COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED STEEL PAPER FORESTRY RUBBER MANUFACTURING ENERGY ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL	:	
v.	:	Case No. PF-C-12-90-W
MCDONALD BOROUGH	:	

FINAL ORDER

The United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on August 6, 2013. The Union's exceptions are filed to a Proposed Decision and Order (PDO) issued on July 18, 2013 dismissing the Union's Charge of Unfair Labor Practices against McDonald Borough (Borough), alleging violations of Section 6(1)(a) and (e) of the Pennsylvania Labor Relations Act (PLRA) as read in *pari materia* with Act 111 of 1968. The Borough filed a timely response to the exceptions and a supporting brief on August 19, 2013.

A previous PDO dismissing the Union's charge was issued in this case on April 22, 2013, from which the Union excepted. By Order issued on June 18, 2013, the Board sustained the Union's exceptions in part, and remanded the case to the Hearing Examiner to address whether the Borough conducted its negotiations with the Union in bad faith by *inter alia*, engaging in regressive and surface bargaining. In the Order Directing Remand to Hearing Examiner, the Board directed as follows:

> A determination of bad faith bargaining involves questions of credibility and fact, which are matters for the Hearing Examiner in the first instance. In this regard, the Board has recognized as follows:
>
> > Good faith bargaining cannot be discharged simply by counting the number of meetings between the parties or by weighing the amount of information exchanged during such negotiations. The totality of the circumstances of the bargaining procedure must be considered in determining whether good faith bargaining did in fact take place. If after examining all the circumstances one can reasonably conclude that one or the other party never intended to achieve an agreement, demonstrated unreasonableness, or displayed a single-minded purpose to thwart the public policy, then good faith bargaining did not occur.
>
> *PLRB v. Homer-Center School District*, 12 PPER ¶12169 at 262 (Final Order, 1981).

After a review of the record on remand, the Hearing Examiner issued the July 18, 2013 PDO, dismissing the Union's charge based on a finding that under the totality of circumstances, the Borough did not commit unfair labor practices by regressive or surface bargaining, or by failing to bargain in good faith with the Union.

The Hearing Examiner's Findings of Fact on remand, as relevant to the disposition of the exceptions, are summarized as follows. Initially, Borough Council Members Mike Lauderbaugh and Mike Schaal were the Borough negotiators in collective bargaining with the Union. The Union's bargaining representatives were Ross McClellan, Mark Cummings and part-time officers John Tegley and Dan Kuzio. At a January 23, 2012, meeting, Mr. McClellan presented a draft proposal, which did not contain any proposed wage provisions. The Borough did not present any counterproposals at this time, and the parties did not agree on anything during the January 23, 2012, meeting.

On February 9, 2012, Mr. Lauderbaugh e-mailed Mr. McClellan informing him that at a February 6, 2012, Borough Council meeting, Council wanted more information before negotiations continued. The e-mail also reminded Mr. McClellan that he had not yet provided two pieces of information that he was supposed to provide, i.e., wage proposals and the Union's proposal regarding the full-timers' keeping their current contract. On February 13, 2012, Mr. McClellan e-mailed his response to Mr. Lauderbaugh and informed him that the Union proposed honoring the full-timers' contract, including wages, until expiration, but reserved the right to renegotiate wages for the full-time officers under the wage re-opener provision in that contract. Mr. McClellan also attached to that e-mail a draft document that included wage proposals under Article 9, which were omitted from the draft proposal presented to the Borough on January 23, 2012. On February 15, 2012, Mr. Lauderbaugh e-mailed Mr. McClellan thanking him for forwarding the requested information and indicating that he would share the information with Council at the March Council meeting.

Following the March 5, 2012, Borough Council meeting, the parties met face-to-face for the second time. No proposals were exchanged at the March meeting, and nothing was discussed or negotiated.

On April 4, 2012, Mr. Lauderbaugh e-mailed a Borough proposal to Mr. McClellan. The Borough's proposal was based on the full-timers' contract, however the Borough representatives did not intend for all of the provisions of the full-timers' contract to apply to part-timers. It was a starting point for discussion, as reflected on the face page of the Borough's proposal, which stated the following:

> ATTACHED ARE THE BOROUGH BARGAINING COMMITTEES INITIAL PROPOSALS SUBJECT TO APPROVAL BY MAYOR AND COUNCIL OF McDONALD BOROUGH. THE BOROUGH RESERVES THE RIGHT TO ADD, MODIFY, CHANGE AND/OR DELETE ANY PROPOSAL, PROVISION OR TERM SET FORTH HEREIN, UNTIL FINAL APPROVAL BY MAYOR AND COUNCIL OF McDONALD BOROUGH.

