

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING :
ENGINEERS LOCAL 95-95A :
 :
v. : CASE NO. PERA-C-21-36-W
 :
UNIVERSITY OF PITTSBURGH :

PROPOSED DECISION AND ORDER

On March 19, 2021, the International Union of Operating Engineers Local 95-95A (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (PLRB or Board) alleging that the University of Pittsburgh (Pitt, University or Employer) violated Section 1201(a) (1), (2) and (5) of the Public Employe Relations Act (PERA or Act) by engaging in bad faith bargaining and refusing to provide requested information.

On April 12, 2021, the Secretary of the Board issued a complaint and notice of hearing designating June 14, 2021, via Microsoft Teams, as the time and manner of hearing.

The hearing was held on June 14, 2021, via Microsoft Teams, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed its post-hearing brief on October 8, 2021. The University filed its post-hearing brief on November 12, 2021.

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

FINDINGS OF FACT

1. The University is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7).
3. Jason Babeji is an Energy Management Operations Center (EMOC) technician. He works at the University's Energy Management Operations Center which is on campus. His primary duties are to maintain the University's building automation system throughout the entire campus. EMOC is a subsection of the University's Facility Management department. At the time of the hearing, there were approximately eight employes in the EMOC divided into two groups: the EMOC technicians and the EMOC coordinators. These positions have been added to the bargaining unit as a result of a successful unit clarification petition filed by the Union. (N.T. 14-19, 29, 32; In the Matter of the Employes of University of Pittsburgh, 50 PPER 38, PERA-U-17-149-W (Proposed Order of Unit Clarification, 2019), 50 PPER 84, PERA-U-17-149-W (Final Order, 2019).

4. At the time of the hearing, the parties had not reached an agreement on the terms and conditions of employment for the recently accreted EMOC technician employees. There are three such employees. The parties reached an agreement over the other EMOC employees. Thus, recently accreted EMOC technicians, like Jason Babeji were, at the time of the hearing, working under conditions that were not negotiated by the Union and the University. (N.T. 28, 30-32).

5. In 2019 and 2020, Babeji worked 37.5 hours per week as reflected on his paystubs and experience. He had one-hour unpaid lunch break per shift. For 2020, based on a work week of 37.5 hours per week, Babeji earned an hourly rate of \$44.72. (N.T. 21-26, 33; Union Exhibit 3, 4).

6. Joseph Kosky is an EMOC technician. In 2020, Kosky was paid for 1,957.5 hours and was paid an annual salary of \$78,371.98. This is an hourly rate of \$40.03. Thus, on average for the year, Kosky worked 37.5 hours per week. Kosky has a one-hour unpaid lunch break each day. (N.T. 35-47 ; Union Exhibits 5, 5a).

7. Jordan Timko is an EMOC technician. Timko, like Kosky and Babeji, works a 37.5 hour week with one-hour unpaid lunches. For 2020, Timko earned \$73,782.60, which is an effective hourly rate of \$37.69 based on a work week of 37.5 hours. (N.T. 49-53; Union Exhibit 6).

8. In August 2020 the parties began bargaining over the issue of bringing the EMOC employees into the previously existing bargaining unit. These negotiations were part of a larger negotiation over the successor collective bargaining agreement between the parties which expired in July 2021. (N.T. 83-86; Employer Exhibit 9).

9. Jack Gaffney is an employe of the Union and the Assistant Business Manager for the local unit in this matter. He is responsible for representing the EMOC employees. (N.T. 54-56).

10. As part of negotiations with the University over the inclusion of the EMOC employees into the bargaining unit, Gaffney realized that the EMOC employees would need to move away from a 37.5 hour work week with one-hour unpaid lunch to a 40 hour work week with no set lunch period ("straight eight with a rolling lunch") in order to harmonize with the other existing members of the bargaining unit (primarily the operating engineers). The parties agree that the EMOC technicians will be moved to a 40 hour per week schedule with 30 minute paid lunches. (N.T. 58-60, 69-74).

