STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

International Union of Operating Engineers Local 150,	)	
Charging Party	)	
	)	Case No. S-CA-11-157
and	)	
County of Lee,	)	
Respondent	)	

ADMINISTRATIVE LAW JUDGE'S RECOMMENDED DECISION AND ORDER

On January 26, 2011, the International Union of Operating Engineers Local 150 ("IUOE" or "Union") filed a charge with the State Panel of the Illinois Labor Relations Board ("Board"), alleging that the County of Lee ("County") engaged in unfair labor practices within the meaning of Section 10(a) of the Illinois Public Relations Act, 5 ILCS 315 (West 2012), as amended (Act). The charge was investigated in accordance with Section 11 of the Act, and on June 14, 2011, the Board's Executive Director issued a Complaint for Hearing.

The case was heard in Chicago, Illinois, on October 19, 2011, at which time the Union presented evidence in support of its allegations and both parties were given an opportunity to participate, adduce relevant evidence, examine witnesses, argue orally, and file written briefs. After full consideration of the parties' stipulations, motions, evidence, arguments, and briefs, and upon the entire record of the case, I recommend the following.

I. PRELIMINARY FINDINGS

The parties stipulate and I find that:

1. At all times material, the County has been a public employer within the meaning of Section 3(o) of the Act.
2. At all times material, the County has been subject to the jurisdiction of the State Panel of the Board, pursuant to Section 5(a-5) of the Act.
3. At all times material, the Union has been a labor organization within the meaning of Section 3(i) of the Act.
4. At all times material, the Union has been the exclusive representative of the bargaining unit consisting of all full-time and regular part-time employees in the classifications of Mechanic, Maintenance Man I, Maintenance Man II, Maintenance Man III, and Maintenance Man IV ("unit").

5. The second collective bargaining agreement between the Union and the County was effective December 1, 2007, through November 30, 2010.

6. The parties met on at least the following dates to negotiate a successor agreement: October 8, 2010, October 25, 2010; November 11, 2010; December 8, 2010; January 21, 2011; and February 25, 2011.

7. Prior to the parties' January 21, 2011, negotiating session, the parties tentatively agreed on various issues, including clothing and boot allowance, uniform allowance, temporary assignment pay, and compensatory time.

8. Health insurance is a mandatory subject of bargaining.

II. ISSUES AND CONTENTIONS

A. Failure to Bargain in Good Faith

The first issue before me is whether the County failed in its obligation to bargain in good faith by (a) refusing to bargain over health insurance, (b) engaging in regressive bargaining, and/or (c) insisting upon a permissive subject of bargaining to impasse. The Union contends that the County bargained in bad faith in that it repeatedly refused to bargain health insurance; on January 21, 2011, withdrew previously agreed-to tentative agreements; and on February 25, 2011, insisted on withdrawal of the present unfair labor practice charge as an element of a package offer to settle the contract.

The County contends that it did not refuse to bargain health insurance. Instead, it considered the Union's proposal but maintained its position to continue the current practice. The County contends it consistently voiced concerns regarding the economic impact of allowing IUOE members out of the County health insurance plan, including ultimately being required to pay 100% of the health insurance costs for all of the non-IUOE member County employees. With respect to the allegation of regressive bargaining, the County does not contest that at the parties' January 21, 2011, negotiation session, its lead negotiator offered only to continue the current contract with no changes. It contends that this move was not truly regressive because the County put all of the prior agreements and wage increase proposals back on the table at the next negotiation session held on February 25, 2011. Finally, the County admits that it included withdrawal of the current unfair labor practice charge in its February 25, 2011, package offer and that it sought to have the Union take this offer to the members for a vote. However, in the course

of briefing this case,[1] the County indicated its willingness to withdraw the proposal that the Union withdraw the present action as part of contract negotiations.

B. Sanctions for *Ex Parte* Communications

The second issue, which arose during the course of the case, is whether the County, and specifically the County's counsel Jack Knuppel, should be sanctioned for having *ex parte* communications with then-assigned Administrative Law Judge ("ALJ") John Clifford on August 8, 2011.

On September 16, 2011, the Union filed a Motion for Sanctions Based Upon Ex Parte Communication with the Administrative Law Judge. Knuppel responded on September 27, 2011, contending that he did not intentionally engage in *ex parte* communications and that while his email system is unreliable, he should have been more careful to include the Union in the email.

III. FINDINGS OF FACT

A. Background on Health Insurance in Lee County

In 2010, the County employed approximately 108-115 employees. Some employees were not represented by a labor organization. Other employees are in bargaining units represented by Teamsters Local 722 ("Teamsters") and Illinois Fraternal Order of Police Labor Council ("FOP").[2] County employees are offered health insurance through the County's health insurance provider.

The 2007-2010 collective bargaining agreement between the parties contained a provision that IUOE members' health insurance benefits were "to be provided under the same terms and conditions and in the same amount as is applicable to other county employees." The Teamsters' collective bargaining agreement with the County effective through November 30, 2011, contained a provision that Teamsters members' health insurance benefits were "to be provided under the same terms and conditions and in the same amounts as applicable to bargaining unit employees covered by a Labor Agreement within the Lee County Sheriff['']s Office." The FOP's collective bargaining agreement with the County and Lee County Sheriff's Office effective December 2008 through November 2012 contained a provision that the FOP

[1] Post-hearing briefs were filed on December 19, 2011, while the contract was still unsettled.

