

**BEFORE THE INDIANA EDUCATION
EMPLOYMENT RELATIONS BOARD**

CARMEL CLAY EDUCATION ASSOCIATION,)
et al.,)
 Petitioners,)
and) IEERB Case No. U-12-04-3060
CARMEL CLAY SCHOOLS,)
 Respondent.)

ORDER

The above-entitled case came before the Indiana Education Employment Relations Board¹ (“the Board” or “IEERB”) at the Board’s meeting on August 29, 2013, for oral argument. Having considered the arguments of counsel, the briefs, the record, and being otherwise duly advised, the Board now affirms and adopts, deletes, modifies, and adds to the Hearing Examiner’s Report as follows:²

AFFIRMS AND ADOPTS:

Findings of Fact: 1-6, 8-10, 12-18, 20, 22-23, 26, 28, 30-31, 33-37, 39-42, 44, 46-48, 50, 55- 57, 60-64, 67-68;
Conclusions of Law: 1-10, 12-17
Sections: Relevant Law, Recent Changes in the Collective Bargaining Laws, Discussion

DELETES:

Findings of Fact: 69-72
Conclusions of Law: 11, 18-20
Sections: Recitation of Issues, Petitioner’s LBO

MODIFIES:

Findings of Fact: 7, 11, 19, 21, 24-25, 27, 29, 32, 38, 43, 45, 49, 51-54, 58-59, 65-66, 73
Recommended Order

ADDS:

Findings of Fact: 10A, 31A, 33A, 54A, 57A, 66A
Board Discussion

¹ Chairman Patrick Mapes recused himself from this matter. Board member John Krauss is serving as Chairman Pro Tempore.

² The modified and added findings can be found at the end of the Order. The Hearing Examiner’s Report is attached for reference.

Board Discussion

The petitioners in this case, the Carmel Clay Education Association and its president, Brian Lyday (“the Association”)³, claim that Carmel Clay Schools (“the School”) engaged in an unfair practice by bypassing it during the impasse period in the fall of 2012, and that IEERB should adopt its Last Best Offer (“LBO”) as the remedy. Fact finding was suspended pending the outcome of this matter.

The Hearing Examiner found that the Association did not prove that an unfair practice occurred, and that, in any case, the Association’s LBO should not be accepted. The Association contested both findings. We agree with the Hearing Examiner that the Association failed to prove that bypass occurred, delete the portions of the Report regarding the Association’s LBO, and provide the following additional guidance. The Association also took issue with many of the Hearing Examiner’s specific findings claiming they were incomplete. Although we believe most of the Hearing Examiner’s findings to be sufficiently stated, we have modified and added additional findings where we see appropriate, which can be found at the end of this Order.

I. Case Synopsis

The parties engaged in formal bargaining in the fall of 2012. On October 8, 2012, after the end of formal bargaining, School Board member Greg Phillips (“Phillips”) made a presentation at a School Board meeting about the School’s current offer, which the School subsequently sent to teachers and others⁴ in a School Board Meeting Summary and posted on its website. The presentation included changes in the collective bargaining law, meetings between the parties, the School’s stance on bargaining, and the School’s most recent offer. Phillips acknowledged disagreement between the parties regarding the scope of bargaining and stated that although there were unanswered questions about the new bargaining law, the School’s offer was based on various agencies’ advice. The next day, School Superintendent Jeffrey Swensson (“Swensson”) emailed the School’s principals and assistant principals with the bargaining information presented at the meeting and asked them to “refer colleagues” to this information.

IEERB declared impasse on October 10, 2012. Mediation sessions occurred on November 1 and 5, 2012, but were unsuccessful. School Board member Andrew Klein (“Klein”) testified that the School presented what it later called its “True Best Offer” or “TBO” at mediation. Lyday testified that he has never received that offer. The parties exchanged LBOs on November 16, 2012. Following IEERB’s “LBO sample”, both offers included a statement that the LBOs rescinded any prior offers. Klein testified that as the parties could settle outside their LBOs prior to the start of fact-finding, he believed this language to be technical and that the TBO continued to be on the table after the exchange of LBOs.