11. Gaffney found that in his initial negotiations with the University, the University offered wages for the EMOC technicians that were the same as the previous year with a 2% raise but based on a 40 hour work week with 30 minute paid lunches. Gaffney felt that this "watered down" the wages of the technicians compared to the same salary compared to a 37.5 hour work week with one hour unpaid lunches. Gaffney believed that since the technicians were to be working 130 more hours per year, in his calculation, the salary should go up to reflect the additional hours. Gaffney believed that the technicians should get a salary raise for going from 37.5 to 40 hours per week in addition to a 2% raise. (N.T. 57-63).

12. Though the University's proposal was for a 40 hour work week, the EMOC technicians under the proposal would still only work 37.5 hours per week as they would receive a 30 minute paid lunch for each 8 hour shift. (N.T. 91-93, 100, 129-130).

13. On or about August 28, 2020, the University presented an opening proposal to the Union with respect to the issue of adding the EMOC employees to the unit. In this proposal, the University offered an hourly wage of \$35.84 for the EMOC technicians that were being added to the unit. The work week under this offer would be 40 hours. This was the same hourly wage as the operating engineer classification under the collective bargaining agreement. This offer was not accepted by the Union. (N.T. 86-88; Employer Exhibit 1).

14. The parties held a bargaining session on October 27, 2020. The parties exchanged proposals in advance of the session. The University's proposal for the EMOC technicians was \$38.40 an hour based on a 40 hour work week with 30 minute paid lunches. (N.T. 88-89; Employer Exhibit 2).

15. In advance of the October 27, 2020, bargaining session Gaffney sent the University a written counter proposal. The proposal says in relevant part:

PITT EMOC WAGE OFFER . . . EMOC EN TECH \$38.40*
UNION COUNTER WAGE OFFER . . . EMOC EN TECH
\$40.80*
* The counter offer on wages is due to the fact
that all members will ee a loss of days SEE PITT
EMOC PROPOSAL #4, and the 37.50 hours worked per
week salary will be 40 hours + which is approx.
130 more hours worked annually by the members. .
. .
37.5 hrs per week = 1950 40 hrs per week 2080

(N.T. 97-98; Employer Exhibit 3).

16. The parties discussed the wage proposals at the October 27, 2020 bargaining session. No agreement on the issue was reached. (N.T. 98).

17. The next bargaining session was on November 23, 2020. The parties exchanged proposals before the session. The University's wage proposal for the EMOC technicians remained at hourly rate of \$38.40 with Babeji at a slightly higher rate that would be "red circled" until future contracts exceeded the "red circled" amount. The proposal was for a 40 hour work week. At the bargaining session, the Union did not accept the wage proposal for the EMOC technicians and made a counter proposal of \$39.40 per hour. (N.T. 98-101; Union Exhibit 4).

18. On or about November 27, 2020, the University prepared a written response to proposals made by the Union at the November 23, 2020 bargaining session. The written response states in relevant part:

From our discussion, it is the University's understanding that the Union proposes the hourly wage rate for EMOC Energy Technicians to be set at \$39.40/hour, the hourly rate for Mr. Babeji [and be red-circled at \$42.93]. . . .

University Response: The University rejects the proposed \$39.40/hour wage rate and reiterates its offer of \$38.40/hour for Energy Technicians.

The University rejects the proposal to continue Mr. Babeji at the rate of \$42.93/hour. In or about 2017, Mr. Babeji received a substantial pay increase (10%) because he took on various manager-level functions Now that Mr. Babeji will not be performing the tasks he was paid a manager's premium to do, it is appropriate to reduce his rate to \$39.12/hour. . . .

(N.T. 103-105; University Exhibit 5).