[2] At one point, Union Business Representative Mike Kresge testified that the County mentioned a third union representing County employees, which Kresge believed to be AFSCME. (Transcript at pp. 60-61). However, Board files reflect only bargaining units in the County represented by the Teamsters and FOP.

members' health insurance benefits were "to be provided under the same terms and conditions and in the same amounts as applicable to all non-represented County employees."

The County established an Advisory Insurance Committee, comprised of nine members including members of the County Board, County employees, and at least one member employed in a bargaining unit represented by each of the labor organizations that have agreements with the County. The Advisory Insurance Committee reviews insurance issues affecting employees, including (1) reviewing cost containment measures, (2) seeking proposals from insurance carriers and administrators for insurance plans to cover the employees in the future, and (3) researching general insurance issues affecting employees. The Advisory Insurance Committee votes on recommendations to be made to the Lee County Finance Committee regarding health insurance issues. The IUOE membership has one seat on the Advisory Insurance Committee, but the IUOE member had not participated in the Committee.

B. The Parties' History of Bargaining over Health Insurance[3]

The Union and the County were parties to an initial collective bargaining agreement effective December 1, 2004, through November 30, 2007. That contract provided that the Union members would be part of the County's health insurance plan, but also contained an insurance-reopener period. In 2006, the parties met twice to negotiate health insurance, but did not reach any agreement. In correspondence to the Union regarding ceasing negotiations, the State's Attorney indicated that the County "does not think it is fair, cost effective, nor in the best interests of the County to provide the Union with the insurance it is requesting." On December 14, 2006, the Union filed an unfair labor practice charge against the County in ILRB Case No. S-CA-07-121, alleging that the County failed to bargain in good faith over health insurance during the insurance-reopener period.

A Complaint issued in Case No. S-CA-07-121. The County failed to timely answer the Complaint, resulting in a default. The Union, through a compliance petition, sought to have the County pay the Union members the cost of their insurance payments. The Compliance Officer, ALJ, and Board declined to award damages to the Union's members and determined that the appropriate remedy was for the County to post a notice of the unfair labor practice finding.

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[3] The County requested that the Board's ALJs take administrative notice of ILRB Case Nos. S-CA-07-121 and S-CA-07-121(c). The Union did not object. I further find it is appropriate to take administrative notice of the Board's own files.

C. Bargaining over Health Insurance in Fall of 2010

According to IUOE Public Sector Negotiator Robert Paddock, health insurance was the Union's number one priority going into the bargaining sessions. Paddock testified that the first goal was to leave the County health insurance plan and join the IUOE plan, or secondarily, to reduce the amount the County was charging employees to participate in the County's health insurance plan.

The County's lead negotiator and County Board Finance Committee Chairman Richard Ketchum testified that if there was no financial impact to the County, he would have no problem with the Union's members joining the IUOE health insurance plan. Ketchum believed that allowing the Union's members to leave the County's health insurance plan would negatively affect the County's finances in one of two ways. First, Ketchum believed that because of the various "me too" clauses in other labor agreements, if the County paid 100% of the IUOE members' health insurance costs, the County would have to cover 100% of the health insurance costs for the County's other union (and non-union) employees. Ketchum also testified that allowing the approximately 10 IUOE members to leave the County's plan would likely increase the cost of the County's plan available to all other County employees due to the size of the pool of participating employees falling below 100.

Ketchum testified that in the fall of 2010, he had authority to reach an agreement, he sincerely tried to reach an agreement, and he did not refuse to bargain health insurance. Ketchum testified that in later sessions he continued to explain his position that it was not in the County's economically best interest to allow the Union's members out of the County's health insurance plan.

1. October 8th Bargaining Session

At the parties' first bargaining session on October 8, 2010, the Union's proposal included removing members from the County health insurance plan and having them be covered by the Union's health insurance plan. Under the Union's proposal, 100% of the cost of the healthcare program would be paid by the County, but the written proposal did not include the monthly premiums the County would be expected to pay under the plan. The County commented that all County employees pay 25% of the cost of their health insurance coverage through a "me too" clause with the FOP. The County said that the Union's members could join the Union health insurance plan if the Union's plan would also cover the rest of the County's employees. The

Union sought information related to the history of negotiations between the County (via a private consultant) and its health insurance provider. In its package proposal, the County countered the Union's health insurance proposal by stating that the Insurance Advisory Committee could consider a quote for covering all County employees under the Union health insurance plan. The Union did not accept the County's package proposal, and indicated it would make a counter proposal at the following session.

