

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 84, :
LOCAL 757 :
 : CASE NO. PERA-C-23-96-W
 v. :
 :
 BUTLER AREA SEWER AUTHORITY :
 :

PROPOSED DECISION AND ORDER

On May 15, 2023, AFSCME District Council 84, Local 757 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Butler Area Sewer Authority (BASA, Authority or Employer) violated Section 1201(a)(1), (5) and (9) of the Public Employe Relations Act (PERA or Act) when it unilaterally offered certain bargaining-unit employes a retention bonus on January 10, 2023.

On May 30, 2023, the Secretary of the Board issued a letter stating that no complaint shall be issued as the charge did not include sufficient facts and was untimely. On June 15, 2023, the Union filed exceptions to the Secretary's decision to not issue a complaint. The Union's exceptions addressed the timeliness issue by stating that its knowledge of the alleged direct dealing occurred on March 14, 2023 and supplied additional allegations.

On July 18, 2023, the Board issued an Order Directing Remand to Secretary for Further Proceedings with directions to issue a complaint.

On August 1, 2023, the Secretary of the Board issued a complaint and notice of hearing designating October 27, 2023, in Pittsburgh, as the time and place of hearing.

The hearing was held on October 27, 2023, in Cranberry Township, PA, 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 December 5, 2023. The Authority filed its post-hearing brief on December 21, 2023.

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

FINDINGS OF FACT

1. BASA is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6-8).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. For this Proposed Decision and Order, "Union" shall specifically refer to Local 757 which is affiliated with AFSCME District Council 84. (N.T. 6-8).

3. At the time of the hearing, a collective bargaining agreement (CBA) with the effective dates of January 1, 2020, through December 31, 2023, was in effect. The CBA's recognition clause recognizes AFSME District Council 84 and BASA as parties to the CBA. AFSCME District Council 84 is the certified exclusive bargaining representative of a subdivision of the Authority's unit comprised of all white collar, clerical, secretarial and all blue collar employes; and excluding management level employes, supervisors, first level supervisors, confidential employes and guard as defined by the Act. (N.T. 41; Authority Exhibit 3; PERA-R-10,411-W).

4. BASA is a regional facility that collects and treats sewage for seven municipalities in western Pennsylvania. BASA has 33 full-time employes which included, at the time of the hearing, 24 bargaining-unit members and 9 other employes. Of the bargaining-unit members, 21 were in operations and 3 were accounting clerks. The operations employes work primarily outside performing manual labor in the collection, treatment and pump areas. The clerks work in the finance department and typically process customer invoices and payments. (N.T. 25-27; Authority Exhibit 3, page 41).

5. Pennsylvania American Water Company (PAWC), which is not a public employer, agreed to purchase the physical assets of BASA in October, 2022. BASA and the Union agreed to a memorandum of understanding (MOU) in November 2022 regarding issues relating to the pending sale of BASA to PAWC. At the time BASA and the Union were negotiating the MOU, there was an open question between the parties over whether bargaining-unit member accounting clerks would still have a job following the sale of BASA to PAWC. Other bargaining-unit members were projected to keep their positions following the sale. At the time of the hearing, the close of the sale was planned for the end of 2023. (N.T. 14-18, 31-33).

6. In December 2022, BASA's Finance Director, Ronata Lavorini, who was not a bargaining-unit member, resigned after meeting with PAWC and learning about PAWC's lack of commitment for the future employment of BASA's finance department employes. (N.T. 42-43).

7. BASA Executive Director Duane McKee has been the Executive Director since 2017. After Lavorini resigned, McKee was concerned that he was going to lose the rest of his finance department including the clerks because of the instability of them not knowing if their jobs were going to be retained by PAWC. In order to address the issue, McKee proposed to the BASA Board that, among other measures, Beverly McKinney and Marilyn Bresnahan both be promoted from clerk to accounting clerk and that all of the clerks should be offered retention bonuses. (N.T. 25-26, 43-47; Authority Exhibit 5, page 5).

8. Gregory Stiger is employed by AFSCME Council 13 as a staff representative. Council 13 is the state-wide AFSCME organization. He has been a staff representative for over 13 years. Stiger represents various bargaining units in Butler County including the Union in this matter. In December 2022, Attorney Michael Hnath, who represents BASA, told Stiger that the BASA Board is considering a retention bonus for the accounting clerks. Hnath and Stiger continued discussing the idea of retention bonuses up until the January 10, 2023, BASA Board meeting. On the morning of January 10, 2023, before the BASA Board meeting,

Hnath spoke to Stiger and John Galuska on the phone about the issue of retention bonuses. Galuska is the Director of District Council 84, which is the regional AFSCME organization that covers Butler County. Galuska said that it was AFSCME District Council 84's belief that a retention bonus should be paid for the whole bargaining unit, and not just the clerks. Galuska also said that if there was to be any agreement on retention bonuses, it was going to have to be an issue that the bargaining-unit voted to approve. Stiger testified that representatives of the local (the Union) had told him that the bargaining-unit members would not approve a retention bonus plan for only the clerks. At the end of the call, in response to a question from Hnath about going ahead and doing the retention bonuses for the clerks without approval from the bargaining-unit members, Galuska said to Hnath: "Just go ahead and do it." (N.T. 69-77; Authority Exhibit 1).

