CWA, L. 1180, 6 OCB2d 30 (BCB 2013)

(IP) (Docket No. BCB-3068-13)

Summary of Decision: The City alleged that the Union failed to bargain in good faith by engaging in surface bargaining and setting preconditions to negotiation during the parties' contract negotiations. The Union denied the City's allegations and contended that it bargained in good faith and did not state or imply any predetermined position. After a hearing, the Board found that the record evidence does not establish that the Union engaged in surface bargaining or set preconditions to negotiation. Accordingly, the petition was denied. ***(Official decision follows.)***

OFFICE OF COLLECTIVE BARGAINING
BOARD OF COLLECTIVE BARGAINING

In the Matter of the Improper Practice Proceeding

-between-

THE CITY OF NEW YORK
OFFICE OF LABOR RELATIONS,

Petitioner,

-and-

COMMUNICATION WORKERS OF AMERICA, LOCAL 1180,

Respondent.

DECISION AND ORDER

The New York City Office of Labor Relations ("City") filed a verified improper practice petition against Communication Workers of America, Local 1180 ("Union") on February 7, 2013. In the petition, the City alleges that the Union engaged in surface bargaining and set preconditions to negotiation over the salary range of employees in the Administrative Manager title during the parties' contract negotiations. It contends that these alleged actions violate § 12-306(b)(2) of the New York City Collective Bargaining Law (New York City Administrative

Code, Title 12, Chapter 3) ("NYCCBL"). The Union denies the allegations and contends it bargained in good faith and did not impose any preconditions. The Board finds that the record evidence does not establish that the Union engaged in surface bargaining or set preconditions to negotiation. Accordingly, the petition is denied.

BACKGROUND

The Trial Examiner held a one-day hearing and found that the totality of the record established the relevant facts to be as follows:

On April 8, 2009, the Board of Certification ("BOC") issued a decision recognizing the Union as the bargaining representative for employees in the title of Administrative Manager, managerial Levels I and II who were not excluded from representation as managerial or confidential employees. *See CWA, Local 1180,* 2 OCB2d 13 (BOC 2009). The BOC therefore ordered that Certification No. 41-73 be amended to add the title Administrative Manager, managerial Levels I and II to the bargaining unit that includes Principal Administrative Associates ("PAA") and related titles. *Id.* Employees represented by the Union pursuant to the decision were given the title Administrative Manager Non-Managerial ("Admin. Manager NM").

The City maintains a Pay Plan for Managerial Employees ("PPME") which includes the civil service title Administrative Manager.[1] Since the establishment of the PPME, the minimum and maximum salaries for management employees have been increased on numerous occasions. The City issued the most recent salary range increase in October 2009 pursuant to Personnel Order 2009/1. As of that date, the minimum and maximum incumbent salaries for Level I

[1] Prior to the BOC's decision, Administrative Manager had been a managerial title, with its salary range determined under the PPME. *See CWA, Local 1180,* 2 OCB2d 13, at 4 n. 1.

management employees were set at $53,373 and $136,198 per annum, respectively. (*See* Pet., Ex. 1)

Prior to the first formal bargaining session, the parties met on May 19, 2009, to discuss preliminary issues, such as the transfer of benefits for Admin. Manager NMs from the Management Benefits Fund to the Union's Welfare Fund. In a July 15, 2009 letter, the Union requested information on employees in the Admin. Manager NM title, including their agency, civil service status and entry date, pension data, and "EEO Data," including sex, race, and age, among other information. (*See* Pet., Ex. 2)

On May 7, 2012, the City and the Union met for their first formal bargaining session to discuss the incorporation of the Admin. Manager NM title into the existing contract and to negotiate minimum and maximum salary rates, among other matters. At the session, the Union submitted a list of bargaining demands, one of which sought the inclusion of the new title in the existing 2008-2010 PAA collective bargaining agreement "at a minimum salary that is consistent with the percentage increases in the maximum salary for Administrative Manager Level I since the minimum was established January 1, 1978." (Pet., Ex. 3) Union President and chief negotiator Arthur Cheliotes ("Union President") stated that the minimum salary for employees formerly in the Administrative Manager Levels I and II title under the PPME had been "artificially suppressed," and that the current minimum salary of $53,373 for Administrative Managers was unacceptable. (Tr. 35-36) The Union President stated that the Union therefore proposed a minimum salary of $108,958. The City's bargaining representative, Associate Commissioner of Labor Relations Renee Campion ("City negotiator"), responded that the City needed time to consider the Union's demands, and the parties agreed to meet for another bargaining session.