2. October 25th Bargaining Session

At the parties' second negotiation session on October 25, 2010, the parties began with discussions regarding health insurance. The County did not have the requested historical information regarding health insurance history information available at that meeting.[4] The Union indicated that it would not cover all of the other County employees in the Union plan. The County responded to a question from the Union informing them that changes to the County health insurance plan were going into effect on November 1, 2010.[5]

The County's negotiator Ketchum indicated that in his opinion the health insurance issue was done because of the FOP "me too" clause. Even so, Ketchum asked the Union to lay out its health insurance plan, which it did. The parties reviewed the cost sheets for the County's and Union's health insurance plans. Ketchum asked again why the Union could not cover the entire County. IUOE indicated it was not interested in covering the entire County because of the other unions involved. The County asked for a comparison in coverage between the two plans, which the Union agreed to provide.[6]

The Union submitted a package counter proposal which included a two-year contract (down from its desired three-year contract) with the condition that the members were allowed to join the Union's health insurance plan.

3. November 15th Bargaining Session

At the parties' November 15, 2010, negotiating session, the County reviewed a breakdown of benefits from the Union's plan. The County indicated its concern if it paid 100%

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[4] It is unclear from the record exactly what information the County provided during the course of bargaining. Kresge testified that the County did not provide the requested historical information. However, the County must have provided some information, because the parties reviewed documents related to the relative costs of each plan.

[5] The changes went into effect prior to the November 30, 2010, expiration date of the existing contract between the parties.

[6] It is unclear from the record whether, or to what extent, the Union completed a comparison between the two plans.

of the IUOE members' health insurance costs, the County would have to pay 100% of all the other union employees' insurance. The Union stated its belief that the contracts did not require the County to give other employees what it gives IUOE members. The Union asked whether the County would reconsider its position on health insurance if they got letters from the FOP and Teamsters indicating that they do not object to the IUOE members being covered by the Union plan. The County replied, "Maybe." The Union's negotiator Paddock verbally reported that Teamsters would not object to the IUOE members joining the Union's health insurance plan. Paddock showed the County negotiating team an email from him to Bill Logan of the Teamsters indicating that the "county might agree to put our members into our health insurance for a huge savings to the county and our members...The condition is [that] you and the fop are ok with it[.]" The Teamsters representative responded, "Go ahead[.] [W]e will probably be doing the same...but go ahead[.] [W]e're ok with it." The parties bargained other issues for the remainder of the session.

4. December 8th Bargaining Session

At the December 8, 2010, bargaining session, the County asked whether the Union had obtained letters from the FOP and Teamster and indicated that it wanted the State's Attorney to review the letters. The parties also discussed the FOP and Teamsters contracts' "me too" clauses. The Union argued that the State's Attorney's interpretation was wrong, and that any health insurance change by the IUOE does not implicate the "me too" clauses. Ketchum indicated that the State's Attorney disagreed and that the negotiating committee agreed with the State's Attorney.

According to the negotiation notes of the Union's Business Representative, Paddock asked whether they could negotiate any further on insurance until the Union provided the information from the Teamsters and the FOP. Ketchum responded that the County was not willing to negotiate further (absent the additional information) because of the State's Attorney's interpretation that the FOP and Teamsters' "me too" clauses put the County at risk of having to pay 100% of the health insurance costs of other County employees if they agreed to the Union's proposal.

The County presented a "final" package proposal that did not include the Union's health insurance proposal, but included agreeing to the Union's proposal with respect to temporary

assignment provisions and wage increases over both years of the proposed contract. The Union rejected the County's package proposal.

5. FOP Letter Dated December 21, 2010

In a letter dated December 21, 2010, an attorney for the FOP wrote a letter to the Chairman of the Lee County Board. In that letter, the FOP indicated that it "would not consider it a violation of its labor contract if the Highway [IUOE] employees were removed from the County insurance plan and enrolled in the IUOE insurance plan." The FOP letter also contained the following statement, "The [FOP] suggests that the County, before entering to such agreement with IUOE, consult with its insurance experts and confirm that the removal of this number of employees from the County insurance pool will NOT have a detrimental financial impact on those remaining therein as well as upon the County."[7]

Ketchum testified that the State's Attorney reviewed the letter from the FOP. The State's Attorney urged the negotiating committee to use caution, as he was of the opinion that the FOP letter was "vague" and did not preclude grievances over changes to the IUOE members' insurance. Ketchum testified that he never saw a letter from the Teamsters.

D. Other Agreements

On October 8, 2010, the parties tentatively agreed on clothing and boot allowance, uniform allowance, and temporary assignment pay.[8] On October 25, 2010, the parties tentatively agreed on compensatory time. None of these tentative agreements were put down in writing or signed. The County indicated during negotiations that it intended to, and did, present package proposals, rather than agreeing to a series of proposals one-by-one. The County's package proposals included agreements to Union proposals.

E. Bargaining Session on January 21, 2011

According to notes of the January 21, 2011, session, the Union again began with discussions of its health insurance proposal. The County again explained that it was still unwilling to agree to the Union's proposal based on the economics of the impact on the County's potential responsibility to pay 100% of other employees' health care costs. After a bit of back

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[7] Emphasis in original.

[8] These facts were alleged in the Complaint, and the County admitted the allegation. In its post-hearing brief, the County appears to argue that because any tentative agreements were not signed or dated, they have no effect and cannot form the basis for the Union asserting regressive bargaining. Regardless of its later arguments, the County is bound by its Answer to the Complaint.

and forth regarding whether the County already had a final offer on the table or was putting an offer on the table, the County made another "final offer." The offer was to keep the terms of the existing contract with no changes. This would have resulted in a wage freeze from November 30, 2010, to November 30, 2012. The Union rejected that offer. Ketchum testified that he made this offer because of the "frustration" he and the negotiating committee were experiencing with the negotiations.

F. Package Proposal Submitted on February 25, 2011

On February 25, 2011, the parties met with a federal mediator in an attempt to settle their contract. At that session, the County submitted a package settlement offer. The offer incorporated the agreements reached by the parties through December 8, 2010 (uniform/clothing and boot allowance and temporary assignment provisions), included wage increases for each of the proposed contract's two years, and sought to have the Union dismiss the present action as a term of the settlement. The Union rejected the proposal.

The parties did not reach an agreement at the February 25, 2011, session. The parties continued to negotiate prior to the hearing on this matter (October 19, 2011). Ketchum testified that as of October 19, 2011, the County's "final and best offer" required the Union to withdraw the unfair labor practice charge it filed on January 26, 2011.

G. Parties' Agreement to a Collective Bargaining Agreement

On February 1, 2012, counsel for the County Knuppel notified the Board that the Union's membership had "approved the most recent offer" on January 31, 2012. Attached to Knuppel's memorandum is a copy of an email from Paddock to Ketchum.[9] Paddock indicated to Ketchum that the "bargaining unit has approved the last offer."

H. Respondent's Counsel's August 8, 2011, Email to ALJ John Clifford

Following a conference call between counsel for the parties and the ALJ, counsel for the County Knuppel sent the following email to ALJ John Clifford without also sending the message to IUOE's counsel Ken Edwards:

> Sorry for any confusion. I understood that there was no need for any call today. Not sure why the union did so. Union counsel is refusing to discuss settlement short of ILRB reversing the decision in the employers [sic] favor three years ago. When I asked if he believes you have the authority to force the county to switch to

[9] Knuppel's correspondence is carbon-copied to IUOE's Ken Edwards and indicates that the Union asked for Knuppel to notify the Board. The attached email was also carbon-copied to IUOE's Mike Kresge and Randall Larson with an "fmcs.gov" email address.

> the union health plan he has failed to get in 6 years of bargaining [sic] he said, "I don't know."

Moments later, ALJ Clifford responded to Knuppel and copied Edwards. In his response, ALJ Clifford stated that he understood Knuppel's comments to relate to the "parties' attempts to resolve the matter" and indicated that the ALJ was not interested in the parties' efforts. Particularly, ALJ Clifford stated, "generally speaking, settlement discussions remain confidential under the Rules and, to my mind, would [be,] even if they were not confidential, irrelevant to disputes."

After being made aware of Knuppel's communication with ALJ Clifford, Edwards contacted Knuppel in an attempt to "remedy" the situation. When Knuppel did not respond, Edwards filed a Motion for Sanctions Based Upon Ex Parte Communications with the Administrative Law Judge on September 16, 2011.

On September 16, 2011, the case was reassigned from ALJ Clifford to ALJ Michelle Owen.

Knuppel responded to the motion asserting that he did not intentionally engage in ex parte communications. Knuppel indicated that his email system is "unreliable" and that he "should have been more careful" to ensure that the message was sent to both the Union and the ALJ. Knuppel further argued that the information in the email was irrelevant, confidential, and did not include any new information that had not been previously set forth to both the ALJ and the Union in the County's Answer. Finally, Knuppel argues that any alleged prejudice was "cured" when the case was transferred to ALJ Michelle Owen on September 16, 2011.

Prior to the case being reassigned to me, ALJ Owen notified the parties that she would take the Motion for Sanctions with the case. I do so here.

IV. DISCUSSION AND ANALYSIS

A. The County failed to bargain in good faith.

Section 10(a)(4) of the Act makes it an unfair labor practice for an employer to refuse to bargain collectively in good faith with a labor organization that is the exclusive representative of public employees in an appropriate unit. Violation of Section 10(a)(4) is often a derivative violation of Section 10(a)(1), which makes it an unfair labor practice for an employer to interfere with, restrain, or coerce public employees in the exercise of the rights guaranteed in the Act or to

dominate or interfere with the formation, existence, or administration of a labor organization or contribute financial or other support to it.

Section 7 of the Act establishes the duty to bargain, and in relevant portion provides, "A public employer and the exclusive representative have the authority and the duty to bargain collectively set forth in this Section." For the purposes of the Act, "to bargain collectively" means the performance of the mutual obligation of the public employer or his designated representative and the representative of the public employees to meet at reasonable times, including meetings in advance of the budget-making process; to negotiate in good faith with respect to wages, hours, and other conditions of employment, not excluded by Section 4 of the Act; or the negotiation of an agreement, or any question arising thereunder; and the execution of a written contract incorporating any agreement reached if requested by either party. Lake County Circuit Clerk, 29 PERI ¶ 129 (ILRB-SP 2013).