On April 9, 2012, the Union e-mailed its modifications of the Borough's proposal to Mr. Lauderbaugh. On April 13, 2012, Mr. McClellan e-mailed Mr. Lauderbaugh concerning the status of bargaining and the Borough's response to the Union's counter-proposal. Mr. Lauderbaugh responded, in relevant part, as follows:

> I agree with you that it is not in the best interest of the Union or the Borough to drag this out, and I do not feel that this is being done. It might not be moving as fast as you want but unfortunately we all have other jobs and responsibilities, one person cannot make a decision for the entire Borough. I can sit down with you and agree or disagree on items but at the end of the day the ENTIRE McDonald Borough has to vote and agree, I am meeting with these individuals as the requests are made to try and alleviate any hold up down the road some people are easier to get in touch with than others….

In this same e-mail, Mr. Lauderbaugh informed Mr. McClellan that the Borough would agree to Union recognition and the shift provisions, but would not agree to the union shop or the dues checkoff provisions. On April 16, 2012, Mr. McClellan responded with another Union proposal, which reserved the right to discuss the dues checkoff and Union shop provisions at a later date, countered with a different wage increase proposal and requested a list of part-time employes with length of service.[1] On April 30, 2012, Mr. Lauderbaugh and Mr. McClellan exchanged more proposals.

During a bargaining session on May 24, 2012, the parties' representatives discussed items on the April 4, 2012 contract proposal prepared by the Borough. The parties reviewed all sections of the proposed contract, and Mr. McClellan placed sticky notes on his copy. Mr. McClellan noted that Mr. Lauderbaugh did not agree to making police

[1] On April 18, 2012, Mr. Lauderbaugh e-mailed a list of part-time officers and their hire dates.

officers join the Union as a condition of employment or to the dues checkoff. Mr. McClellan proposed giving up the dues checkoff in exchange for agreeing to the Union shop clause. Either Mr. Lauderbaugh or Mr. Schaal told Mr. McClellan that they could not make that decision and they would have to discuss the matter with Council.[2]

After the May 24, 2012, meeting, Mr. Schaal and Mr. Lauderbaugh apprised Council members at Council meetings that negotiations were ongoing, but they had not presented Council with tentative agreements for a vote. Indeed, Mr. Schaal understood that there were no agreements to present, and expected to do more work on more provisions at more sessions. He noted that often, the negotiators moved onto another subject just to move forward, but discussion on the subject had not been concluded, and that the items put aside during bargaining had not been mutually agreed upon. His understanding was that dialogue had not been exhausted on many items and nothing had been put to rest to present to Council.

In early June 2012, Mr. Lauderbaugh resigned from Borough Council. Mr. McClellan spoke with Council President Marilou Ritchie on June 5, 2012, who confirmed that Mr. Lauderbaugh was no longer a member of Borough Council and that all future collective bargaining should be through the Borough's labor attorney, Christopher Gabriel. Mr. McClellan set up the first negotiation session with Mr. Gabriel over the phone, and the two met at the Borough Building on June 20, 2012. The telephone conversation and meeting were very cordial. During the June 20, 2012, meeting, Mr. Gabriel asked Mr. McClellan to provide documentation confirming that there were tentative agreements for him to show Council. However, Mr. McClellan did not produce any documents to indicate that tentative agreements had been made concerning the part-timers or that the parties had agreed to honor the existing contract for the full-timers. In fact, at that meeting, Mr. McClellan told Mr. Gabriel that there were no tentative agreements to present to Council for a vote. Mr. Gabriel and Mr. McClellan set up another meeting for July 31, 2012.

At the July 31, 2012, meeting, Mr. McClellan took the position that there were tentative agreements on all but three issues, and that the Union was only willing to negotiate those three issues. According to the Union, the unresolved issues as of May 24, 2012, were limited to Union membership and dues check-off, payment of arbitration costs, and wages. However, prior to the July 31, 2012, meeting, Mr. Schaal informed Mr. Gabriel that the Borough did not want to negotiate piecemeal and that there had to be a total package to take back for a Council vote. Because Mr. McClellan previously told Mr. Gabriel that there was no package proposal, Mr. Gabriel concluded that there was nothing totally or tentatively agreed to. Mr. Gabriel did not believe that bargaining should start all over, but believed that no tentative agreements had been made on all the points claimed by the Union. Although Mr. Gabriel wanted to review the contract proposals with Mr. McClellan, he did not tell Mr. McClellan that the Borough would refuse to negotiate unless the Union withdrew the unfair labor practice charge.

