COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| ERIE COUNTY TECHNICAL SCHOOL FEDERATION OF TEACHERS | : | |
| v. | : | Case No. PERA-C-15-345-W |
| ERIE COUNTY TECHNICAL SCHOOL | : | |

**FINAL ORDER**

Erie County Technical School (School) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on June 13, 2016, challenging a Proposed Decision and Order (PDO) issued on May 24, 2016. In the PDO, the Board's Hearing Examiner concluded that the School violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) when it distributed a memorandum regarding collective bargaining negotiations and a Final and Best offer to the bargaining unit members represented by the Erie County Technical School Federation of Teachers (Union). The Union did not file a response to the exceptions.

The facts of this case are summarized as follows. In January 2014, the School and the Union began negotiations for a successor collective bargaining agreement (CBA). However, the parties did not reach a successor agreement by the time the CBA expired in June 2014. Negotiation meetings continued from the fall of 2014 through and including the fall of 2015. These meetings were not productive. On December 2, 2015, the parties had an unsuccessful negotiation session in which a mediator was present.

On December 11, 2015, the School sent a memorandum to all the bargaining unit members, which stated as follows:

> On September 21st, after nearly two years of negotiations, the [School's] Negotiating Committee presented a Final and Best Offer to the Negotiating Committee of the [Union]. We again met with the [Union's] team on December 2nd.
>
> We have enclosed for your review the [School's] Final and Best Offer. If you should have any questions about this offer, you should direct them to the [Union's] Negotiating Committee as they are your exclusive bargaining representatives.
>
> At the December 2nd meeting, the Committee advised the [Union] that if an agreement was not ratified by December 14th, there was no guarantee the wage increases proposed would be retroactive.

A copy of the School's Final and Best offer from September 21, 2015, was attached to the December 11, 2015 memorandum.

The Union filed its Charge of Unfair Practices on December 14, 2015, alleging that the School violated Section 1201(a)(1), (2) and (5) of PERA when it sent bargaining unit members a copy of the School's most recent contract proposal in an attempt to negotiate directly with the bargaining unit members. A hearing was held before the Board's Hearing Examiner on March 10, 2016, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In concluding that the School violated Section 1201(a)(1) and (5) of PERA, the Hearing Examiner stated in the PDO as follows:

> The memorandum is directly addressed to the bargaining unit members rather than being information that is publicly released such as an update on a website or a statement made to the press. Thus, the obvious

> intent of the memorandum is to directly communicate with the bargaining unit members in the context of ongoing negotiations. Further, the memorandum contains the statement "At the December 2nd meeting, the Committee advised the Federation that if an agreement was not ratified by December 14th, there was no guarantee the wage increases proposed would be retroactive." This is a clear effort by the School to coerce the bargaining unit members by threatening to remove benefits from their "Final and Best Offer." This statement is a bald appeal by the School directly to the bargaining unit members and goes beyond a mere informational statement.

(PDO at 3).[1] By way of remedy, the Hearing Examiner ordered the School to, among other things, rescind the December 11, 2015 memorandum issued to the bargaining unit members.

In its exceptions, the School alleges that the Hearing Examiner erred in concluding that it violated Section 1201(a)(1) and (5) of PERA because the memorandum is an objective account of the status of negotiations. The School further alleges that the language regarding retroactivity is not coercive or threatening because it is an accurate account of what occurred at the December 2, 2015 meeting with the Union and is merely a factual representation of the School's position.

Ordinarily, rights of free speech remain operational during periods of negotiation between the parties. The law is well-established that an employer is not precluded from communicating, in non-coercive terms, with employes during negotiations as long as such communications are not an attempt to negotiate directly with bargaining unit members. **Chester County Intermediate Unit No 24 Education Association, PSEA/NEA v. Chester County Intermediate Unit No 24**, 35 PPER 110 (Final Order, 2004). An employer's communications, however, may not include actual or veiled threats of reprisal, promise of benefits directed to the employes, or constitute an attempt to circumvent the employes' bargaining representative and negotiate directly with employes. **PLRB v. Williamsport School District**, 6 PPER 57 (Nisi Decision and Order, 1975). An employer's threats, coercion, and direct dealing with employes to circumvent the employe representative are unfair practices under Section 1201(a)(1)[2] and (5) of PERA. *E.g.* **AFSCME, Local Union No. 1971 v. Philadelphia Office of Housing and Community Development**, 31 PPER ¶ 31055 (Final Order, 2000).

This case is virtually identical to **PLRB v. Portage Area School District**, 7 PPER 325 (Nisi Decision and Order, 1976). In **Portage Area School District**, the district's superintendent sent a letter to all bargaining unit members during negotiations for a successor agreement, which stated that the district would terminate all benefits such as health insurance if the parties did not reach an agreement before expiration of the parties' contract. The Board concluded that the district committed an unfair practice by sending the letter to all the bargaining unit members stating, in relevant part, as follows:

> A *threat* made during the pendency of negotiations to unilaterally eliminate economic fringe benefits because a successor collective bargaining agreement has not been negotiated can only be viewed by the Board as a device to intimidate or coerce the Association and its members to reach such an agreement. A threat so made is as disruptive

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[1] The Hearing Examiner did not find a violation of Section 1201(a)(2) of PERA because no evidence was presented to support a finding that the School assisted or controlled the Union to the point that its independence was questioned. No exceptions were filed by the Union to the Hearing Examiner's decision regarding this issue. 34 Pa. Code § 95.98(a)(3)("[a]n exception not specifically raised shall be waived").