The duty to collectively bargain in good faith fundamentally requires both parties to engage in negotiations with "an open mind and a sincere desire to reach an ultimate agreement." Service Employees Int'l Local Union No. 316 v. Ill. Educ. Labor Relations Bd., 153 Ill. App. 3d 744, 751 (4th Dist, 1987); City of Mattoon, 11 PERI ¶ 2016 (IL SLRB 1995); City of Springfield, 6 PERI ¶ 2051 (IL SLRB 1990). However, the Board "cannot force an employer to make a 'concession' on any specific issue or to adopt any particular position." Id. *citing* County of Woodford, 8 PERI ¶ 2019 (IL SLRB 1992) (*quoting* Atlanta Hilton & Tower, 271 NLRB 1600, 1603 (1984)). This principle is expressly incorporated in Section 7 of the Act, which provides that the obligation to bargain in good faith "does not compel either party to agree to a proposal or require the making of a concession."

The Board will examine "the totality of the circumstances" in order to determine whether a respondent engaged in permissible "hard bargaining" or whether the respondent was instead motivated by a bad faith desire to avoid reaching agreement altogether. County of Cook (Dep't of Cent. Srvs.), 15 PERI ¶ 3008 (IL LLRB 1999); City of Mattoon, 11 PERI ¶ 2016. The types of conduct indicative of bad faith intent include delaying tactics, unreasonable bargaining demands, an employer' s implementation of unilateral changes involving mandatory subjects of bargaining, failure to designate a representative with sufficient bargaining authority, withdrawal of previously accepted proposals, and arbitrary scheduling of bargaining meetings. County of Woodford, 8 PERI ¶ 2019. A party also breaches its duty to bargain in good faith if it insists to

impasse on a non-mandatory subject of bargaining. County Of Cook (Cook County Hospital), 15 PERI ¶ 3009 (IL LLRB 1999) *citing* County of Cook, 6 PERI ¶ 3003 (IL LLRB 1989); City of Mattoon, 13 PERI ¶ 2016 (IL SLRB 1997).

In this case, the Union contends that the County failed to bargain in good faith, and identified three ways in which it believes the County failed in its obligation: (a) refusing to bargain over health insurance; (b) engaging in regressive bargaining by making its January 21, 2011, proposal to continue the existing contract with no changes; and (c) insisting to impasse on a permissive subject – withdrawal of the present action. The County argues that it (a) did not refuse to bargain over health insurance; (b) voluntarily restored the status quo after it made an offer that did not include prior tentative agreements; and (c) did not insist to impasse on a permissive subject, as it is willing to further maintain the status quo by withdrawing its request to have the unfair labor practice withdrawn in order to settle the contact dispute.

I find that the County did not violate its obligation to bargain in good faith regarding the issue of health insurance and did not insist to impasse on a permissive subject of bargaining. However, by engaging in regressive bargaining the County violated Sections 10(a)(4) and (1) of the Act. I discuss each in turn below.

1. Health Insurance

I find that the County did not fail to bargain over health insurance and did not use health insurance in an attempt to avoid reaching agreement altogether. Instead, I find that the record supports that the County considered the Union's demands regarding health insurance and consistently rejected the Union's proposal, something it is entirely within its right to do. Documentary evidence from the negotiation sessions and witness testimony indicates that throughout the parties' bargaining, the Union made and maintained a single health insurance proposal – allow the IUOE employees to leave the County health insurance plan in order to join the Union's health insurance plan. The County consistently maintained its position that, for economic reasons and concerns about the health insurance parity provisions of a number of collective bargaining agreements, all of its employees would be covered by the same health insurance plan.

The Board has held that "an adamant insistence upon a bargaining position is not in and of itself a refusal to bargain in good faith," but that the Board will look to the totality of the parties' bargaining to determine whether a party has met its obligation. Lake County Circuit

Clerk, 29 PERI ¶ 129 *citing* County of Cook (Dep't of Cent. Srvs.), 15 PERI ¶ 3008. In County of Cook (Dep't of Cent. Srvs.), 15 PERI ¶ 3008, the Board found that an employer could show that it bargained in good faith by demonstrating "that the Employer met and conferred with the Union; that it listened to, considered and responded to the Union's demands; and that it did not engage in a calculated effort to avoid reaching an agreement."

The County in this case can demonstrate each of those factors and, more importantly, the totality of circumstances reflects hard, but permissible, bargaining on the issue of health insurance. The County listened to, considered, and responded to the Union's desires to have its members join the Union health insurance plan and the Union's attempts to appease the County's concerns. At the parties' initial bargaining session, the Union proposed having its members covered by the Union health insurance plan, with the County paying 100% of the unspecified premium amount. The County referenced "me too" provisions of the Teamsters and FOP contracts as supporting its position that all County employees should be subject to the same health insurance plan. Regardless, the County indicated that it would consider the Union health insurance plan if it was less expensive and the Union plan could cover all employees. At the next session, the Union indicated that it was not interested in covering all of the employees, since some of the County employees were covered by other unions. Despite this, the parties still reviewed cost information and continued to discuss the Union's health insurance proposal, though the Union never wavered from its initial proposal.

The County repeatedly voiced its concern about the risk of unintended consequences from allowing the Union members to leave the County health insurance plan and join the Union health insurance plan. Specifically, the County feared (1) having to pay 100% of the health insurance cost for the other unions' members and non-represented employees following a challenge and (2) that the County's health insurance plan would become more expensive if the number of participants fell below 100. The record reveals that the Union attempted to appease the County's concerns by reaching out to the Teamsters and the FOP. The County indicated its willingness to review and consider the information gathered by the IUOE and to have the State's Attorney review it. However, the provided information did nothing to provide reassurance. The FOP cautioned the County to avoid making decisions to the financial detriment of the County and the remaining County health insurance plan members. Upon review, the State's Attorney opined that the FOP letter was "vague" and did not preclude grievances over changes to the

IUOE members' insurance. Teamsters, at least in the initial email to the IUOE negotiator, indicated its intent to try to leave the County health insurance plan, too, which would put the County health insurance plan at even greater risk.

Union officials testified that the health insurance issue was the number one issue for the members going into negotiations. Paddock indicated that the number one goal was to get agreement for the Union members to join IUOE's health insurance plan, with a secondary goal of having the members pay a reduced rate if they were to stay in the County health insurance plan. However, the record reflects that the Union maintained its position (and proposal) throughout while offering different justifications or enticements in an attempt to have the County concede. The County's response was not what the Union hoped.[10] However, the County did not engage in bad faith bargaining on this issue.

The record indicates that the County firmly and truly believed that it was in its financial best interest to continue to cover all of its employees with the same health insurance plan. It considered all the information the Union presented, yet maintained its position. By doing so, the County did not fail to bargain the issue of health insurance and did not otherwise engage in bad faith bargaining regarding the issue of health insurance. Accordingly, I find that the County did not violate Section 10(a)(4) or (1) with respect to the issue of bargaining over health insurance.

2. Regressive Bargaining

The County failed in its obligation to bargain in good faith when it engaged in regressive bargaining during the January 21, 2011, bargaining session. It is uncontested that, despite the County's intent to offer only "package proposals," the parties had reached agreement on several issues over the first several bargaining sessions. Moreover, the County had proposed wage increases for each of the upcoming two years. It is also uncontested that on January 21, 2011, after exchanging back-and-forth comments on health insurance, the County, acting out of

[10] The parties' post-hearing briefs provide a glimpse into their poor relationship. The Union argues that the County has "discovered a way to get around its obligation to negotiate insurance. It simply refuses to do so, draws an unfair labor practice charge, posts a notice, and suffers no economic penalty whatsoever." Counsel for the County argues that the Union is, once again, attempting to have the Board grant them what they could not obtain in six years of bargaining – opting out of the County health insurance plan to join the Union plan. Both arguments refer back to the parties' history and specifically the unfair labor practice charge filed by the Union in 2007 (ILRB Case No. S-CA-07-121). However, the 2007 case is not especially compelling in this matter, in no small part because the County was not found to have failed to bargain health insurance after a hearing on the merits. Instead, the County defaulted when it failed to timely file an answer to the Complaint.

"frustration" made a "final offer" of keeping the terms of the existing contract with no changes, which would result in a wage freeze from November 30, 2010, through November 30, 2012 (the end of the two-year term the County was proposing).

A respondent engages in regressive bargaining when it effects substantive changes in tentative agreements that are less favorable to the charging party than the earlier agreed-to terms. Village of Midlothian, 29 PERI ¶ 125 (ILRB-SP 2013) *citing* Granite City Comm. School Dist. No. 9, 19 PERI ¶ 175 (IELRB ALJ 2003). However, the withdrawal of previous proposals or tentative agreements does not in and of itself establish the absence of good faith. Id. *citing* Mead Corp. v. NLRB, 697 F.2d 1013, 1022 (11th Cir. 1983). Rather an employer engages in bad faith bargaining only when it withdraws its proposals without good cause, after the union has either agreed to them or after the union's agreement appears imminent. Id. The key issue in evaluating the propriety of regressive bargaining is whether it is designed to "frustrate the bargaining process." Id. *citing* Chicago Local No., 458-3M v. NLRB, 206 F.3d 22, 33 (DC Cir. 2000)(citations omitted) *but see* Irving Ready-Mix, Inc., 357 NLRB No. 105 (2011) (if the parties were not close to agreement a regressive proposal cannot be found to have frustrated bargaining).

While there is no doubt that contract negotiations can be frustrating, a party fails in its obligation to bargain in good faith when it attempts to go back to square one after months of bargaining. *See* City of Collinsville, 16 PERI ¶ 2026 (IL SLRB 2000)(Employer engaged in bad faith bargaining when, in response to union's attempt to modify an agreed-upon provision, the employer proposed going back to square one and eliminating the provision all together). Here the County withdrew a provision upon which there had been prior agreement without good cause. There is no question that the County's actions frustrated the bargaining process. Following the proposal and the Union's rejection of that proposal, the parties did not meet again until they selected a federal mediator to assist in the process.[11] By submitting a "final offer" that eliminated all of the provisions upon which the parties had agreed and resulted in a two-year wage freeze, despite having previously proposed wage increases for each of the two years, the County violated Sections 10(a)(4) and (1) of the Act.

[11] There is no evidence in the record that the parties were considering using a federal mediator to assist with the completion of the contract negotiations prior to the County's January 21, 2014, proposal.