On January 23, 2013, the parties met for a second bargaining session. In response to the Union's salary proposal, the City proposed a minimum and maximum incumbent salary of $53,373 and $85,000 per annum, respectively. The City negotiator testified that she explained to the Union during the bargaining session that it is the City's "longstanding practice" that when there is no change in job duties, there is no rationale to raise salary levels. (Tr. 41) It is undisputed that there has been no substantial change in the Admin. Manager NM's job duties since the title gained union representation. On cross-examination, the City acknowledged that it did not state during the second bargaining session that its minimum salary proposal was flexible.

The Union President stated that he was "very disappointed" with the City's salary proposal, and proceeded to give the City a package of material containing a number of charts. (Tr. 43) The charts reflect, in part, the calculations that the Union used to reach the $108,958 minimum salary proposal. The Union President stated that the basis for the $108,958 minimum salary proposal is the Union's desire to rectify what it views as a longstanding practice of discrimination by the City towards employees in the title, which consists primarily of minority women. The Union obtained the $108,958 figure by calculating the difference between the minimum and maximum salary rates in 1978, and applying that difference to the current maximum salary of $136,198.

The Union's charts contain two other minimum salary figures, $85,024 and $78,971. The Union President explained that these two figures represent, respectively, what the minimum salary would be if the wage increases received by the bargaining unit since 1978 had been applied to the PPME minimum in 1978 and what it would be if increases in the Consumer Price Index since 1978 were applied to the PPME minimum in 1978. The City negotiator testified that

she understood the $85,024 and the $78,971 figures to be "reference points," and not minimum salary proposals. (Tr. 50)

When questioned on cross-examination as to whether the $85,024 and $78,971 salary figures in the Union's charts were actual proposals, the Union President conceded that they were not intended to be proposals for the January 23 bargaining session, but that "they were specifically placed there because we knew that there were going to be other bargaining sessions." (Tr. 74-75) In response to the question of whether the proposals were intended for future bargaining sessions, the Union President responded, "They were put out there. There was a rationale behind each of those columns [in the chart] that would allow for us to have a discussion about the possibility of those, the [$]85,000 and [$]78,000, being a reasonable negotiated settlement." (Tr. 75)

According to the City negotiator, the Union President was "very clear" during the bargaining session that $108,958 was the Union's minimum salary demand, and that she did not view the demand as a "flexible" proposal. (Tr. 50-51) She further testified that the Union President stated that "if [the Union] did not achieve this salary in bargaining . . . and they went to mediation, and that they next went to impasse arbitration and . . . if the award in impasse arbitration was not satisfactory to them, that they would then go to court on the discrimination lawsuit." (Tr. 51)

The City negotiator testified that, after hearing this statement, the City understood that if the Union did not obtain a minimum salary of $108,958, it would continue to proceed through any forum necessary to obtain it, "up to and including court." (Tr. 54) She stated that, as a result, "it just felt like it was cold water on the process . . . because no matter what I said, unless I

said '108,958, yes, I will give that to you, I offer that to you,' that there was no way we were going to achieve a salary, a conclusion of the issue." (Tr. 54-55)

The Union President acknowledged that he had raised the issue of an impasse as well as a discrimination lawsuit as possible outcomes during the bargaining session. He testified that "we were headed for a path that could lead to an impasse, and that it had been my hope that we could negotiate something and avoid that," and indicated to the City that "we should be engaged in the process that mitigates the potential liabilities the City would realize." (Tr. 67) He also testified that he told the City during the session that the Union had the absolute right to pursue a discrimination lawsuit and that right was independent of the bargaining process and binding arbitration. The Union President testified that he stated at the end of his presentation that it was the Union's desire to negotiate and reach an agreement. This testimony was not disputed by the City.

