15, 2012 and June 7, 2012. Section 701 of PERA provides, in relevant part, as follows:

Collective 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.

The record shows that the Board certified the unit on February 15, 2012, and that Mr. Bankard sent a letter, on February 20, 2012, to Mr. Pellegrino seeking information for collective bargaining and requesting that the Township refrain from changing terms and conditions of employment. The process of collecting the information requested by Mr. Bankard was taxing and complex; it also involved the cooperative effort of multiple Township employes. Mr. Bankard requested an employe list including their names, dates of hire, rates of pay, job titles, licensing or certifications, last known address, phone number, date of completion of any probationary period, and any records of discipline. He also requested copies of all current personnel policies, practices, pay-scales, procedures and any changes or copies of personnel policies that have been changed going back three years to date on this topic. Additionally, he requested copies of any benefit plans such as pensions, profit sharing, severance, stock incentive, 401Ks, vacation plans and benefits, bereavement leave, holiday leave, health and welfare plans, sick leave, personnel leave, training, legal services, child care or any other plans or benefits provided to the unit employees.

Although Mr. Bankard requested that the information be supplied within ten business days, the Township was unable to complete the task within the ten days. The Union further requested that bargaining begin by the second week of March. While attempting to compile the requested information for the Union, the Township satisfied the Union's request and met with the Union on March 12, 2012. It was during the March 12, 2012, meeting that the parties discussed the three-percent wage increase. The March 12, 2012, meeting belies the Union's claim that the first meeting was April 3, 2012. On March 26, 2012, Mr. Bankard e-mailed Mr. Pellegrino asking for bargaining dates. The same day, Mr. Pellegrino responded as follows: "We can meet next week if you like. I will not have a draft agreement prepared, but we can certainly discuss the issues. Tuesday anytime and Wednesday morning are open right now." Every time Mr. Bankard attempted to contact Mr. Pellegrino via telephone or e-mail, Mr. Pellegrino answered the call or responded to the e-mail. The

parties were always cordial in attempting to schedule meeting dates. Mr. Pellegrino has to coordinate the schedules of three other people besides him for negotiation sessions.

The parties did in fact meet the following week for negotiations on April 3rd and met again on June 4th, 2012. Although there were eight weeks between the April 3, 2012, meeting and the June 4, 2012, meeting, Mr. Pellegrino was away for one full week with the Township Board of Supervisors at a conference during the month of May, and he was busy with a back log of work when he returned. Additionally, Mr. Pellegrino's mom was terminally ill between February 2012, and October 2012, when she passed, which detracted from many of his Township duties, including his ability to attend bargaining sessions. Indeed, at no time prior to the filing of the charge did Mr. Bankard indicate to Mr. Pellegrino that he was unhappy with the schedule of bargaining sessions being held.

During the time period between March 12, 2012 (the first session) and June 7, 2012 (the filing of the charge), the Township Manager, in addition to his duties and responsibilities managing the Township, endeavored to respond to the Union's extensive information request; tended to his dying mother; communicated via e-mail and telephone scheduling meetings; apprised the Union of progress on its written proposal; coordinated bargaining sessions with three other Township employees; and met with the Union three times within three months, while his schedule was compromised by an intervening business trip. On this record, the Township has satisfied its statutory obligation "to meet at reasonable times and confer in good faith with respect to wages hours and other terms and conditions of employment." Although the Union may have wanted to meet more times, at a minimum, the Union should have communicated those desires to Mr. Pellegrino to give him an opportunity to accommodate them.

CONCLUSIONS

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

1. The Township is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Township has **not** committed unfair practices within the meaning of Section 1201(a) (3), (5) or (9).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is 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 thirteenth day of June, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner