UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 12

TAMPA ELECTRIC COMPANY, a wholly owned subsidiary of TECO ENERGY, INC., d/b/a TECO PEOPLES GAS,

Respondent

and

Case No. 12-CA-144359
Case No. 12-CA-152306
Case No. 12-CA-167550

INTERNATIONAL BROTHERHOOD OF ELECTRICAL WORKERS, AFL-CIO, LOCAL 108,

Charging Party.
_____/

RESPONDENT'S POST-HEARING BRIEF AND PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

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The Respondent, Tampa Electric Company, a wholly owned subsidiary of TECO Energy, Inc., d/b/a TECO Peoples Gas, submits its brief and proposed findings of fact and conclusions of law pursuant to 29 C.F.R. § 102.42.

I. Procedural Background

1. On January 13, 2015, the Charging Party, Local 108 of International Brotherhood of Electrical Workers, AFL-CIO, filed Charge Number 12-CA-144359. In the charge Local 108 alleged that the Respondent violated Sections 8(a)(1) and (3) of the National Labor Relations Act by, "since December 19, 2014, has discriminated against the bargaining unit employed at the Respondent's Sarasota, Florida facility, by failing and refusing to maintain the historic status quo of issuing them annual pay raises, in early January

of each year, and because they engaged in Union and other protected, concerted activities with other employees."

2. On February 3, 2015, Local 108 filed an amended charge in Case Number 12-CA-144359, adding the allegation that "on or about September 5, 2014, the Respondent interrogated employers concerning their support for Local 108 and other protected, concerted activities."

3. On March 23, 2015, Local 108 filed a second amended charge in Case Number 12-CA-144359, adding the allegation that the Respondent violated Section 8(a)(5) of the Act. The amendment did not provide any new or additional facts or include any amendment of the basis of the charge.

4. On April 28, 2015, the Region issued a complaint and notice of hearing in Case 12-CA-144359. The hearing was set for June 1, 2015.

5. On May 12, 2015, the Respondent filed its answer to the complaint and notice of hearing in Case Number 12-CA-144359.

6. On May 13, 2015, Local 108 filed a third amended charge in Case number 12-CA-144359, adding the allegation that on September 5, 2015, the Respondent promised wage increases to its employees in order to dissuade them from engaging in union activity.

7. On May 14, 2015, Local 108 filed Charge Number 12-CA-152306, alleging that the Respondent violated Sections 8(a)(1) and (5) of the Act when it refused to provide information requested by Local 108 regarding 2014 merit amounts, "which [information] is relevant to [the Union's] representation of unit employees."

8. On May 14, 2015, Local 108 filed Charge Number 12-CA-152319, alleging that the Respondent violated Section 8(a)(1) and (5) by "changing the way employees earn

and use vacation hours, floating holidays, short-term disability and long-term disability."

9. On May 18, 2015, the Region indefinitely postponed the hearing set for June 1, 2015 on the complaint in 12-CA-144359.

10. On July 28, 2015, the Region approved Local 108's withdrawal of Charge Number 12 CA-152319.

11. On August 28, 2015, the Region issued its order consolidating cases, consolidated complaint and notice of hearing. The hearing on the consolidated complaint was set for November 9, 2015. Upon the Respondent's motion for postponement, the hearing was reset for November 12, 2015.

12. On September 14, 2015, Local 108 filed Charge Number 12-CA-159956, alleging that on August 24, 2015 and September 14, 2015, the Respondent violated Sections 8(a)(1) and (5) of the Act by cancelling bargaining sessions which had been set for those dates.

13. On October 2, 2015, Local 108 filed a first amended charge in Case Number 12-CA-159956, deleting the allegation that the Responded had violated the Act on September 14, 2015.

14. On October 7, 2015, the Region indefinitely postponed the hearing on the consolidated complaint set for November 11, 2015.

15. On November 30, 2015, the Region issued its decision to dismiss Charge 12-CA-159956.

16. On December 8, 2015, the Region rescheduled the hearing on the consolidated complaint to March 7, 2016.

17. On January 15, 2016, Local 108 filed Charge Number 12-CA-167550, alleging that the Respondent violated Sections 8(a)(1), (3) and (5), by failing to pay the bargaining unit their 2016 merit raise increase and therefore failed to maintain the status quo.

18. On February 16, 2016, the Region entered its order further consolidating cases, consolidated complaint and notice of hearing.

19. On February 23, 2016, Local 108 filed Charge Number 12-CA-170274, alleging that the Respondent violated Sections 8(a)(1), (3) and (5) of the Act by "unilaterally discontinuing the practice of paying employees overtime premiums on days in which they logged 'unproductive time.'" The Region did not postpone the hearing or issue a complaint on the charge

20. On March 7, 2016 the hearing on the consolidated complaint was begun. In its case in chief the Board announced that it reserved its right to litigate 12-CA-170274. The hearing was continued at the close of that day until April 25, 2016, when the hearing was concluded.

II. Proposed Findings of Fact: Sections 8(a)(1) and (3), Interrogation

21. Local 108 is the bargaining agent for a bargaining unit comprising all Apprentices, Utility Technicians, Sr. Utility Technicians and Utility Coordinators employed by the Respondent in its Sarasota Division.

22. Jonathan Sinkler was and is employed by the Respondent as a Utility Technician in its Sarasota Division. (T 15). Sinkler has been employed by the Respondent, in its Sarasota Division, since 2009. (*Id*.).

23. Steven Patterson is the Division Manager of the Sarasota Division. (T 16). Patterson is Sinkler's performance coach, Sinkler's immediate supervisor.

24. The Sarasota Division conducts a team meeting each Wednesday. (T 19-20). The meetings cover various topics. (T 251). There are Safety & Training meetings, which are held twice a month. (*Id*.). There are also Safety meetings, which as their name implies, focus on safety and related issues. (T 187). And once a month, the Division conducts a general meeting. (T 251). General meetings may be about any topic related to the work performed by the bargaining unit. (*Id*.) At general meetings, guest speakers attend, from HR and other parts of the company, to speak to different areas of the business. (*Id*.). The meetings are "more open for more conversations than just safety." (*Id*.).

25. Team meetings are normally conducted by Patterson. (T 20)). A meeting occurred on September 3, 2014. (*Id*.). It was a general meeting. (T 54-55). Patterson did not attend the meeting, being out of town, at training which was being held in Orlando. (T 188). The meeting was therefore chaired by a team member or some other person employed in the Sarasota Division. (*Id*.).

26. Eric Shryock is and was a human resources generalist for TECO services, which is [a] TECO Energy Company. (T 185). TECO Energy is the parent company of the Respondent. Shryock provides human resources support to the Sarasota Division. (*Id*.). Shryock's office is in Tampa, but he travels to the Sarasota Division when needed and once a month he attends the general meeting. (T 187). At general meetings Shryock provides Human Resource updates about "anything pertaining to HR." (T 252). Shryock was present at the September 3, 2014 meeting. (T 188).

27. Sinkler and other bargaining unit members attended the September 3, 2014 meeting. He testified that at the meeting Shryock talked about TECO Energy's recent purchase of New Mexico Gas, a utility company. (T 21). Sinkler remembers that "something

was brought up about New Mexico either having some divisions that were union or some divisions were trying to unionize." (*id*.). These comments were raised by employees in attendance at the meeting, not by Shryock. (T 56). In fact, Shryock made no comments about unions at the meeting. (*Id*.). Other than the questions from the employees about unionization at New Mexico Gas, Sinkler testified, nothing else was said at the meeting about unions, unionization or any other protected activity. (*Id*.).

28. According to Sinkler, unions have been a topic treated at previous general meetings. He testified that "there's always been questions of like bargaining units and the electric company compared to us. (T 58). It is "not unusual" for unions to be a topic, raised in questions asked by Sarasota Division employees in attendance at the meetings. (T 58).

29. Shryock does not remember any comments having been made at the meeting relating to New Mexico Gas. (T 189-190, 192). During the meeting he sat in the back of room in which the meeting was held, working on his computer. (T 192-193). As the meeting closed, he remained in place working on his computer. (T 193). It is customary that Shryock is available "at the end of the meeting for any employee concerns, any team members' concerns." (T 252).

30. On September 3, 2014, after the meeting had ended, several, 4 or 5, employees came to Shryock and he was "chatting with them" when Sinkler, and a co-employee, Cody Young, approached the group. (T 193-194, 22).

31. Sinkler asked Shryock how "they" (the employees of New Mexico Gas) were able to organize and whether "we" (the Sarasota Division employees) could. (T 21). Sinkler observed that Shryock "kind of looked a little hesitant and that was one of them tricky subjects with HR you're not really supposed to talk about." (T 22). "And he kind of

explained a little bit about it, like you know, the HR is for employees, and the Union is like someone that stands between us and, you know, HR." (*Id*.).

32. Shryock testified that Sinkler asked about "protection." (T 194). "You know, he mentioned union, he mentioned protection is all I remember. Exactly how he opened it, I'm not sure." (*Id*.). "He kind of came over and says will union protect my job. What's the benefit of having a union. Something to that effect." (*Id*.). "Everyone was kind of listening or looking." (*Id*.).

33. Sinkler remembers that Young asked him, "why don't you ask [Shryock] about your issue you have?" (T 22). Sinkler then told Shryock that he had a performance issue "that had happened about a month-and-a-half prior, and I wanted to know if there was a statute of limitations on a, you know, PD or possibly DML." (*Id*.).

34. "PD" refers to Positive Discipline. (*Id*.). Positive Discipline is the disciplinary process that is used by all TECO Energy companies, including the Respondent. (T 186). "DML" is a decision making leave in a step in Positive Discipline that is imposed when the employee does "something bad." (T 22). "They send you home and you think about . . . do you want to work here, you know, and/or they make up, you know they say, well, we're going to keep him or, you know, put him on probation. I don't know the ins and outs of it a hundred percent, but that's my understanding of it." (*Id*.).

35. The performance issue to which Sinkler referred in the conversation with Shryock was an incident involving a report by a customer of a gas leak, which had occurred some 45 days prior to September 3, 2015. (T 22, 44). Sinkler said that he had gotten a verbal warning and filled out a "Lessons Learned" form as a result of his handling of the call, "but I was kind of worried that, hey, it could progress into something more because Steve was kind

of being a little - - Mr. Patterson was being a little unclear with whether or not it was all over." (T 23). According to Sinkler, Shryock told him that "typically if it turns into PD or DML, it would have been on my desk like ASAP, and it hasn't been, it's not." (*Id*.).

36. The incident involving the reported gas leak was one in which Sinkler had been dispatched to handle the report. (T 41-42). Sinkler detected a leak, shut off the meter, and left a door tag, informing the resident that there were no leaks in the main or service line (meaning that the leak was inside the residence). (T 42). But the residence at which he left the door hanger was not the residence from which the leak had been reported. (T 257). He had gone to the wrong residence and turned off the wrong account. (Id.). The error was discovered when the resident on whose door the hanger had been left called to inquire why he had no gas service. (T 255). In response, the company shut off the meter at the house from which the original report had been made and restored service to the residence whose service had incorrectly been shut off. T 257).

37. Gas leaks are a serious matter, and so a week later, when the error was detected, Sinkler was called in by Patterson, his supervisor. (T 44). Patterson gave Sinkler a "little talk" and told him to fill out a "Lessons Learned" form. (T 47-48).

38. Sinkler testified that he had filled out the form and "thought [the handling of his performance involving the call] was over." (T 47-48). But when Patterson mentioned the incident during Sinkler's evaluation, that made him a little nervous." (T49). Sinkler thought it was as if Patterson were holding it "over my head." (T 50). As of the date of his evaluation Sinkler has no knowledge that Patterson knew of any organizational activity that was or was not occurring. (T 50).

39. Patterson does not impose discipline without consulting his immediate supervisor, Jesus Vega. (T 259). When Patterson determined that Sinkler had handled the leak, Sinkler was on vacation. (T 257). When Sinkler returned to work, Patterson met with him and asked Sinkler to fill out a "Lessons Learned" form. (*Id*.). Sinkler did so and left then form on Paterson's desk. (T 261). Patterson reviewed the form and determined that it did not include everything which had been discussed and asked Sinkler to "fill in more detail." (*Id*.).

40. Patterson was not aware of any organizational efforts being made at the time he met with Sinkler or when he asked him to provide greater detail. (T 262-263). Patterson did not communicate with Vega about the incident, because Vega was on vacation at the time. (T 263-264). Sinkler had submitted the original Lessons Learned form approximately one and one-half weeks before the September 3, 2014 team meeting. (T 262). Patterson knew nothing of Local 108's organizing efforts before the date of that meeting. (T 262-263).

41. The discussion between Shryock and Sinkler on September 3, 2014 was witnessed by the employees who had been talking with Shryock when Sinkler and Young approached the group. These employees did not participate in the conversation between Shryock and Sinkler, which was "all about leak calls," other than some "head nodding." (T-198-199). The discussion ended with Shryock telling Sinkler that Sinkler had to get in touch with Steve, and "offering [his] services to broker the meeting." (T 200-201).

42. As he walked away from Shryock, a "senior" co-employee said to Sinkler, "Hey, were you all just asking Mr. Shryock about a union? And he kind of - - I think he made a joke about that's not who you ask to start a union." (T 23).

43. On September 5, 2014, Patterson called Sinkler in to his office, telling him to bring his "a copy or two" of the "Lessons Learned" form, so they could "go over it together."

(T 24). Shryock was also in the room when Sinkler arrived. The door to Patterson's office was shut and Patterson started going over the "Lessons Learned" form with Sinkler. Sinkler read the form out loud and was asked questions about it, which he answered. (T 25). According to Sinkler, Patterson asked Sinkler, who had not contacted Patterson after being told to do so by Shryock, that he felt as if he had been left in the dark, since he and Sinkler had just finished Sinkler's evaluation and had heard nothing about any issues that he had. (T 25-26). Sinkler says he asked Patterson what he meant and Patterson said he had heard from Shryock that Sinkler was "asking about unionizing." (*Id*.).

44. In the General Counsel's direct examination, Sinkler described Patterson as saying, "[Shryock] said you all are - - you were asking about unionizing. And I was like, well, just me and Cody joking around." (T63). "He said, well you say, we, that means there has to be someone else with you." (*Id*.). "I said, well, just me and Cody joking around." (*Id*.). "Then we went between that and the performance issue." (*Id*.).

45. On cross-examination, Sinkler said that he told Patterson that he and Cody had been "joking around." (T 26). And "from there" Patterson asked what Sinkler thought a union could do for him and Sinkler raised the issue of guaranteed wage increases. (*Id*.).

46. Sinkler was not disciplined for the gas leak. In a later meeting, Patterson and Vega, Patterson's supervisor, met with Sinkler. They reviewed the job procedure and "made sure I understood that weight of what I had done and what could have happened." (T 75). Sinkler has received no discipline as a result of the leak incident or his meeting with Patterson. (*Id*.).

III. Proposed Findings of Fact: Sections 8(a)(1) and (3), Promise of a Wage Increase.

47. In the meeting held in Patterson's office on September 5, 2014, Sinkler testified that Patterson asked him what the Union could do for him. (T 26). Sinkler replied that he heard that "the Lakeland guys" get a guaranteed 3 percent. (*Id*.). According to Sinkler, Patterson replied, "well, I can do that for you bud." (*Id*.). Sinkler testified that after this exchange, "we went kind of back and forth between the performance issue and the union." (*Id*.). Shryock stopped the conversation, telling Sinkler, "this is not a strong-arm by HR. This is just our job to figure out what's going on, you know, and to hear what the issues there are." (*Id*.). The meeting "didn't last a whole lot longer than that." (*Id*.).

48. Shryock confirmed that Sinkler spoke about a guarantee of a 3% raise, saying he had "heard' about guaranteed stuff that the union gets." (T 223). Neither Shryock nor Patterson testified to any comment by Patterson that he could give Sinkler a 3% raise.

49. Although Sinkler testified that Patterson told him that he could give employees a 3% increase, he does not contend that Patterson tied that increase to unionization.

> Q. Did he ever tell you [that you would get a 3% increase] if you don't vote for the union?
>
> A. Can you repeat the question?
>
> Q. Yeah. Did he ever tell you if you don't vote for the Union?
>
> A. No. He did not say that. (T 65).

IV. Proposed Findings of Fact: Sections 8(a)(1) and (5), Refusal to Provide Information.

50. The General Counsel contends that on May 8, 2015, Local 108 requested information about individual merit raises that the Respondent paid to non-bargaining

employees employed in the Sarasota Division. (T 89). The General Counsel provided no document which contains such a request. Nevertheless, there is no dispute that the information was requested and supplied.

51. On May 11, 2015, Local 108 requested from the Respondent the following information. (Jt. Ex. 11):

> Please send the Union the low percent awarded, the high percent awarded, and average percent awarded for the 2014 merit amounts paid to the Tampa Division Peoples Gas employees. (*Id*.).

52. On May 12, 2015, the Respondent responded to Local 108. (Jt. Ex. 11):

> The company will not provide the information you requested because the data are relevant or necessary to the union's representation of the bargaining unit. Moreover, this information is confidential in the hands of the Company. As you know, under the merit pay plan the company designated an amount of money which would be available for payment of raises. In the 2014 year, that amount was equal to % of payroll. Each division made decisions as to the raises that would be paid to each individual employee, exercising the discretion based on several factors. PGS Operations did not have to spend all of the money and the 3% average was to be determined across all divisions. There is no relationship between different divisions as to the particular raise awarded to a particular employee, or between individual employees of those divisions.

53. Local 108 responded to the Respondent on May 13, 2015. (Jt. Ex. 11):

> The Union believes that this information is relevant to the Sarasota Division negotiations, especially since the Company stated that the information provided for the Sarasota Division was irrelevant because it pertains to only four Non-Bargaining Employees. The same information on the Tampa Division will show what was given to all employees, and demands that the information on the Tampa Division, merit amounts be provided.

54. In fact, the Respondent did not maintain that the information about the non-bargaining unit employees of the Sarasota Division was irrelevant. In the Respondent's May 12, 2015 response to Local 108's May 11, 2015 request for information about the individual merit raises given to the Tampa Division, the Respondent had written. (Jt. Ex. 11):

> We previously have provided information concerning the merit raises awarded to non-bargaining unit employees at the Sarasota Division. These data were relevant because the total amount of money available for increases was to be distributed on a division-wide basis, and not just among bargaining unit members. But data relating to other divisions had no impact on or relevance to the merit increases that were given under the merit plan.

55. The Respondent did not provide the information which Local 108 requested about the individual merit raises paid to employees employed in the Tampa Division. (T 92).

V. Proposed Findings of Fact: Sections 8(a)(1) and (5): Refusal to Pay Merit Increases for 2015.

56. Prior to December 10, 2014, the Respondent paid wage increases to employees of the Sarasota Division based on a Merit Pay Plan. The Merit Plan increases were determined through a process which had been followed in all years prior to 2014. The

process was based on a number of factors, including the evaluation given to employees by their performance coaches (immediate supervisors). The process is reviewed by all levels of management, from the immediate supervisor of the employee to the chief executive officer of TECO Energy, and the compensation department. (T 147-148). The process includes "hard deadlines" for each step in the process. (T 146).

57. For 2015, the Merit Pay Plan increases were to be paid on January 8, 2015, effective December 22, 2014. (Jt. Ex. 8(a)). The deadlines established for the process included one for the vice president overseeing the departments and divisions in which the employee is employed. (Jt. Ex. 8(c)). The deadline for vice presidential action for the 2015 year was December 12, 2014. (*Id.*).

58. On December 10, 2014, the bargaining unit voted for representation by Local 108. The results of the election were certified on December 23, 2014.

59. On December 19, 2014, the Respondent informed the bargaining unit:

> For your information, with the IBEW elected as your exclusive bargaining representation, Peoples Gas can no longer routinely convey status on certain items without first bargaining with the IBEW; like future wage increases, hours of work, and changes in working conditions. During the collective bargaining process, the company must maintain the status quo. (Jt. Ex. 10).

60. In the same memorandum, the Respondent informed the bargaining unit:

> 1. Peoples Gas will be promptly reaching out to IBEW Local 108 to commence collective bargaining over your wages, hours, and working conditions.

2. A 2015 wage increase cannot be implemented because the increases were not determined as of the date of certification and therefore were not part of the status quo. (*Id*.).

61. Local 108 and the Respondent began negotiations on March 26, 2015. (Jt. Stip. 11). The negotiations included the wages to be paid in 2015. (T 88). In its original proposal, submitted at the bargaining table on May 8, 2015, Local 108 proposed a three-year contract including a 5% across-the-board wage increase in each year. (T 107-108). The increases were to be paid in addition to the merit increases that would be paid to unit members for 2015. (*Id*.). Local 108 did not propose the continuation of the Merit Pay Plan. (T 108).

62. As of May 8, 2015, the hearing on the complaint issued in Case Number 12-CA-144359 Local 108 was set for June 1, 2015. Robert Thomas, Local 108's assistant business manager, represented the bargaining unit in negotiations. (T 83-84). He testified that at the May 8, 2015 bargaining session, the Respondent:

> Addressed us on negotiation day 2 about addressing the ULP charges that the union had filed on the merit raises for 2015 and that [it] wanted to see if we can come to a first year agreement. And I spoke up and said the Union will take a 5 percent increase across the board for all unit employees for the year 2015 and back pay and all other wages that's earned until this date, and if an agreement is not reached by the end of 2015, that the employees will receive another 5 percent increase for the year 2016 come January. (T 88).

63. On May 18, 2015, the Region indefinitely postponed the hearing which had been set in Case Number 12-CA-144359 for June 1, 2015. On August 28, 2015, the Region

set the hearing on the consolidated complaint for November 9, 2015 (postponed until November 11, 2015).

64. The parties did not reach agreement on the wage increases to be paid for 2015. On August 25, 2015, the Respondent wrote Local 108 the memorandum which is GC Exhibit 4, which included the following statement:

> 2015 Wages: The company is concerned with the pace of negotiations and since it is now the end of August, we feel that it is important that we get something finalized for this year (2015) and beyond for wages. And most importantly for wages, we have been talking to the NLRB to resolve the ULPs. Which includes compensation for 2015, and have been unable to resolve the matter based on the Board's insistence to include charges the company did not commit. Therefore, the company is going to do the following:
>
> a. Pay the 2015 merit increases, which were recommended but not finalized on December 10, 2014, treating that recommendation as the final amount and paying retro-active to December 22, 2014.
>
> b. For those individuals who have been promoted since December 22, 2015, the company will provide what it considers to be the status-quo NCNE Wage & Skill Progression plan. Promotion base wage increases will not be affected by the percentage wage increase.

65. The Respondent paid bargaining unit members the 2015 Merit Plan increases referred to in the August 25, 2015 memorandum on September, 2015, in the August 31 – September 13, 2015 pay period. (Jt. Ex. 1, Stipulation No. 13).

66. In its bargaining for the 2015 wages to be paid to bargaining unit members, Local 108 did not propose continuation of the Respondent's Merit Pay Plan, instead proposing that it would be replaced by a progression plan like that paid at the Lakeland Division, another organized unit of the company.

> Q. All right. So with respect to the 2015 wages, when you said that the Union came back and you came back with I believe 2.5 percent; is that correct? . . .
>
> A. We went no lower than 3.0. . . .
>
> Q. With a proposal that upon ratification of the contract, there wouldn't be a merit pay plan applicable to the employees; there would be a progression plan applicable. Is that correct?
>
> A. If the contract is ratified, yes, sir, that's what we negotiated. Yes, sir.
>
> Q. Did the Union ever propose a merit pay plan for the bargaining unit?
>
> A. Not to my knowledge.
>
> Q. For 2015 or 2016?
>
> A. Not to my knowledge. The only thing we wrote out was across the board. (T 110-111).

VI. Proposed Findings of Fact: Sections 8(a)(1) and (5), Refusal to Pay Merit Increases for 2016.

67. The Respondent did not pay members of the bargaining unit Merit Pay Plan increases for 2016. The parties were still negotiating for the initial contract.

VII. Conclusions of Law

68. The Respondent did not interrogate Jonathan Sinkler concerning union organizational activities or any other protected concerted activity.

69. The Respondent did not promise Jonathan Sinkler an increase in pay in order to dissuade him from engaging in union or any other protected concerted activity.

70. The information requested by Local 108 concerning the individual merit increases paid to employees employed at the Respondent's Tampa Division.

71. The Respondent did not unlawfully refuse to provide information requested by the Union.

72. The Respondent did not refuse to bargain when it did not implement Merit Pay Plan increases for 2015. The Respondent bargained with Local 108 on the subject of wage increases for 2015, including merit pay increases.

73. The Respondent did not refuse to bargain when it did not pay Merit Pay Plan increases to bargaining unit members for 2016.

BRIEF

The Respondent did not violate the Act. The General Counsel did not prove that the Respondent violated Section 8(a)(1), (3) or (5) of the Act.

The Respondent did not interrogate Jonathan Sinkler.

The General Counsel presented uncontested testimony which established that the topic of unionization was not an unusual topic to be raised in general meetings held in the Sarasota Division. When it was raised, it was an employee who did so, by asking questions directed to the subject. In fact, the General Counsel presented no evidence to show that the Respondent ever raised the topic of unionization or of any other protected concerted activity

before September 5, 2014, and on that day it was raised by Sinkler's immediate supervisor in the course of a meeting that occurred specifically because of discussions Sinkler had with Eric Shryock two days earlier, in which Sinkler had raised the question of whether a union could provide him protection in the context of what he thought was a threat to his continued employment.

Specifically, Sinkler and a fellow employee approached Shryock when he was speaking to other employees about something which apparently had nothing to do with the union or unionization. At the prompting of his co-worker, Sinkler spoke of an incident in which he was involved, in which he had mishandled a report of a gas leak. The co-worker, Cody Young, did not testify. Sinkler testified that he asked about unions and what they could do for him. Sinkler described Shryock as being uncomfortable with the question. The main point of discussion was the leak. Sinkler was concerned that his having been talked to by his supervisor, Steve Patterson, was "not the end of it." The conversation ended with Shryock advising Sinkler to contact Patterson, and offering to broker the meeting. Sinkler apparently did not take the advice.

On September 5, 2014, Patterson summoned Sinkler to his office. He told him to bring copies of a "Lessons Learned" form, which Sinkler had completed at Paterson's direction and which had been returned to him with a request for revision. That request had been made a week and one-half before the meeting of September 3, 2014, when Sinkler raised the leak call.

After Patterson and Sinkler had reviewed the form, Sinkler remembers that he was asked about the involvement of other employees in union activity. Shryock testified that the subject of unions was raised first by Sinkler who asked him whether a union could save his

job. Shryock's testimony is consistent with Sinkler having raised the issue on September 3rd. It is also consistent with Sinkler's testimony that he spoke in the meeting of having heard that employees in organized divisions were guaranteed a 3% increase. In any event, Shryock and Sinkler agree that Sinkler said that he or he and Young had been joking around.

The conversation proceeded from there to a discussion of what benefit a union could give to Sinkler. He testified that he participated in the discussion saying that he did not know. He asked "man to man" whether he would lose his job over the gas leak incident, a matter that everyone agreed was a serious one. Patterson, who is accused of offering a 3% raise in return for dropping an involvement with unions did not take the opportunity to condition discipline on union non-involvement answered that it was not up to him.

The meeting concluded. Sinkler was asked to return to re-date his "Lessons Learned" form, because it bore its original date. He refused to do so. Any re-dating of the form to the actual date, when the discussions about unions occurred would not have helped Patterson to retaliate. Nothing was done to Sinkler for his refusal. Sinkler was not disciplined for his handling of the gas leak or any other reason. He was promoted from apprentice after that. The evidence allows no conclusion other than Sinkler's discussion with Patterson occurred in the context of discussions which flowed naturally from his questions to Shryock and his concern for the possibility of future discipline. The question of who was involved in the union, if it was asked, was not pursued. No action was taken against Sinkler. There was no interrogation.

<u>The Respondent did not promise Sinkler a wage increase if he did not support the union</u>. The General Counsel presented testimony that when Sinkler spoke of the 3% wage increase he had heard organized divisions received, Patterson replied that he could give unit

members that amount of a raise. Shryock and Patterson do not remember that conversation. But no one testified, and there was no other evidence, that the raise Patterson could give was tied in any way to union or other protected concerted activity. There was no promise of benefit.

The Respondent did not unlawfully refuse to provide information requested by the Union. The General Counsel presented virtually no evidence on the topic of Local 108's request for information related to individual merit increases to employees paid at the Respondent's Tampa Division, relying on a series of emails embodying the request. Robert Thomas, the Union's assistant business manager testified that the Union wanted the information because:

> That will help us be able to - - we don't want to be out in Pluto land when we're asking for base wage increase. We want to be in the ballpark. The information is vital. (T 92).

The information requested was the individual pay raises given to employees of the Respondent's Tampa Division. The testimony was undisputed that all of the divisions received the same amount of money to be available for raises, and for 2015 the amount was 3% for every division. That information was provided to the Union and repeated in the memorandum sent in response to the written request which the Union made on May 11, 2015. (Jt. Ex. 11).

In fact, the individual increases were not relevant to the Union's representation of the bargaining unit. The Respondent was not required to provide it.

The Respondent did not unlawfully refuse to implement Merit Pay Plan increases for 2015 or 2016. It is undisputed that the prior to the Union's election as the bargaining unit's exclusive representative on December 10, 2014, the Respondent paid Sarasota Division

employees pursuant to a merit pay plan. It is undisputed as well that on December 19, 2014, the Respondent informed Local 108 that it would not implement merit pay increases for the bargaining unit for 2015 because of Local 108's election. The Respondent did not violate the Act by its actions.

The Respondent's Merit Pay Plan resulted in wages which were determined on an employee-by-employee basis. Each unit of the Respondent's operations – in the case of the bargaining unit that unit was the Sarasota Division, including both represented and unrepresented employees – was budgeted the same amount of available dollars, established as a percentage. This same amount was budgeted to all units. Within that budgeted amount the immediate supervisor would begin the process by making a recommendation for the individual raises which each employee in the unit would be paid. The supervisor's decision would be informed by several factors, including his or her evaluation and the employee's placement in pay in the context of the market for his job function.

The supervisor's decision would be reviewed by the next level of management, who could change the result if he felt it in the company's interests to so. That manager's decision would be reviewed by the tier of management, possessed of the same discretion as those he or she supervised and finally by the vice president.

The process established by the company to determine pay raises included what the General Counsel characterized as "hard deadlines," by which time each step in the merit pay process was to be completed. It is undisputed that as of the Union's selection as the bargaining agent on December 10, 2014, the vice president's deadline had not occurred and the process was not complete. The Respondent did not discontinue the payment of merit increases. In its memorandum of December 19, 2014, the Respondent said first that it would

be reaching out to bargain with the Union, specifically with respect to "wages, hours and working conditions." The Respondent's memorandum explained that, "with the IBEW elected as your exclusive representation, Peoples Gas can no longer *routinely* convey status on certain items *without first bargaining with the IBEW*; like future wage increases . . . ." (Emphasis added). In that context the Respondent wrote:

> A 2015 wage increase cannot be *implemented* because *the increases* were *not determined* as of the date certification and therefore are not part of the status quo. (Emphasis added).