Based on the evidence presented, the Hearing Examiner found, and concluded, as follows:

> After reviewing the totality of the circumstances, I find that the Union did not establish that the parties had a meeting of the minds tentatively agreeing to a package of substantive provisions for the Borough negotiators and the Union negotiators to take back for a ratification vote. The only substantive provisions that the Borough offered to agree to were the Union recognition and the part-time shift provisions in Article XVI. There are no markings on any contract proposals indicating that the parties tentatively agreed on any other provisions. The Borough was clear about its willingness to agree to the Union recognition and part-time shift provisions in Article XVI. However, given the explicit clarity with which the Borough negotiators

[2] Also during the May 24, 2012, meeting, Mr. McClellan and Mr. Lauderbaugh addressed wages for the full-timers and agreed that all part-timers would receive the same rate of pay. Mr. Lauderbaugh proposed a three percent wage increase for the part-timers in the first year and a four percent wage increase the following year, beginning January 2013. Mr. McClellan proposed a dollar amount that was for a greater amount than the three and four percent increases proposed by Mr. Lauderbaugh.

> offered to agree to these provisions, there is no evidence anywhere in the record indicating that the Borough tentatively agreed to anything else.
>
> At a minimum, the term "tentative agreement" requires that both parties outwardly, clearly or affirmatively, express their mutual intent to agree upon a substantive contractual provision or package of provisions subject to the ratification vote and final acceptance of the public employer's governing body or the union's membership. This record is devoid of evidence of mutual assent to any substantive contract provisions, beyond the benign recognition and shift provisions. There are no "TA"s or initials on any of the contract provisions and the correspondence between the parties does not indicate mutual acceptance of any proposals or offers.
>
> Also, on July 23, 2012, in response to Mr. McClellan's request for Act 111 interest arbitration, Borough Council President Marilou Ritchie sent a letter to Mr. McClellan informing him that the Borough appointed Mr. Gabriel as their partial arbitrator and that the Borough considered all issues to be in dispute. Ms. Ritchie stated that "[d]espite this notice, which is required by Act 111, ***the Borough nevertheless looks forward to meeting with the Union in the near future in the hopes of resolving all issues and reaching an agreement***." The Borough's willingness to continue bargaining with the Union and to proceed to interest arbitration, albeit over more issues than the Union wanted, demonstrates the Borough's efforts to bargain in good faith.
>
> On July 31, 2012, Mr. Gabriel told Mr. McClellan at a meeting at the Borough Building that Council told him that there were no tentative agreements. The record supports Mr. Gabriel's position that there was no tentative agreement on all but three issues and that there was no agreement to apply the existing contract to the full-timers. The Borough negotiators did not agree to, and the Union did not assent to, a tentative package or set of agreements. I also credit Mr. Gabriel's testimony that he did not, at any time, refuse to negotiate unless the Union withdrew the charge.
>
> Accordingly, under the totality of the circumstances, I conclude that the Borough and Union negotiators did not mutually agree upon a package of terms and conditions of employment that became ripe for a ratification vote. Therefore, the Borough did not unlawfully renege on any such non-existent agreements or engage in regressive bargaining. Moreover, the Borough did not refuse to bargain or engage in surface bargaining at any time prior to the filing of the amended charge. After examining all the evidence, I am unable to reasonably conclude that the Borough "never intended to achieve an agreement, demonstrated unreasonableness, or displayed a single-minded purpose to thwart the public policy." ***Homer-Center***, ***supra***.

(PDO at 9-10).

In the exceptions, the Union challenges the Hearing Examiner's Finding of Fact 54 that the Borough's bargaining representatives understood that there were no agreements; Finding of Fact 55 that Schaal and Laderbaugh did not agree to anything and that the items put aside during bargaining had not been agreed to; and Finding of Fact 60 that the Borough representatives did not at any time use the term tentative agreement or indicate that any provision no longer needed to be discussed. The Hearing Examiner's findings must be supported by substantial evidence. **PLRB v. Kaufmann Department Stores, Inc.**, 345 Pa. 398, 99-400, 29 A.2d 90, 92 (1942). Substantial evidence is defined as such relevant evidence as a reasonable mind might accept as adequate to support the finding. **Id.** Upon review of the record, the Hearing Examiner's Findings of Fact 54, 55 and 60 are supported by substantial record evidence. As cited for support of these findings, Mr. Schaal testified as follows:

> The status of the negotiations were ongoing. … [W]e were definitely past the reading stages, but … we had not made any agreements.