9. The BASA Board's minutes for its January 10, 2023, regular meeting contains the following entry:

[11]B. Discuss Retention of Business and Clerical Staff.

A motion was made by [BASA Board Member] Syber and seconded by [BASA Board Member] Vero to approve the promotion of Virginia Ferderber to Director of Finance, as well as the retention bonuses as outline[d] in the memo prepared by the Executive Director for Virginia Ferderber (Finance Director), Mindy Spohn, Marilyn Bresnahan and Bev McKinney (Accounting Clerks). Motion approved 3-0.

(Authority Exhibit 5, page 5).

10. On January 10, 2023, McKee personally gave a memorandum to Spohn, McKinney and Bresnahan with the subject "Retention Bonus". Spohn was an accounting clerk. This memo states:

The BASA Board has authorized a one-time retention bonus in the amount of \$5,000 to each of you if you maintain your individual Accounting Clerk position until the closing date of the sale of the Authority to PAWC. The bonus will be made payable at the time of the closing.

(N.T. 18-19, 41, 59; Union Exhibit 1).

11. Daniel Steere is a bargaining-unit member and is the Union President. He has been President since 2022. (N.T. 21).

12. Steere first became aware of the January 10, 2023, retention bonus plan on March 14, 2023, during a meeting with meeting with PAWC. (N.T. 11-12, 19, 22-24, 37).

13. Steere never agreed to allow BASA to offer a retention bonus to the accounting clerks. (N.T. 21-22).

DISCUSSION

The Union charges that BASA engaged in direct bargaining with bargaining-unit employees when it unilaterally issued its January 10, 2023 memorandum regarding a retention bonus to three bargaining-unit employees. The Union charges a violation of Section 1201(a)(1), (5) and (9). The Union's evidence and arguments at the hearing and in its brief focus on an apparent violation of Section 1201(a)(5) of the Act. Section 1201(5) prohibits an employer from "[r]efusing 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." 43 P.S. § 1101.1201(a)(5).

Section 701 of PERA requires public employers to bargain in good faith with the employees' exclusive bargaining representative "with respect to wages, hours and other terms and conditions of employment...." 43 P.S. § 1101.701. Thus, an employer commits an unfair practice when it unilaterally changes a mandatory subject, such as wages, even where the change may benefit an individual employee. Warrior Run Education Association v. Warrior Run School District, 48 PPER 71 (Final Order, 2017); PLRB v. Jefferson-Morgan School District, 9 PPER ¶ 9056 (Nisi Decision and Order, 1978); PLRB v. Highland Sewer and Water Authority, 4 PPER 116 (Nisi Decision and Order, 1974); PLRB v. General Braddock Area School District, 4 PPER 86 (Nisi Decision and Order, 1974).

It is not contested that the retention bonus plan is a mandatory subject of bargaining. The record does show that the Authority made a retention bonus offer to the clerks without the knowledge or approval of local Union leadership. This would seem to be, on its face, to be an example of unlawful direct dealing from the point of view of the local Union. However, I agree with the Authority that the Authority had the permission of John Galuska, Director of AFSCME District Council 84, to move forward with the retention bonus plan on January 10, 2023. The Authority makes this argument at pages 3-6 of its Brief. Since the Authority bargained with Galuska over the retention bonus plan and had Galuska's permission to implement it, there is no unfair practice in this matter.

The Board has held that an agreement made between agents of the employer and union are binding upon the agent's principal if the agent has apparent authority to negotiate on behalf of that principal. St. Clair School District v. PLRB, 18 PPER ¶ 18116 (Final Order, 1987), aff'd 577 A.2d 879 (1990); Richland School District, 22 PPER ¶ 22077 (Proposed Decision and Order, 1994); Northampton School District, 22 PPER ¶ 22202 (Proposed Decision and Order, 1991); City of Philadelphia, 27 PPER ¶ 27185 (Final Order, 1996) ("The principle of apparent authority in labor relations is premised upon the need of the parties to the bargaining process to be able to rely on the promises and commitments of their bargaining counterpart."); AFSCME District Council 47, Local 2187, AFL-CIO v. City of Philadelphia, 52 PPER ¶ 65 (Final Order, 2019).