It is undisputed that following this notification the Respondent bargained with Local 108 on all topics, including wages and including the merit increases which were to be paid for 2015. The General Counsel presented no evidence that would prove that the Respondent ever refused to bargain at the table, on any subject, that it ever refused specifically to negotiate the merit pay increases for 2015, or that Local 108 ever sought to do so.

The General Counsel submits the memorandum from Local 108, sent on December 29, 2014 (GC Ex. 3) as a demand for payment of the merit increases. In fact, that memorandum included only the following mention of pay: "if any bonus or pay raise are schedule please pay these employees theirs." But there were no pay raises scheduled for the Sarasota bargaining unit, a fact made clear in the memorandum which the Respondent had sent to the union on September 29, 2014, which could not be much clearer in telling the union that the 2015 merit pay plans had not yet been "determined" and could not be pending bargaining.

The General Counsel presented evidence which showed that the assistant business manager, Robert Thomas, to whom the Respondent had addressed its letter did not see the letter until he returned from vacation. That is of no moment because there is no dispute that

Mr. Thomas was I fact the chief negotiator and the letter was in fact sent. But what is most important is that the parties bargained thereafter, about wages, with the Union seeking 5% raise on top of the merit pay plan and never sought to negotiate either individual employee raises or the continuation of the merit pay plan. And the Respondent never sought to negotiate the continuation of, or change to, the merit pay plan.

A merit pay plan clearly is a mandatory subject of bargaining. But to say that is not enough because not only is the merit pay plan a mandatory subject of bargaining, the individual raises to be given under a merit plan are themselves subject to the obligation to bargain. This distinction is illustrated clearly in *McClatchy*, 321 NLRB 1386, *enforced* 131 F.3d 1026 (1997), where the Board held that although an employer was allowed to bargain to impasse over a merit pay proposal that permits discretion over wage increases, it not lawfully implement such a proposal, even after bargaining to a good faith impasse. To do so, the Board reasoned, would deprive the union of its right to bargain over *individual* wage increases.

The Board's reasoning in *McClatchy* is consistent with the prevailing law on the right of an employer to discontinue merit pay plans. That law is set forth in *The Daily News of Los Angeles*, 315 NLRB 1236 (1994):

> An employer with a past history of a merit increase program neither may discontinue that program . . . nor may he any longer continue to unilaterally exercise his discretion with respect to such increase, once an exclusive bargaining representative has been selected. What is required is the maintenance of preexisting practices, i.e., the general outline of the program, however the implementation of that program (to the extent that discretion has existed in determining the amounts or timing of the increases), become a matter as to which the bargaining agent is entitled to be consulted. (at 1239).

In its memorandum of December 19, 2014, the Respondent did not discontinue its merit pay plan and it did not say that it did. It announced that it would reach out to the Union

and that it could not *implement* the raises for 2015 for the Sarasota Division because Local 108 had been selected as the bargaining agent for the unit and *the raise* had not been determined. Following that memorandum, the Union was consulted. In fact the Respondent and Local 108 did in fact negotiate, including negotiations over the wage increases to be paid for 2015. The Union proposed a three-year contract with 5% increases in each of the three years atop whatever the employees would receive from the merit plan. The Union did not propose, for 2015 or any other year, a continuation of the merit pay plan.

Local 108 did not seek to negotiate the specific increases which employees would receive from the merit pay plan. At no time through the date of hearing herein has the Union proposed a merit increase for 2015 without an additional 5%. But the Union was consulted on the merit increases to be paid. It bargained over that increase. Those discussions were not completed by the time the process for the 2016 merit increases were to be formulated, and so the Respondent paid the 2015 amounts. It did not refuse to continue the consultation. As of the date of the hearing the parties were still negotiating the 2016 increase.[1]

As wrong as the General Counsel is on the issue of the 2015 raises, its error in even greater in its position for 2016. The parties were in active negotiations all the way through the time in which the process by which the 2016 merits would be determined. The Union never sought to bargain the process, the factors to be used or the amounts that would be paid for individuals. To hold that the Respondent violated the Act by not paying a merit pay plan that had not even been sought does not further the rights of employees to bargain the wages, hours and terms and conditions of employment.

[1] The negotiations are now concluded and the parties have agreed to an agreement, which has been ratified, and which includes wages retroactive to the beginning of 2016.

The General Counsel presented no testimony that supported the contention that the Respondent refused to pay the 2015 increases to discourage union membership.

The Respondent did not violate the Act by refusing to pay the 2015 or 2016 merit increases.

CONCLUSION

The General Counsel has not established that the Respondent violated the Act.

Respectfully submitted,

/s/ Thomas M. Gonzalez

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been electronically filed via the NLRB website and has been sent by U.S. Mail and E-mail on this 3rd day of June, 2016, to:

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