* * *

During all of these discussions, we never agreed to any portion of them because if I were to do that, that would limit my ability to negotiate further points of the contract.

* * *

[T]he things that we put aside weren't necessarily agreed upon…. There were probably things that we just kind of breezed over because neither side thought they would be points of contention. So, did we go past certain things? Yes, … probably big things, … many things, but if you are asking me if we had agreement on all the things that we went past, no.

(N.T. 225, 243, 253).

The fact that the Hearing Examiner credited this testimony is no basis for reversal of the Hearing Examiner's Findings of Fact. Indeed, the Hearing Examiner, who is able to view the witnesses' testimony first-hand, is in the best position to determine the credibility of the witnesses and to weigh the probative value of the evidence presented. Thus, the Board will not disturb the examiner's credibility determinations absent the most compelling of circumstances. **Mt. Lebanon Education Association v. Mt. Lebanon School District**, 35 PPER 98 (Final Order, 2004); **Hand v. Falls Township**, 19 PPER ¶ 19012 (Final Order, 1987); **AFSCME District Council 84 v. Department of Public Welfare**, 18 PPER ¶ 18028 (Final Order, 1986). The Union's exceptions present no compelling circumstances warranting review of the Hearing Examiner's acceptance of Mr. Schaal's testimony, and thus the exceptions to Findings of Fact 54, 55 and 60 are dismissed.

The Union also argues that Finding of Fact 61 that Mr. McClellan had not presented any documents to the Borough to indicate that tentative agreements had been reached, is not supported by substantial evidence. Further, the Union asserts that the finding that Mr. Gabriel did not believe that bargaining should start all over, and believed that no tentative agreements had been made (Finding of Fact 63), and the finding that Mr. Gabriel did not tell Mr. McClellan that the Borough would refuse to negotiate unless the Union withdrew its Charge of Unfair Labor Practices (Finding of Fact 64) are unsupported in the record. However, Mr. Gabriel testified as follows:

Q: Did you tell Mr. McClellan that the Borough would not negotiate with the Union unless they withdrew their unfair labor practice charge?

A: No.

Q: What was the Borough's position as to the status of the negotiations as of July 31st, 2012?

A: Confused because, again, the Borough wanted to negotiate. Remember, I had not taken the position that there was no tentative agreement on anything at the June 20th meeting, nor had I gotten to do that at the July 31st meeting.

What I was telling [Mr. McClellan] was, I did not have any information from the Borough that agreed with his assertion that there were tentative agreements. I said to him, you could be right. He told me he was going to get a letter that showed some more agreements and he said he had some other documents.

I said, if you show me those things and I can go back to the Borough and say, hey, look, it looks like the bargaining committee agreed to things, I would tell them that, but he hadn't done that. He had simply asserted that there was such an agreement.

* * *

> What I was trying to convey was, we might end up at the same place, Mr. McClellan, where you think we are, but I don't think we are going to get there by just asserting that we are there because the Borough doesn't think that it's there, so we need to have some bargaining over those things.

(N.T. 322 – 324). Mr. Gabriel's testimony is corroborated by Borough Council President Ritchie's letter of July 23, 2012, to Mr. McClellan, expressing that "the Borough nevertheless looks forward to meeting with the Union in the near future in the hopes of resolving all issues and reaching an agreement." (Finding of Fact 27; Union Exhibit 19). There are no compelling circumstances presented warranting the reversal of the Hearing Examiner's acceptance of testimony and documentary evidence. Accordingly, the Union's exceptions to Findings of Fact 61, 63, and 64 are dismissed.