19. On December 9, 2020, Gaffney sent Tiffany Jenca, Esq., counsel for the University, a letter requesting information relevant to bargaining. The letter states in relevant part:

Tiffany: I am writing regarding the ongoing negotiations between the [University] and the [Union] members at the [EMOC]. Pitt has stated that their offer includes a 2% salary increase, however they have added 130 annual work hours to the [EMOC employees]. The net effect of this is that the members of [the Union] at the [EMOC] will make LESS MONEY, even after factoring in the two percent. The University has been adamant that their stance on wages would not change.

Also, when pressed about the economic issues, the University communicated to [the Union] negotiating committee that decreased enrollment and financial uncertainty had forced the University to make such an offer on wages. It is the position of [the Union] that the offer is regressive - that members of [the Union] at the [EMOC] are being asked to work more hours for less pay.

Accordingly, [the Union] is requesting University financial information verifying that the University must legitimately bargain regressively. Kindly provide the following items. . . .

(N.T. 64; Union Exhibit 1).

20. On December 16, 2020, Jenca responded to Gaffney by letter which states in relevant part:

. . . On the whole, the University responds that the Union's requests [for financial information] are denied. . . .

. . . [T]here is no factual basis for the Union's requests. In its December 9 letter, the Union purports to base its sweeping requests for University financial data on its belief that the University's EMOC proposal will require EMOC [technicians] to work an additional 130 hours annually. This is simply not true. To the contrary, under the University's proposal, the EMOC [technicians] would receive *130 hours of additional pay per year with no additional time worked.*

As the University has explained, no EMOC [technician] will be required to work additional hours in their regular schedule under the University's proposal. At current, all EMOC [technicians] are scheduled to work 42.5 hours per week and receive a one hour per day unpaid meal break. This results in 37.5 hours worked per week with 37.5 hours paid per week. Under the University's proposal, the EMOC [technicians] will be scheduled to work 40 hours per week (a reduction of 2.5 hours/week from current state), and will receive a 30 minute *paid* lunch break. This results in 37.5 hours worked per week but 40 hours paid per week on account of the paid meal break benefit.

This is not regressive bargaining, as the University's proposal clearly benefits the workers. . . .

(Union Exhibit 1) (emphasis in original).

21. On or about February 17, 2021, the University made a new offer to the Union on the issue of the EMOC technicians wages. The new offer was written and states in relevant part:

From our discussion, it is the University's understanding that the Union proposes the hourly wage rate for EMOC Energy Technicians to be set at \$39.40/hour, the hourly rate for Mr. Babeji [to be red-circled at \$42.93]. . . .

University Response: The University tentatively agrees to the proposed \$39.40/hour wage rate for the existing EMOC Technicians (members Babeji, Kosky, Coyne, Safreed, and Timko). The University proposes, however, that the classifications rate for new EMOC Technicians be set at \$38.40/hour, and the existing EMOC

Technicians will be red-circled until such time as the classification rate meets or exceeds their individual rate of pay. . . .

(N.T. 105; Employer Exhibit 7).

22. On or about February 19, 2021, Gaffney responded to the University's offer with a written counteroffer. The written counteroffer states in relevant part:

The Union [will accept the \$39.40 wage], but does not agree and rejects the offer to start any new hires of EMOC TECHS at \$38.40, and also rejects the red circle offer to current EMOC TECHS. The [Union] counters that the \$39.80 wage and the wage negotiated in the upcoming negotiations would apply to the EMOC Members as well.

[The Union] offers the following to settle the wage issue in RE: Jason Babeji. The current CBA has Foreman job title Current language in the CBA states that the Foreman receives 10% above the Journeyman rate. . . . \$39.80 plus 10% (\$3.98) total Foreman rate \$43.78

(N.T. 108, 140-142; Employer Exhibit 8).

23. After February 2020, the Union filed the instant unfair practice charge and the issue of the EMOC technicians wages has not been bargained. (N.T. 109).