The Union President testified that he never stated or implied that the Union would file a lawsuit unless the City agreed to the $108,958 minimum salary proposal. He also testified that he never stated or implied that, unless the City agreed to the $108,958 minimum salary proposal, there would be no collective bargaining agreement.

Following the Union's presentation at the January 23 negotiating session, the City representatives caucused and advised the Union that it would have to go back and speak with its principals. The Union President requested certain information from the City and the bargaining session concluded. Approximately two weeks later, on February 7, 2013, the City filed the instant petition. Subsequently, the parties have not convened any additional bargaining sessions.

POSITIONS OF THE PARTIES

City's Position

The City contends that by threatening to proceed to mediation, impasse, and a lawsuit to obtain its desired minimum salary, the Union stated "in clear terms" that it has no desire to engage in meaningful bargaining over the salary range for Admin. Manager NMs. (City brief at 9) According to the City, this demonstrates that the Union is taking an "inflexible" bargaining position and refusing to consider "reasonable compromise," which is evidence of bad-faith bargaining, in violation of NYCCBL § 12-306(b)(2).[2] (*Id.* at 10)

The City argues that the Union's conduct amounts to surface bargaining and setting preconditions for negotiating, which also violates the NYCCBL. The Union's "inflexible" demand for an "exorbitant" salary increase and its "threat" to resort to litigation if the City did not agree to "exactly" what it was seeking reflect a lack of desire to engage in meaningful negotiation. (City brief at 10-11) The City contends that these actions amount to surface bargaining. The City further contends that, by indicating that it would proceed to impasse and resort to litigation unless its demands were met, the Union set preconditions to meaningful negotiation. According to the City, the Union has therefore rendered futile any attempt by the

[2] NYCCBL § 12-306(b) provides, in pertinent part:

> It shall be an improper practice for a public employee organization or its agents:
>
> (2) to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer[.]

City to negotiate a settlement, any attempt by the Board to mediate such settlement, or any attempt by an impasse panel to resolve an impasse between the parties.

Union's Position

The Union denies that it refused to bargain with the City by engaging in surface bargaining or setting preconditions with respect to contract minimum salaries. It asserts that the City's claims are premised on the belief that the Union insisted on a minimum salary of $108,958 as a precondition to an agreement. However, the hearing testimony and evidence reflect that this is not the case. Instead, the Union presented three separate minimum salary proposals of $108,958; $85,024; and $78,971, each based on a different set of factors. The Union contends that all of these proposals were supported by charts, documents, and "facts," including job descriptions and salary data.[3] (Union brief at 2)

The Union further contends that it did not state or otherwise indicate that it has no desire to "engage in meaningful bargaining" over the minimum salary of Administrative Managers. (Union brief at 3) The Union asserts that, while it made references to the Board's impasse procedure and the possibility of filing a discrimination complaint during the negotiations, it did not threaten, either actually or implicitly, to go to impasse and/or to file a discrimination lawsuit if the City did not agree to its minimum salary proposal. In sum, the Union claims that it bargained in good faith at all times and conveyed its preference for negotiating a resolution of all contract terms.

[3] The Union asserts that its rationale for the $108,958 salary proposal is based on the discriminatory treatment of employees in the title. It maintains that the Administrative Manager title had historically been populated primarily by white male employees. Over the years, more women and minorities were appointed to the title. It claims that, when the title was held primarily by white men, the salary ranges under the PPME were reflective of the job. However, as the numbers of minorities and women in the title increased, the minimum salary of Administrative Managers was not increased in proportion to the maximum salary and thus was suppressed. (*Id.*)

DISCUSSION

NYCCBL § 12-306(b)(2) provides that "It shall be an improper practice for a public employee organization or its agents . . . to refuse to bargain collectively in good faith with a public employer on matters within the scope of collective bargaining provided the public employee organization is a certified or designated representative of public employees of such employer[.]" The duty of both the public employer and the certified public employee organization to bargain in good faith includes the obligation "to approach negotiations with a sincere resolve to reach an agreement." NYCCBL § 12-306(c)(1).[4]

