COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SERVICE EMPLOYES INTERNATIONAL UNION LOCAL 668	:	
v.	:	CASE NO. PERA-C-18-127-E
CITY OF HAZLETON	:	

PROPOSED DECISION AND ORDER

On June 5, 2018, the Service Employes International Union Local 668 (Union or SEIU) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Hazleton (City) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that the City entered into individual employment contracts with Code Enforcement Officers (CEOs) who are in a bargaining unit exclusively represented by SEIU and covered by a collective bargaining agreement (CBA). The Union further alleged that the individual contracts alter wages and other terms and conditions of employment in conflict with the negotiated CBA.

On June 19, 2018, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on October 3, 2018, in Harrisburg. I granted the Complainant's continuance request and rescheduled the matter for January 28, 2019. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On April 24, 2019, the Union filed its post-hearing brief. The City filed its post-hearing brief on June 20, 2019, however, an email copy was received by the Board on June 17, 2019.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)

3. Kimberly Yost is a business agent for SEIU. The Union represents a bargaining unit of employes at the City which includes CEOs. (N.T. 13-15; Joint Exhibits 1 & 4)

4. The City and the Union are parties to a CBA which expired on December 31, 2016. The parties have not negotiated new wages for any of the employes in the bargaining unit. The International component of SEIU, not Local 668, represents the City's DPW employes.[1] The City negotiated a new

[1] The abbreviation "DPW" is not explained on the record. Presumably DPW refers to the Department of Public Works.

collective bargaining agreement with that union. (N.T. 17-18, 22-23, 32; Joint Exhibit 2)

5. The parties met 3 times in the fall of 2016 to negotiate a new CBA but did not reach an agreement. A meeting was scheduled for December 27, 2016, but that meeting was cancelled due to weather. The parties did not meet at all in 2017. Ms. Yost credibly testified that at no time did the City attempt to schedule bargaining or negotiate salaries or other terms and conditions of employment for the CEOs. (N.T. 22, 27-29, 32-33, 44)

6. On January 31, 2018, Ms. Yost sent a "cease and desist" letter to the Code Enforcement Supervisor. (N.T. 16-17)

7. The letter provides, in relevant part, as follows:

> It has come to the Union's attention that you are forcing employees who are being hired as Code Officers to sign a contract that is separate from the Collective Bargaining Agreement that is negotiated with the Union. The Code Enforcement [O]fficers are part of the bargaining unit represented by SEIU Local 668 and as such would be controlled by the negotiated agreement.
>
> The Union is requesting that you cease and desist immediately the direct dealing with the Code Officers and forcing them to sign . . . the contract you have provided to them.

(Joint Exhibit 4)

8. On February 2, 2018, the City filed an unfair practice charge against the Union for refusing to bargain, which was administratively dismissed by the Board. Two part-time CEOs were hired as full-time CEOs. The two CEOs signed individual employment contracts with the City, effective February 5, 2018. Mayor Jeffrey Cusat signed the contracts on behalf of the City. At no time did the City bargain the individual contracts for the CEOs with the Union. The individual contracts are not signed by a Union official and do not mention the Union. (N.T. 16, 21, 28, 31, 34-36,43-44; Joint Exhibits 3 & 6)

9. City officials never responded to Ms. Yost's "cease and desist" letter. (N.T. 17-18)

10. The individual contracts change wages for the CEOs. The starting salary for a full-time CEO in the CBA is $20,000. The individual contracts provide a CEO with a starting salary of $24,000. The Mayor raised the starting salaries to attract employes after a number of CEOs left. (N.T. 18-19, 35-36, 40-41; Joint Exhibits 2 & 3)

11. The individual contracts change health insurance premium contributions for the CEOs. Under the CBA, CEOs pay $20 per month ($240 per year) for health insurance. The individual contracts require the CEOs to pay 10% of their annual salaries in 2018 with 2% increases every year until 2023 when they will pay 20% of their salaries for health insurance. (N.T. 18-19; Joint Exhibits 2 & 3)