DISCUSSION

The Union claims that the University violated Section 1201(a) (5) of the Act by bargaining in bad faith during the negotiation of an agreement to add EMOC technicians into an existing unit.¹

Section 701 of PERA states:

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, or the negotiation of an agreement of any question arising thereunder and the execution of a written contract incorporating any agreement reached but such obligation does not compel either party to agree

¹ The Union's claim on the basis of refusing to provide requested information was not argued by the Union in its Brief. It is therefore dismissed. Additionally, the Union presented no argument on any claim based on Section 1201(a) (2) and that charge is also dismissed.

to a proposal or require the making of a concession.

43 P.S. § 1101.701.

Good-faith bargaining requires the parties to make a serious effort to resolve differences and to reach common ground. Morrisville School District, 687 A.2d 5 (Cmwlth Court, 1996). Although an employer cannot be forced to make a concession on a particular issue or to accept a specific proposal, part of an employer's mutual obligation of good-faith bargaining is a sincere desire to reach agreement and to make a serious effort to resolve differences to reach common ground. Id.; Appeal of Cumberland Valley School District, 483 Pa. 134, 142 (1978). The failure to make a counterproposal may constitute some evidence of an overall failure to make a serious effort at resolving differences and reaching common ground, but, by itself, is within the protection of Section 701. Morrisville School District, 687 A.2d 5. While a rigid, inflexible adherence to a "line in the sand" may be a normal bargaining ploy, it can constitute lack of good faith when combined with other factors of bad faith bargaining. Id. Good-faith bargaining is not demonstrated by mere attendance at bargaining sessions and the exchange of information if these events are also accompanied by a rigid bargaining position. Morrisville School District, 25 PPER ¶ 25197 (Final Order, 1994). The Board has held:

In order to determine whether the parties to the bargaining process are bargaining in good faith the Board can only rely on the outward manifestations of their intent. In such circumstances it is important to distinguish between self-serving evidence which may show essentially procedural compliance with the obligation to negotiate over subcontracting and evidence which tends to show open mindedness and serious desire to reach common ground through real compromise over substantive matters. Good faith in collective bargaining is not demonstrated solely by the amount of information exchange or the number of times the parties have met or stated their desire to agree. Rather, good faith in bargaining is demonstrated principally by modification of one's position with regard to the matters at issue in the negotiation which shows actual attempt to reach compromise or agreements. Because it is possible to comply with the procedural requirements of bargaining such as supplying information and meeting with the bargaining committee without actually intending to reach out to the other side with compromise, **the Board has found the willingness to modify a position through counterproposal to be of primary importance when looking at the totality of the circumstances.**

Morrisville School District, 25 PPER ¶ 25197 (internal citations omitted) (emphasis added).

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. Commonwealth of Pennsylvania Public Utility Commission, 35 PPER ¶ 113 (Final Order, 2004), citing Homer-Center School District, 12 PPER ¶ 12169 (Final Order, 1981). When determining whether an employer bargained in good faith, the Board examines the totality of the circumstances. Lancaster County, 45 PPER 94 (Final Order, 2014).

Turning to this matter, the evidence shows that the University has bargained in good faith on the issue of EMOC technician wages. Most importantly, the record shows that the University has modified its positions on wages of the EMOC technicians through the process of counterproposals. On or about August 28, 2020, the University presented an opening proposal of an hourly wage of \$35.84 for the EMOC technicians. On or about October 27, 2020, the University's wage proposal for the EMOC technicians was \$38.40 an hour. On or about November 27, 2020, the University rejected the proposed \$39.40/hour wage rate and reiterated its offer of \$38.40/hour for Energy technicians but countered with offering Babeji a rate at \$39.12/hour. On or about February 17, 2021, in response to Union counterproposals, the University tentatively agreed to the proposed \$39.40/hour wage rate for the existing EMOC technicians. The University counteroffered that any new EMOC technicians be set at \$38.40/hour, and the existing EMOC Technicians will be red-circled until such time as the classification rate meets or exceeds their individual rate of pay. The record shows that the University opened at \$35.84 per hour for the EMOC technicians and by the time this charge was filed, had ultimately raised its offer to \$39.40 for the existing EMOC technicians. Thus, the record clearly shows the University was willing to modify its position through counterproposal which is "of primary importance when looking at the totality of the circumstances" when determining if bargaining is in good faith. Morrisville School District, 25 PPER ¶ 25197.