3. *Insisting to Impasse on a Permissive Subject of Bargaining*

The Union also contends that the County violated the Act when it insisted to impasse on a permissive subject of bargaining, the withdrawal of the present charge. The County does not dispute that a proposal requiring the withdrawal of a pending unfair labor practice charge is a permissive subject of bargaining. *See also* Bd. of Trustees, Southern Ill. Univ. at Edwardsville, 19 PERI ¶ 83 (IELRB 2003) (a proposal to settle an unfair labor practice case is a permissive subject of bargaining). Insistence to impasse upon a permissive subject of bargaining is a violation of Section 10(a)(4) of the Act. City of Chicago, 30 PERI ¶ 194 (IL LRB-LP 2014) *see also* Village of Wheeling, 17 PERI ¶ 2018 (IL SLRB 2001) *citing* City of Mattoon, 13 PERI ¶ 2016; County of Kane and Kane County Sheriff, 4 PERI ¶ 2031; County of Cook (Cook County Hospital), 15 PERI ¶ 3009; County of Cook, 6 PERI ¶ 3003; *see also* Bd. of Ed. School Dist. No. 1, Lake County, 2 PERI ¶ 1029 (IELRB 1986) (condition that the union drop unfair labor practice charges it had filed against the employer and refrain from filing more charges is evidence of bad faith)(collecting cases).

In order to find that the County violated the Act by insisting to impasse on a permissive subject of bargaining, I must determine whether the parties were, in fact, at impasse, and whether the County insisted on its provision that the Union withdraw the present action in order to settle the contract.

The parties presented the following facts regarding the County's proposal and relevant to the status of negotiations: at the parties' February 25, 2011, bargaining session, the County tendered a package settlement proposal that included all issues the parties had agreed upon prior to the January 21, 2011, session as well as the dismissal of the present action; the February 25, 2011, session was overseen by a federal mediator; as of October 19, 2011, the February 25, 2011, proposal was "still on the table;" according to Ketchum, in order to accept the proposal, the Union would have to withdraw its unfair labor practice charge; in its December 19, 2011, post-hearing brief, counsel indicated that the County "voluntarily withdraws this permissive issue as part of its effort to restore the status quo in th[e] case. The recommended order can also reference withdrawal of the permissive issue as part of restoring the status quo;" and on January 31, 2012, the bargaining unit "approved the most recent offer."

In analyzing whether a legitimate impasse exists, the Board looks at several factors including the parties' bargaining history, the good faith of the parties during negotiations, the

length of the negotiations, the importance of the issue or issues as to which there is disagreement and the contemporaneous understanding of the parties regarding the state of the negotiations. City of Peoria, 11 PERI ¶ 2007 (IL SLRB 1994); County of Jackson, 9 PERI ¶ 2040 (IL SLRB 1993), *affd., unpub. order*, No. 5-93-0685 (1994); McLean County Unit Dist. 5, 29 PERI ¶ 174 (IELRB 2013) *citing* Kewanee Community Unit School District No. 229, 4 PERI ¶ 1136 (IELRB 1988).

Here, the parties provided no additional information regarding the state of the negotiations between February 25, 2011, and October 19, 2011, or from October 19, 2011, through January 31, 2012. In fact, at the hearing, only the Union's counsel Edwards even uttered the word "impasse," and his comments were in the context of a single relevance objection. During the County's cross-examination of Union witness Kresege, Edwards objected to the County's question regarding putting past proposals back on the table in the February 25th session, saying,

> I don't see how what the Union did or didn't do with the County's last, best, and final offer[,] which by the way includes a permissive subject of bargaining [-] withdrawing an unfair labor practice charge, which we're not required to back to our membership, how that has anything to do with this proceeding. It's after the fact. It's after this charge. Anything that happened predates this charge, which is January 26th of 2011. What they did in a mediation or mediated settlement I don't think has any bearing on this. [] So the county bargains in bad faith for seven times, refuses to discuss health insurance, we file a charge, they put it back on the table and say, "Sure, just withdraw your charge and we'll give you everything that we already gave you except for health insurance." How is that evidence of good faith? I mean, the law is pretty clear on you can't go to impasse on permissive subjects of bargaining, i.e., withdrawal of an unfair labor practice charge. It's here in black and white, in writing.

I do not agree that the County's February 25, 2011, proposal is a "black and white" depiction of insisting to impasse on a permissive subject. The Union's notes included at least two other "final" offers by the County prior to seeking the assistance of federal mediator, and this was the first meeting with the federal mediator. Moreover, merely submitting a permissive subject as part of a final package offer is not necessarily a violation of the Act. *See e.g.* Village of Bensenville, 14 PERI ¶ 2042 (IL SLRB 1998) (submission of a proposal on a submissive subject of bargaining to interest arbitration is not necessarily a violation of the Act).

In unfair labor practice cases, the burden of proof is generally upon the charging party. *See* Village of Ford Heights, 26 PERI ¶145 (IL LRB-SP 2010). Based on the limited

information in the record, I cannot determine whether the parties were truly at impasse or what role the charge withdrawal provision played in that impasse. Accordingly, I find that the Union has failed to meet its burden of proof regarding its claim that the County violated Sections 10(a)(4) and (1) by insisting to impasse on a permissive subject of bargaining.