The Union asserts that the Hearing Examiner erred in failing to address or consider evidence presented by the Union. Initially, we note that the Hearing Examiner need not make findings summarizing all of the evidence presented, but need only make those findings of fact that are relevant and necessary to the disposition of the unfair practice charge. **Page's Department Store v. Velardi**, 464 Pa. 276, 346 A.2d 556 (1975). In regard to this exception, the Union claims that the Hearing Examiner failed to find that the Borough presented a complete proposed contract on April 4, 2012, and that the Union tentatively accepted all but a few of the proposed terms. The Hearing Examiner, however, did discuss this contention in Findings of Fact 41 and 42 where the Hearing Examiner found, as fact, that "on April 4, 2012, Mr. Lauderbaugh e-mailed the Borough's proposal to Mr. McClellan. … The Borough representatives did not intend for all of the provisions of the full-timers' contract to apply to part-timers. It was a starting point for discussion." (FF 41). Indeed, "[t]he face page of the Borough's proposal states the following:

> ATTACHED ARE THE BOROUGH BARGAINING COMMITTEES INITIAL PROPOSALS SUBJECT TO APPROVAL BY MAYOR AND COUNCIL OF McDONALD BOROUGH. THE BOROUGH RESERVES THE RIGHT TO ADD, MODIFY, CHANGE AND/OR DELETE ANY PROPOSAL, PROVISION OR TERM SET FORTH HEREIN, UNTIL FINAL APPROVAL BY MAYOR AND COUNCIL OF McDONALD BOROUGH."

(FF 42).

The Union further asserts that the Hearing Examiner should have found that the parties acknowledged that only a few items remained open for discussion. Again, the Hearing Examiner rejected this allegation, as found in Findings of Fact 54 and 55, where the Hearing Examiner found as follows:

> After the May 24, 2012, meeting, Mr. Schaal understood that there were no agreements. Mr. Schaal and Mr. Lauderbaugh apprised Council members at Council meetings that negotiations were ongoing, but they had not presented Council with tentative agreements for a vote. Mr. Schaal expected to do more work on more provisions at more sessions.
>
> During e-mail exchanges and face-to-face meetings, Mr. Schaal and Mr. Lauderbaugh did not agree to anything so as not to limit their ability to negotiate later points of discussion. For example, Mr. Schaal would not agree to vacation time without being able to revisit vacation time when discussing wages. As of the May 24, 2012, meeting, the entire contract was still being negotiated and wages remained unresolved. Mr. Schaal understood that dialogue had not been exhausted on many items and nothing had been put to rest to present to Council. Often, the negotiators moved onto another subject just to move forward, but discussion on the subject had not been concluded. The items put aside during bargaining had not been mutually agreed upon.

The Union also claims that the Hearing Examiner erred in failing to find that Mr. Gabriel informed Mr. McClellan "that none of the tentative understandings which had

previously been reached by the parties' negotiators relating to management's contract proposal would be considered tentatively resolved", and that "negotiations could only continue as if no such understandings had been reached…." (Union's Exceptions ¶8). However, as noted above, these claims are addressed by the credited testimony of Mr. Gabriel, and found in Findings of Fact 61 and 63, as follows:

> On June 20, 2012, Mr. McClellan told Mr. Gabriel that there were no tentative agreements to present to Council for a vote.
>
> * * *
>
> When Mr. McClellan told Mr. Gabriel that there was no package, Mr. Gabriel concluded that there was nothing totally or tentatively agreed to. Mr. Gabriel did not believe that bargaining should start all over; he believed that no tentative agreements had been made on all the points claimed by the Union.

The Hearing Examiner did not fail to consider or address the Union's evidence, but rejected the testimony presented by the Union in favor of the Borough's evidence. As discussed above, there are no compelling reasons of record warranting review of the Hearing Examiner's credibility determinations. Thus, the Union's exception to the Hearing Examiner's failure to find alleged relevant facts is dismissed.

The Union's final argument on exceptions is that the Hearing Examiner erred in concluding that the Borough did not engage in surface or regressive bargaining in violation of Section 6(1)(a) and (e) of the PLRA. After a thorough review of the exceptions and all matters of record, we need not expound further on the Hearing Examiner's thorough and complete analysis of the totality of circumstances as set forth in the July 18, 2013 PDO at pages 9-10, as quoted above and adopted herein. Accordingly, as found and concluded by the Hearing Examiner, under the totality of circumstances, the Borough did not engage in surface or regressive bargaining or refuse to bargain in good faith in violation of Section 6(1)(a) and (e) of the PLRA. Thus, the Union's exceptions shall be dismissed, and the July 18, 2013 PDO shall be made absolute and final.

ORDER

In view of the foregoing and in order to effectuate the policies of Act 111 and the Pennsylvania Labor Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the United Steel, Paper, Forestry, Rubber, Manufacturing, Energy, Allied-Industrial and Service Workers International Union are hereby dismissed, and the July 18, 2013 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr, Member, this seventeenth day of September, 2013. 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.