[2] Threats and coercion falling within Section 1201(a)(1) of PERA will be found "if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employes have been shown in fact to have been coerced." **Northwestern Education Association v. Northwestern School District**, 16 PPER ¶ 16092 at 242 (Final Order, 1985). "[P]urity of heart is no defense to a charge under Section 1201(a)(1) of [PERA]." **Montgomery County Community College v. PLRB**, 16 PPER ¶ 16156 at 409 (Court of Common Pleas, 1985)(*quoting* **PLRB v. Eastern State School and Hospital**, 14 PPER ¶ 14153 at 331 (Proposed Decision and Order, 1983)). In fact, even an inadvertent act, if objectively threatening or coercive, will nevertheless violate Section 1201(a)(1). **PLRB v. Woodland Hills School District**, 13 PPER ¶ 13298 (Final Order, 1982).

> to the collective bargaining practice as is an actual unilateral cessation of such benefits.
>
> …
>
> Here, the threatening letter was specifically addressed to "Members of the Portage Area Education Association." Said letter specifically states that board payment of certain economic fringe benefits would be discontinued "for all members of the Portage Area Education Association." When viewed in the context of negotiations, it appears, and we infer, that members of the Association were singled out, since they were the ones who would vote to ratify any collective bargaining agreement, and they were the ones who, because of their relation to the Association, could put pressure on the Association to reach such an agreement. Nothing in the record tends to alter this inference.
>
> An attempt to interfere with the administration or existence of an employe organization may be direct or indirect. Where unlawful threats are made to members of the employe organization, which are found to be designed to place economic coercion on those members so as to "force an agreement, such tends to weaken the position of the employe organization at the bargaining table, tends to interfere with the internal processes of the organization and tends to weaken the collective bargaining process, itself.["]

7 PPER 236-237.

Similarly, here, the School's memorandum was specifically addressed to all bargaining unit members and contained a statement that if an agreement was not reached by December 14, 2015, "there was no guarantee the wage increases proposed would be retroactive." Notably the bargaining unit members received the School's memorandum just three days before the School's self-imposed December 14, 2015 deadline. Clearly, the intent of the memorandum was to bypass the Union and coerce the bargaining unit members into pressuring the Union to reach an agreement under threat of the loss of retroactive wage increases.

Indeed, based on the evidence presented, the Hearing Examiner rejected the School's attempt to legitimize its veiled threats, finding as follows:

> The School argues in its brief that this statement in the memorandum is not a threat because "it is a legitimate negotiating tactic and is used from time to time by employers negotiating with public sector labor organizations." School's Brief at 8. That argument does not address the fact that a statement made orally over a bargaining table to a negotiating team may be unlawfully coercive if fixed into a memorandum and directly transmitted to all bargaining unit members. Furthermore, the School is thus admitting in its Brief that it was utilizing a negotiation tactic in a direct communication with all bargaining unit members which strongly undercuts its argument that the memorandum was not unlawful direct dealing.
>
> The School also argues that the statement is not unlawful because it merely "states the obvious – there is no "guarantee" of retroactivity." Id. However, the inference of the statement is a threat to bargaining unit members that they will lose their retroactive pay if they do not ratify the School's proposal by December 14th. Indeed, … veiled threats are as unlawful as direct threats.

(PDO at 3-4).

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the School's December 11, 2015 memorandum was a

direct communication to the bargaining unit members in an attempt to coerce employes, and contained a veiled threat of reprisals through the loss of retroactive pay increases. As such, the Hearing Examiner properly concluded that the School violated Section 1201(a)(1) and (5) of PERA.[3] Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final as modified herein.

**ORDER**

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

**HEREBY ORDERS AND DIRECTS**

that the exceptions filed by Erie County Technical School are hereby dismissed, and the May 24, 2016 Proposed Decision and Order be and the same is hereby made absolute and final as modified herein.

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that the School shall:

1. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

2. Take the following affirmative action:

(a) Post a copy of the Proposed Decision and Order and Final Order within five (5) days from the date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

(b) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Final Order by completion and filing of the attached Affidavit of Compliance; and

(c) Serve a copy of the attached Affidavit of Compliance upon the Union.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this eighteenth day of October, 2016. 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.

[3] We find however, that the remedy issued by the Hearing Examiner directing rescission of the December 11, 2015 memorandum, at this point, would not be remedial and thus would not further the purposes and policies of PERA. Accordingly, the remedy will be modified to direct the School to cease and desist from its unfair practices.

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**AFFIDAVIT OF COMPLIANCE**

The Erie County Technical School hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (5) of PERA, that it has posted a copy of the Proposed Decision and Order and Final Order as directed and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public