B. Sanctions are not appropriate.

Section 1200.80 of the Rules and Regulations of the Board ("Rules") states, "No party or other persons legally interested in the outcome of a hearing may communicate ex parte, either directly or indirectly, with an Administrative Law Judge or with any member of the Board regarding matters pending before the Board."

To be sure, the County through its counsel is a party legally interested in the outcome of a hearing. On August 8, 2011, Knuppel communicated directly with ALJ Clifford without including the Union in those communications. Such communications conflict with the Board's Rule if the communications regarded "matters pending before the Board." As ALJ Clifford noted in his response, information regarding potential settlement, like that communicated by Knuppel, is intended to be confidential[12] and is otherwise "irrelevant to disputes." Though irrelevant to an ALJ's determination of a dispute, settlement discussions are still regarding matters pending before the Board. Especially, in this instance, the "settlement discussions" being passed along included opposing counsel's alleged assessment of his case.

Here, Knuppel repeated the parties' discussion regarding an attempt to settle this case. Knuppel did not disclose facts related to the unfair labor practice charge or response and did not attempt to persuade the ALJ regarding an position taken by a party to the case.

Though careless and unprofessional, Knuppel's ex parte communication of parties' settlement efforts does not fall within the purview of the Board's rule on sanctions. Section 1220.90 of the Board's Rules provides that sanction may be sought from the ALJ "for both *allegations or denials made without reasonable cause and found to be untrue and/or instances of frivolous litigation*." 80 Ill. Adm. Code §1220.90(d)(2)(emphasis in the rule incorporating Section 11(c) of the Act). Neither the Rules or the Act provide authority for an ALJ to level sanctions for violation of the Board's ex parte communication rule. Therefore, Knuppel's

[12] According to the Board's Rules, "[a]ny facts, admissions against interest, offers of settlement or proposals of adjustment that have been submitted pursuant to this Section shall not be used as evidence of an admission of a violation of the Act." 80 Ill. Adm. Code §1200.120.

conduct does not warrant sanctions in this instance. However, Knuppel should use better judgment when communicating with the Board's ALJs in the future.

V. CONCLUSIONS OF LAW

The Respondent violated Sections 10(a)(4) and (1) of the Act when it failed to bargain in good faith by engaging in regressive bargaining.

VI. RECOMMENDED ORDER

The Board' s policy in unfair labor practice cases is to order a make-whole remedy and restore the status quo ante, that is, place the parties in the same position they would have been in had the unfair labor practice not been committed. Village of Dolton, 17 PERI ¶ 2017 (IL LRB-SP 2001). On the basis of the foregoing findings of fact, conclusions of law, and the entire record, issuance of the following Order is recommended:

IT IS HEREBY ORDERED that the Respondent, County of Lee, its officers and agents shall:

1. Cease and desist from:
   a. Engaging in regressive bargaining; and
   b. In any like or related manner, interfering with, restraining, or coercing its employees in the exercise of the rights guaranteed them in the Act.
2. Take the following affirmative action designed to effectuate the policies of the Act:
   a. On request, bargain collectively in good faith with the International Union of Operating Engineers Local 150 as the bargaining unit's exclusive representative.
   b. Post at all places where notices to employees are ordinarily posted, copies of the notice attached hereto and marked "addendum." Copies of this Notice shall be posted, after being duly signed by the Respondent, in conspicuous places and shall be maintained for a period of 60 consecutive days. Reasonable steps shall be taken to ensure that these notices are not altered, defaced, or covered by any other material.
   c. Notify the Board in writing, within 20 days from the date of this decision, of what steps the Respondent has taken to comply herewith.

VII. EXCEPTIONS

Pursuant to Section 1200.135 of the Board's Rules and Regulations, parties may file exceptions to the Administrative Law Judge's Recommended Decision and Order and briefs in support of those exceptions no later than 30 days after service of this Recommendation. Parties may file responses to exceptions and briefs in support of the responses no later than 15 days after service of the exceptions. In such responses, parties that have not previously filed exceptions may include cross-exceptions to any portion of the Administrative Law Judge's Recommendation. Within 7 days from the filing of cross-exceptions, parties may file cross-responses to the cross-exceptions. Exceptions, responses, cross-exceptions, and cross-responses must be filed with the Board's General Counsel at 160 North LaSalle Street, Suite S-400, Chicago, Illinois 60601-3103, and served on all other parties. Exceptions, responses, cross-exceptions, and cross-responses will not be accepted at the Board's Springfield office. The exceptions and/or cross-exceptions sent to the Board must contain a statement listing the other parties to the case and verifying that the exceptions and/or cross-exceptions have been provided to them. The exceptions and/or cross-exceptions will not be considered without this statement. If no exceptions have been filed within the 30-day period, the parties will be deemed to have waived their exceptions.

Issued at Springfield, Illinois, this 19th day of May, 2014.

STATE OF ILLINOIS
ILLINOIS LABOR RELATIONS BOARD
STATE PANEL

Sarah R. Kerley
Sarah Kerley
Administrative Law Judge