Related to the issue of wages discussed above is the intractable disagreement between the parties over the number of hours worked. The Union argues:

University witness Dan Fisher repeatedly proffered testimony that Pitt proposals for the EMOC technicians included a 30-minute meal break wherein the techs were not required to work during their paid meal break. (Transcript at 93). Fisher went on to state that the proposed workday would be eight (8) hours for the EMOC techs, including the 30-minute lunch, thereby totaling 37 ½ hour s worked per week. (Transcript at 93)

Jack Gaffney, however, clarified that the EMOC techs would follow the lunch break contractual language the Pitt engineers had been following for years. (Transcript at 71). That language called for an eight (8) hour workday, including lunch on the fly. (Transcript at 72). In fact,

the exact contract language, in section 6.1 of Employer Exhibit 9, provides for: "a reasonable period of time, up to 30 minutes per shift for a meal break without loss of pay so long as the break does not interfere with the performance of duties, projects or critical situations." (Transcript at 73). Gaffney went on to explain that the Local 95 engineers at Pitt have worked under this language for years, and it translates to 2080 work hours per year, with lunch on the fly which sometimes allows for up to 30 minutes for lunch, but often times requires that work be performed during that 30-minute stretch. (Transcript at 74-75). Thus, the EMOC techs would undoubtedly be working more hours annually, so their base pay should be set on their prior rate (at 1957.5 annual hours), with increases added to that number. (Transcript at 75-76).

(Union's Brief at 5). Thus, the Union argues that since the EMOC technicians would be working more hours per year due to "lunch on the fly" being in actuality an additional 2.5 hours per week of work, the wage proposals from the University have been "regressive" because, the Union argues, the annual pay offered by the University for the EMOC technicians is less than what they currently earn when considering the number of annual hours worked. I am not persuaded by this argument and I do not find that it shows an unfair practice for the following reasons.

First, even if I were to credit Gaffney's testimony that the 30-minute lunch in the new proposed work week is illusory and that the EMOC techs will have no breaks (thus, in effect, they will work as much as 130 hours more per year), the evidence shows that the University is still engaging in good faith bargaining with the Union because the University has consistently modified its position towards the Union's position through the counterproposal process. I do not agree with the Union that an opening position for wages that the Union believes to be below what the EMOC technicians currently make is *per se* bad faith bargaining.

Second, I find that this record shows that the EMOC technicians will, as part of their new 40-hour work week, have paid lunch breaks without duties which means that their effective hours worked per week will be 37.5 (five 8 hour shifts with 2.5 hours of paid lunch per week) which is substantially similar to the number of hours they worked at the time of the hearing (five 8.5 hour shifts with 5 hours of unpaid lunch breaks per week). Therefore, I fundamentally do not agree with the Union that this is an issue of the EMOC technicians working more hours per year under the University's proposals. In so finding I credit the testimony of University witness Daniel Fisher, who oversees EMOC Operations, who testified on direct as follows:

Q: And are [EMOC technicians] required to perform work during that 30 minutes paid meal break?

A: They are not.

Q: So how many hours, under this proposal, is the University proposing to Mr. Babeji, Mr. Kosky and Mr. Timko would be expected to actively work per shift?

A: Seven and a half.

Q: And that's the same number of hours that they actively work per shift now?

A: Yes, it is.

(N.T. 93).

For the above reasons, I find that the Union has not carried its burden of showing that the University has engaged in bad faith bargaining and its charge will be dismissed.

CONCLUSIONS

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

1. The University 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 University has **not** committed unfair practices in violation of Section 1201(a)(1), (2) and (5) of PERA.

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 rescinded.

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 seventh day of January 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich
STEPHEN A. HELMERICH, Hearing Examiner