



Re: Final and Best Offer

On September 21<sup>st</sup>, after nearly two years of negotiations, the Joint Operating Committee's Negotiating Committee presented a Final and Best offer to the Negotiating Committee of the ECTS Federation of Teachers. We again met with the Federation's team on December 2<sup>nd</sup>.

We have enclosed for your review the JOC's Final and Best Offer. If you should have any questions about this offer, you should direct them to the Federation's Negotiating Committee as they are your exclusive bargaining representatives.

At the December 2<sup>nd</sup> meeting, the Committee advised the Federation that if an agreement was not ratified by December 14<sup>th</sup>, there was no guarantee the wage increases proposed would be retroactive.

A copy of the Employer's Final and Best offer from September 21, 2015, was attached to this memorandum. (N.T. 20; Federation Exhibit 1).

### DISCUSSION

The Federation alleges that the School violated Sections 1201(a)(1), (2) and (5) of PERA when it distributed the December 10<sup>th</sup> memorandum to bargaining unit members on December 11, 2015. As an initial matter, the Federation did not present evidence or argue to support its charge that the School violated Section 1201(a)(2), therefore that charge is dismissed and I will only consider its charge under Section 1201(a)(5).

An employer engages in an unfair practice under Section 1201(a) (5) when it bypasses the exclusive bargaining representative and deals with the employees. **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 employees 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 employees' 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).

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. Portage Area School District**, 7 PPER 325 (Nisi Decision and Order, 1976); **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 employees during negotiations, so long as such communications are not an attempt to negotiate directly with bargaining unit members. **Chester County Intermediate Unit No. 24**, 35 PPER ¶ 110 (Final Order, 2004).

However, an employer's expression may not include actual or veiled threats of reprisal or promise of benefit directed to the employees for their participation in protected activities and may not constitute an attempt to circumvent the bargaining representative and negotiate directly with employees. **PLRB v. Williamsport School District**, 6 PPER 57 (Nisi Decision and Order, 1975).

The record in this matter clearly supports the conclusion that the December 10<sup>th</sup> memorandum issued by the School to all bargaining unit members was a violation of Section 1201(a)(5) of PERA.

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.

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 14<sup>th</sup>. Indeed, as discussed in **Williamsport School District, supra**, veiled threats are as unlawful as direct threats.

Thus, I find that the December 10<sup>th</sup> memorandum was a direct communication to bargaining unit members and an effort by the School to undercut the authority of the employees' duly selected representative, or fragment the unity of the bargaining unit. Therefore, the School has committed unfair practices by violating Section 1201(a)(1) and (5) of PERA.

### **CONCLUSIONS**

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The School is a public employer within the meaning of Section 301(1) of PERA.
2. The Federation is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The School has not committed unfair practices within the meaning of Section 1201(a)(2).
5. The School has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

### **ORDER**

In view of the foregoing and in order to effectuate the policies of the Act, the Hearing Examiner

### **HEREBY ORDERS AND DIRECTS**

that the School shall:

1. Cease and desist from refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
2. Take the following affirmative action:
  - (a) Rescind the December 10, 2015, memorandum to bargaining unit members entitled "Final and Best Offer";
  - (b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employees and have the same remain so posted for a period of ten (10) consecutive days;
  - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and
  - (d) Serve a copy of the attached Affidavit of Compliance upon the Union.

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

**SIGNED, DATED AND MAILED** at Harrisburg, Pennsylvania, this twenty-fourth day of May, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

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STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ERIE COUNTY TECHNICAL SCHOOL  
FEDERATION OF TEACHERS

v.

ERIE COUNTY TECHNICAL SCHOOL

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CASE NO. PERA-C-15-345-W

**AFFIDAVIT OF COMPLIANCE**

Erie County Technical School hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has rescinded the December 10, 2015, memorandum to bargaining unit members entitled "Final and Best Offer"; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed 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.

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Signature of Notary Public