The Board has found that union presidents possess apparent authority to bind the union to agreements. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, 24 PPER ¶ 24055 (Final

Order, 1993), City of Philadelphia, 52 PPER ¶ 65, *supra*. Negotiating teams are clothed with apparent authority to bind the principal. St. Clair School District, 18 PPER ¶ 18116 (Final Order, 1987), *aff'd* 579 A.2d 879 (1990); University of Bridgeport 229 NLRB 1074, 95 LRRM 1389 (1977).

The record shows that on the morning of January 10, 2023, Hnath spoke to Stiger and Galuska about the issue of retention bonuses. At the end of the call, in response to a question from Hnath about going ahead and doing the retention bonuses, Galuska said "just go ahead and do it."¹ Galuska is the Director of District Council 84. I infer from the record that Galuska's title of director of the regional organization of AFSCME which includes the local Union is analogous to "union president". His title and participation in the phone call which bargained the issue of retention bonuses are therefore sufficient for him to have at least apparent authority to bind the Union.

The Union at the hearing presented evidence that, normally, agreements between BASA and the Union are subject to ratification by the local bargaining-unit members. Galuska also mentioned the need for a ratification vote to Hnath in the January 10, 2023, phone call. Thus, there is evidence showing that there was a past practice which required bargaining agreements to be ratified by the local bargaining-unit members. There is also evidence showing that the Authority was aware of the issue. However, the evidence also shows that Galuska said "just go ahead and do it" to Hnath without any ratification qualification at the end of the phone call after being pressed on the retention bonus issue by Hnath prior to the imminent BASA Board meeting. I find that this statement by Galuska would reasonably create an ambiguity as to whether the Union's right of ratification of the retention plan still existed. An ambiguity as to such a right must be held against the party asserting the privilege. Richland School District, 22 PPER ¶ 22077 (Proposed Decision and Order, 1991). On the issue of the past practice of ratification requirements, in Richland School District, the Hearing Examiner explained:

The danger of permitting past practice alone to control on this issue is that the parties may have different interpretations of such a practice. Such differences create confusion and may well destroy the trust developed between the parties during the bargaining stage; such damage to the bargaining relationship may not only affect the matter in dispute, but the many different phases of the bargaining relationship. The danger of allowing past practice alone to control the issue of reservation of ratification was described by the New Jersey Public Employment Relations Commission (PERC) in Black Horse Pike

¹ The Authority obtained evidence of Galuska's "just go ahead and do it" statement through the direct testimony of Stiger although Galuska was available to testify. The Union did not object to this testimony as hearsay and the testimony fits within the opposing party's statement exception to hearsay. Pa.R.E. 803(25).

Regional Board of Education, 4 NJPER ¶ 14126
(1978):

In order for collective negotiations to be effective and productive, it is essential that each participant know with certainty the extent of the opposing negotiating team's authority. A party must be able to rely on the statements and general conduct of the other side's representatives during the negotiations process. Accordingly, the Commission . . . will consider only whether, during the course of the particular negotiations in dispute, there was an absence of oral or written qualifying statements or general conduct by negotiating representatives from which binding authority on the part of the negotiating teams could reasonably be inferred. To consider the additional factor of past history of ratification would only cause confusion and disruption to the negotiating process.

4 NJPER at 250.

Richland School District, *supra*. Applying the above reasoning into this case, Galuska's ultimate and definitive statement at the end of the bargaining session with Hnath is conduct by a negotiating representative from which binding authority could reasonably be inferred, notwithstanding the evidence of the Union usually requiring a ratification vote for bargained agreements. Therefore, the Authority did not unilaterally implement the retention bonus plan and the Authority did not commit an unfair practice.

As the Section 1201(a) (5) charge is decided on the authority of Galuska to approve the record retention offer, I do not address the Authority's other argument that the case was mooted by an alleged settlement agreement. Authority's Brief at 1-3. The Findings of Fact above also do not contain any reference to the alleged settlement agreement.

With respect to the Union's charge under Section 1201(a) (9), Section 1201(a) (9) prohibits the employer from "[r]efusing to comply with the requirements of "meet and discuss."" 43 P.S. § 1101.1201(a) (9). The record in this matter does not show that the employer failed to meet and discuss the issue of retention bonuses. The record shows that on January 10, 2023, and before, the Authority bargained the issue of retention bonuses with representatives of AFSCME District Council 84 and AFSCME District 13. The Union's charge under Section 1201(a) (9) will be dismissed.

I will order the charge to be dismissed and the complaint to be rescinded.

CONCLUSIONS

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

1. Butler Area Sewage Authority is a public employer within the meaning of Section 301(1) of PERA.

2. AFSCME District Council 84, Local 757 is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. Butler Area Sewage Authority has not committed unfair practices in violation of Section 1201(a)(1), (5), and (9) 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 charge is dismissed and the complaint is 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 twenty-eighth day of February, 2024.

PENNSYLVANIA LABOR RELATIONS BOARD

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