12. The individual contracts reduce the number of annually provided and paid holidays, paid sick days and paid personal days for the CEOs than they receive under the CBA. The individual contracts also reduce the amount of sick leave CEOs are permitted to accumulate from 210 days to 126 days. (N.T. 19-20; Joint Exhibits 2 & 3)

13. The individual contracts reduce the amount of vacation that CEOs receive as compared to the amount they would receive under the CBA. Under the

CBA, bargaining unit employes receive 3 weeks of vacation time annually. Under the individual contracts, the CEOs must have 10 years of service to receive 3 weeks of vacation time. Under the CBA, bargaining unit employes receive 4 weeks vacation after 10 years of service. The individual contracts require the CEOs to wait 20 years for 4 weeks of vacation. (N.T. 19-20; Joint Exhibits 2 & 3)

14. The individual contracts for the CEOs change the progressive discipline delineated in the CBA. The CBA contains a 5-step progressive disciplinary procedure beginning with a verbal warning, written warning, 3-day suspension, 5-day suspension, then discharge. The individual contracts contain a 4-step progression eliminating the fourth step of a 5-day suspension. (N.T. 20-21; Joint Exhibits 2 & 3)

15. The individual contracts for the CEOs change the grievance procedure provided for bargaining unit employes under the CBA. The CBA provides bargaining unit employes with a 3-step grievance procedure that culminates in binding arbitration. The individual contracts with the CEOs eliminate the right to proceed to binding arbitration and contains a 2-step procedure that ends with the Mayor. (N.T. 21; Joint Exhibits 2& 3)

16. The individual contracts do not indicate whether the CBA controls where the contracts are silent regarding a term or condition of employment. (N.T. 21-22)

17. On May 4, 2018, the City's Act 47 Recovery Plan became effective.[2] The Mayor entered the individual contracts with the CEOs, effective February 5, 2018, before the Act 47 Plan. (N.T. 43; Joint Exhibit 5)

18. The parties held a negotiation session in August 2018, at which time the Union requested that the City respond to the Union's fall of 2016 proposal. The City informed the Union that negotiations had to start from the beginning because it entered into Act 47 status. At no time between negotiations in the fall of 2016 and the negotiation session of August 2018 did the City contact the Union with bargaining dates. (N.T. 33-34, 44)

DISCUSSION

The Union has charged the City with violating Section 1201(a)(3) by discriminating against employes regarding hire and tenure of employment (Specification of Charges ¶s 8 & 9). The Union's discrimination claims under Section 1201(a)(3) are dismissed as unsubstantiated by the record. There was no evidence that that the City entered individual contracts with the CEOs and changed their terms and conditions of employment for unlawfully motivated reasons or that the employes were engaged in known protected activities as required by St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The record is also devoid of evidence that the City entered the side agreements changing employment conditions to retaliate or otherwise discriminate against the Union generally for its activities or alleged lack thereof. Moreover, the Union did not present any arguments in its post-hearing brief in support of its discrimination claim.

The Union argues that the City violated its bargaining obligation by unilaterally entering side agreements and directly dealing with employes represented by the Union. (Union's Post-hearing Brief at 3). The Union

[2] Act of July 10, 1987, P.L. 246, No. 47, as amended, 53 P.S. §§11701.101-11701.501.

further maintains that the City violated Section 1201(a)(5) of the Act by unilaterally changing mandatory subjects of bargaining and by repudiating the CBA during a status quo period. (Union's Post-hearing Brief at 3-5).

The City argues that it was contractually privileged to enter into the individual contracts. The City specifically maintains that "its sound arguable basis for its decision to hire CEOs through separate contracts stemmed from the City's depressed financial status and immediate need to hire said employees at a salary that would be more attractive to them. The City thus did not act in bad faith by providing a higher salary to the CEOs." (City's Post-hearing Brief at 4-5). The City distinguishes Millcreek Township School District v. PLRB, 631 A.2d at 734 (Pa. Cmwlth. 1993), and argues that the Union's reliance on that case is misplaced. (City's Post-hearing Brief at 5). The City further asserts that "[i]f anything, it was the Union that acted in bad faith by refusing to bargain to reach a successor agreement upon the expiration of the CBA." (City's Post-hearing Brief at 5)(emphasis original).