In *LEEBA*, 2 OCB2d 29 (BCB 2009), we held that "determining good faith requires evaluating the totality of a party's conduct . . . by considering the entire circumstances surrounding bargaining. . . . This approach requires the use of circumstantial evidence, such as surrounding events and comments, as indicia of the subjective intent motivating conduct at the bargaining table." *Id.*, at 9. (citations and internal quotation marks omitted) Characterizing what it means for a party to bargain in good faith during the course of negotiations, the National Labor Relations Board ("NLRB") and the New York State Public Employment Relations Board

[4] NYCCBL § 12-306(c) mandates that the duty to bargain in good faith also includes the obligation:

> (2) to be represented at the negotiations by duly authorized representatives prepared to discuss and negotiate on all matters within the scope of collective bargaining;
> (3) to meet at reasonable times and convenient places as frequently as may be necessary, and to avoid unnecessary delays;
> (4) to furnish to the other party, upon request, data normally maintained in the regular course of business, . . . ;
> (5) if an agreement is reached, to execute upon request a written document embodying the agreed terms, and to take such steps as are necessary to implement the agreement.

("PERB") have similarly emphasized the importance of examining the totality of a party's conduct. PERB has long held that:

> [T]he duty to negotiate in good faith means that both parties approach the negotiating table with a sincere desire to reach an agreement. Thus, essentially good faith is a matter of intention. Objectively, intent can be determined only by the actor's word and deeds; and where there is a variance between the two, experience would dictate that greater reliance be place[d] on the latter. Thus, whether one had approached the negotiating table with a sincere desire to reach agreement can only be determined by this overall conduct in this regard. This determination should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct.

Matter of Erie Co. Water Auth., 35 PERB ¶ 4560, at 4696 (ALJ 2002) (citing *Town of Southampton*, 2 PERB ¶ 3011, at 3274 (1969)); *see Brink's USA*, 354 NLRB No. 41 (2009) (A party's "overall conduct must be scrutinized to determine whether it has bargained in good faith. The total conduct will show whether [the party] is lawfully engaging in hard bargaining or unlawfully endeavoring to frustrate the possibility of arriving at any agreement.") (citing *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 (1984)).

Construing the scope of the duty to bargain in good faith, the NLRB has held that a party "is entitled to stand firm on a position if he reasonably believes that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree." *Atlanta Hilton & Tower*, 271 NLRB 1600, 1603. Although an adamant insistence on a bargaining position is not in and of itself a refusal to bargain in good faith, other conduct has been held to be indicative of a lack of good faith. *See id.* Such conduct includes: delaying tactics, unreasonable bargaining demands, unilateral changes in mandatory subjects of bargaining, efforts to bypass the union, failure to designate an agent with sufficient bargaining authority, withdrawal of already agreed-upon provisions, and arbitrary scheduling of meetings. *Id.*

In the instant matter, we evaluate the totality of the Union's conduct to determine whether it has indeed engaged in surface bargaining with no "sincere desire to reach an agreement." *Matter of Erie Co. Water Auth.*, 35 PERB ¶ 4560, at 4696. The City contends that the Union made an inflexible salary demand and threatened to resort to litigation during the second bargaining session and that these actions amount to bad faith bargaining. Here, the alleged threat and inflexible demand by the Union occurred at one of only two bargaining sessions. Assuming that these statements were made in the manner described by the City, under the circumstances we cannot conclude that these actions constitute surface bargaining. We agree that a finding of surface bargaining "should not be made on the basis of an isolated act during the course of negotiations, but should be based on the totality of a party's conduct." *See Matter of Erie Co. Water Auth.*, 35 PERB ¶ 4560, at 4696. Simply put, there is insufficient evidence in the record to find that the Union was engaged in surface bargaining based on the limited exchanges highlighted by the City.

We find no evidence in the record that would lead us to conclude that the Union was unwilling or unprepared to negotiate further or to compromise on its salary demand, or that its $108,958 salary proposal was its final offer. It is uncontroverted that the Union President introduced the $85,024 and $78,971 figures and explained the basis for each to the City. He testified that he intended to discuss these figures at future bargaining sessions and use them as a basis for a negotiated settlement. The Union President's presentation of these figures is consistent with his testimony in this regard and leads us to conclude that the Union was not "inflexible" in its salary demand. *Cf. LEEBA*, 2 OCB2d 29, at 13 n. 7 (finding that union failed to bargain in good faith where, among other evidence, union counsel stated at the first bargaining

session that there was no point in negotiating any further if the City was not prepared to offer a "police contract" and "declared" an impasse immediately thereafter).