In Millcreek Township School District, supra, the Commonwealth Court of Pennsylvania opined as follows:

> The rationale for considering the unilateral grant of benefits to be an unfair labor practice is that, even if unintentional, the role of the collective bargaining agent as the sole representative of all employees would be undermined if the [employer] could unilaterally bargain to give individual employees greater benefits than those negotiated for employees who bargained collectively. The issue is not whether the change is a benefit or a detriment to the employees, but whether it affects a mandatory subject of bargaining, i.e., wages hours or other terms or conditions of employment. A unilateral change in a mandatory subject of bargaining constitutes a refusal to bargain in good faith and is an unfair labor practice because it undermines the collective bargaining process which is favored in this Commonwealth.

Millcreek Township School District, 631 A.2d at 738.

Contrary to the City's argument, I find that the policies and the legal principles espoused by the Commonwealth Court in Millcreek, supra, are applicable to the instant case. The record in this case supports a finding that the City, by and through its Mayor, engaged in direct dealing with two CEOs. The City entered into individual contracts with CEOs that changed wages, health insurance contribution requirements, amounts of paid vacation, sick and holiday time as well as the maximum amount of accumulated sick time, which are all, without question, mandatory subjects of bargaining. The Act 47 plan places financial limits on the City for overall spending on wages and benefits. However, the Act 47 plan does not authorize the City to unilaterally establish or impose specific wages, health care and other terms and conditions of employment for any bargaining unit employes without the Union's agreement. Act 47 does not authorize a recovery plan to supersede an existing collective bargaining agreement or the status quo of an expired collective bargaining agreement. Rather Act 47 requires future agreements to comply with the terms of the recovery plan. City of Scranton v. E.B. Jermyn Lodge No. 2 of the Fraternal Order of Police, 8 A.3d 971 (Pa. Cmwlth. 2010), reversed on other grounds, City of Scranton v. Firefighters Local Union No. 60, 612 Pa. 23, 29 A.3d 773 (2011)

In this regard, the City was not authorized to violate the status quo of the existing, expired CBA, and it has a duty to bargain those subjects with SEIU until an agreement on those matters is obtained. Section 252 of Act 47 recognizes that a public employer, in distressed status under an Act 47 recovery plan in the Commonwealth, still has a duty to bargain with the exclusive representative of its bargaining unit employes provided that "[a] collective bargaining agreement or arbitration settlement executed after the adoption of a plan shall not in any manner violate, expand or diminish its provisions." 53 P.S. § 11701.252. See also, City of Scranton v. Firefighters Local Union No. 60, 612 Pa. 23, 29 A.2d 773 (2011)(holding that Section 252 of Act 47 does not impinge on interest arbitration awards issued pursuant to Act 111). Furthermore, the Act 47 plan was not in effect until after the Mayor entered the side agreements with the CEOs.

The record shows that the City and the Union failed to bargain in 2017 and did not bargain in 2018 until August, when the City wanted to start bargaining from the beginning under the Act 47 Recovery Plan. The City's claimed emergency exception (that it could not find individuals to work for the starting salary provided in the CBA and that the Act 47 plan limits spending on employes' wages and benefits) does not excuse the City from its bargaining obligation, especially where the record shows that the City did not reach out to the proper Union bargaining agents, at any time, to negotiate the CEO matters or share with the Union the City's difficulty in finding CEOs willing to work for the starting salary in the CBA. The City has an obligation to initiate contact and negotiate the desired changes regarding CEO's terms and conditions of employment with the Union. The record shows that both parties failed to communicate with each other for over a year. In this environment of avoiding each other and where the City had the obligation to bargain any changes to employes wages, benefits and other terms of employment, the City's asserted emergency need to fill the positions at a higher salary and reduced benefits for CEOs is not credible.

Moreover, the City's position does not explain or justify why the City also changed disciplinary procedures and the grievance process, which is a negligible cost to the City. Indeed, the Mayor removed arbitration from the side agreements, which is statutorily required under Article IX of PERA for employes covered by a collective bargaining agreement, as are the CEOs here. There are many different conditions to which the Union could have agreed and conceded while allowing the City to stay within the limits of the Act 47 plan. The City does not have the authority to unilaterally decide exactly how it will stay within the limits of the Act 47 plan with respect to employe wages and employment benefits. The City must fulfill its bargaining obligation and obtain agreement from the Union on how to spend the approved allotment of financial resources under the Act 47 plan. The City has to work with the Union on the manner in which it spends the Act 47 money on employes' terms and conditions of employment; it cannot unilaterally decide where and how it will save money on terms and conditions of employment that are also mandatory subject of bargaining.

Accordingly, the City engaged in unfair practices in violation of Section 1201(a)(1) and (5) of PERA by engaging in the following conduct: (1) by unilaterally changing mandatory subjects of bargaining regarding conditions of employment for full-time CEOs; (2) by bypassing the exclusive bargaining representative of bargaining unit employes when it engaged in direct dealing with two CEOs; (3) by entering into individual contracts with two CEOs which contradicted and repudiated the express terms of the CBA with regard to the following: wages, health insurance contributions, personal leave, sick leave, vacation time, discipline, grievance and arbitration

procedures and sick leave accumulation. However, in returning to the status quo regarding salary, the CEOs will keep the excess wages earned from their start date until the date of this order. AFSCME District Council 88 v. Warminster Township, 31 PPER ¶ 31156 (Final Order, 2000) (holding that "[t]he collective bargaining rights of public employes would become a nullity if employers were permitted to undermine the employes' exclusive bargaining representative through direct dealing and then unilaterally recoup its unlawful investment when found by that conduct to have violated its bargaining duty.")

CONCLUSIONS

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

1. The City is a public employer within the meaning of Section 301(1) of PERA.

2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The City has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

5. The City has not committed unfair practices in violation of Section 1201(a)(3) of PERA

ORDER

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

HEREBY ORDERS AND DIRECTS

that the City shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act;

2. 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;

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Rescind all individual contracts between the City and City Code Enforcement Officers;

(b) Immediately return to the status quo ante of applying the terms and conditions of employment contained in the expired CBA to the Code

Enforcement Officers, including but not limited to the Collective Bargaining Agreement provisions regarding starting salary, health insurance contributions, amount of sick leave annually, vacation time, personal leave, holidays, overall sick leave accumulation and grievance and arbitration procedures and apply those terms retroactively to February 5, 2018 regarding any leave and holiday shortages;

(c) Permit the CEOs to keep the unlawfully increased wages received until the date of this order;

(d) Immediately return all health care contributions in excess of contributions required by the expired collective bargaining agreement and make whole CEOs for any out of pocket expenses incurred under the individual contracts, lost leave and holiday pay they would have received under the CBA retroactive to February 5, 2018;

(e) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(f) 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.

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fourth day of June 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SERVICE EMPLOYES INTERNATIONAL UNION LOCAL 668	:	
v.	:	CASE NO. PERA-C-18-127-E
CITY OF HAZLETON	:	

AFFIDAVIT OF COMPLIANCE

The City of Hazleton hereby certifies that it has ceased and desisted from directly dealing with employes, repudiating the terms of the expired collective bargaining agreement, unilaterally changing bargainable terms and conditions of employment in violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has rescinded any and all individual employment contracts with bargaining unit employes; that it has returned to the status quo ante of applying the terms of the expired collective bargaining agreement; that it has made CEOs whole for any leave and holiday pay they would have received under the CBA and out of pocket expenses incurred under the individual contracts; that it has posted a copy of the decision and order as directed therein; 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