Moreover, even if the Union's $108,958 salary proposal was "inflexible," on these facts we cannot find it breached its duty to bargain in good faith. *See Atlanta Hilton & Tower*, 271 NLRB 1600, 1603 ("A party is entitled to stand firm on a position if he reasonably relieves that it is fair and proper or that he has sufficient bargaining strength to force the other party to agree.") (citation omitted). In reaching this conclusion, we note that the City itself conceded that it never indicated during negotiations that its own counterproposal of a minimum salary of $53,373 was at all flexible. Instead, it asserted that its standard policy is not to increase the minimum salary of a job title without a change in job duties.

Finally, there is no other evidence that would lead us to conclude, based on the totality of the Union's conduct, that it was engaged in surface bargaining. Accordingly, we find that at most the Union was engaged in hard bargaining and not surface bargaining.[5]

Similarly, we conclude that the Union did not violate NYCCBL § 12-306(b)(2) by setting preconditions on bargaining. The City asserts that the Union refused to engage in "meaningful negotiation" by indicating that it would proceed to impasse and then pursue litigation unless the City acceded to its salary demand. The City maintains that the Union's statement that it would

[5] *City of New York*, 9 PERB ¶ 4502 (ALJ 1976), *affd. in part*, 9 PERB ¶ 3031 (1976), which the City analogizes to the instant matter, is distinguishable. In that case, PERB found that the City was engaged in surface bargaining based primarily on the fact that, while it adhered to its original proposal during three pre-impasse negotiating sessions, it provided little information to the union about the practical impact of its proposal and insisted that the proposal was clear and intelligible. *Id.* In contrast, here the Union was forthcoming with explanatory information to support its $108,958 salary proposal and even a reasonable basis for the two additional salary figures.

resort to litigation unless the City agrees to its $108,958 minimum salary demand negated the City's ability to negotiate on that issue.

We note that the Union does not deny that the Union President remarked during the January 23rd bargaining session that the parties' disagreement over salary rates could bring them to impasse or result in litigation. Even assuming that the Union President indeed "threatened" to file a discrimination lawsuit if the Union did not obtain its proposed minimum salary in bargaining, we cannot equate this statement with the setting of preconditions. In *LEEBA*, we inferred bad faith from, among other conduct, our finding that the union preconditioned bargaining on the City's agreement to the "sum and substance" of another union's contract. 2 OCB2d 29, at 15. The facts in this case are simply not analogous. Both sides to the bargaining process have the ability to assert all their rights and avail themselves of all remedies under state and federal laws to achieve their goals. In this instance, although such a lawsuit is related to the mandatory bargaining subject of wages, it exists independently from the collective bargaining process, and in any event, there is no evidence that the Union refused to negotiate because it was considering filing a lawsuit. Therefore, we cannot construe as a precondition one party's pronouncement that it can or will resort to litigation concerning a discrimination claim if it does not achieve its salary targets in negotiations.

Moreover, as we previously discussed, there is no record evidence that the Union refused to bargain further unless the City accepted its $108,958 minimum salary proposal. On the contrary, the Union President credibly testified that he intended that the $85,024 and $78,971 salary figures could be used as the basis for negotiation in future bargaining sessions. We can infer from this statement that the Union had plans to continue negotiating past the second bargaining session with the goal of reaching an agreement. Accordingly, we find that the record

evidence does not reflect that the Union set preconditions to bargaining or engaged in surface bargaining.

ORDER

Pursuant to the powers vested in the Board of Collective Bargaining by the New York City Collective Bargaining Law, it is hereby

ORDERED, that the verified improper practice petition filed by the City of New York Office of Labor Relations, docketed as BCB-3068-13, is hereby dismissed.

Dated: October 23, 2013
New York, New York

MARLENE A. GOLD
CHAIR

GEORGE NICOLAU
MEMBER

CAROL A. WITTENBERG
MEMBER

M. DAVID ZURNDORFER
MEMBER

CHARLES G. MOERDLER
MEMBER