³ We will refer to the petitioners as the Association for simplicity. We will refer to Association President Bryan Lyday (“Lyday”) individually as appropriate.

⁴ It is unclear who the recipients of this message were. Lyday testified that because it was sent through the school messenger system, “it’s forwarded to all of the stakeholders, including the teachers, via email.”

On November 19, 2012, Lyday emailed the Association's bargaining unit members ("teachers") regarding the Association's problems with the School's LBO. The School received the email from a principal and believed that it was inaccurate. At the November 26, 2012, School Board meeting, Klein gave a Bargaining Status Report, which was made at least in part to counter the perceived inaccuracies in the Association's email. This report described the School's LBO, how it differentiated from the School's TBO, and that the TBO was still on the table. Klein then answered questions from School Board members. Phillips stated that he hoped the Association could explain to their teachers why they would have to do without a financial benefit from the School Board if the TBO was not accepted. The next day, Swensson emailed the School's principals and assistant principals in which he recapped the School Board meeting and encouraged them to tell colleagues that the TBO was still alive.

Over the next several days, four principals emailed their teachers and/or staff regarding topics of bargaining, encouraging the teachers to read the information provided by the School. In addition, bargaining materials were left in approximately one-third of the schools.⁵ On November 25, 2012, in response to concerns from teachers, School Board member Pam Knowles ("Knowles") sent an email to Shelly O'Malia, explaining the changes in the law regarding collective bargaining, the School's position regarding negotiations, and the School's offer.⁶ The School also sent via email a School Board Meeting Summary on November 29, and a CCSpotlight, which appears to be a School newsletter, on November 30, that contained, among other items, negotiation information and links to summaries of the School's LBO and TBO. The record indicates that these emails were sent to teachers as well as other groups, although it is not clear what other groups received them. Klein also emailed a teacher in response to her inquiries, confirming that the TBO was still on the table and providing information contained on the School's website.

On December 3, 2012, the Association and Lyday filed the Complaint of Unfair Practice and Request for Interlocutory Relief ("Complaint"). The Board suspended fact finding, and a summary hearing on the request for interlocutory relief was scheduled for December 14, 2012. At a prehearing conference, the parties requested that the hearing be cancelled and a hearing examiner be appointed to make a final judgment on the merits. The parties agreed that fact finding should remain suspended pending a final decision. The request for interlocutory relief was subsequently withdrawn. The Board cancelled the hearing and appointed Bernard Pylitt as Hearing Examiner on December 11, 2012. Fact finding remained suspended. A hearing was held on April 25-26, 2012. The Hearing Examiner submitted his report on May 15, 2013. The Association timely appealed, and a Board hearing was held on August 29, 2013.

II. Suspension of Impasse Procedures

Upon the filing of the Complaint, the Board suspended fact finding. The parties agreed to continue the suspension of fact finding while a hearing examiner made a determination on the merits. This is a case of first impression regarding if, and under what circumstances, impasse

⁵ The record reflects that one principal placed the materials in a lounge, presumably a teacher area. Lyday testified that materials were left out in other schools, but the record does not reflect whether these materials were placed in teacher areas.

⁶ Ms. O'Malia's job title was not identified for the record.

procedures will be suspended due to a pending unfair practice case. The relevant statute and rules are silent on this issue.

There are various concerns to reconcile. Generally, the remedy of an unfair claim is a cease and desist order that tells the offending party to stop committing the unfair practice, and to start or resume bargaining, if appropriate. Under the new impasse timelines, if the Board does not suspend impasse procedures when a party alleges interference with the bargaining process, the parties would likely receive a fact-finder-imposed contract prior to a decision on the unfair case. Either the contract would be upheld, in which case the interfering party could be rewarded for committing an unfair practice, or the parties would be required to return to the bargaining table without reference to the fact finder's decision, resulting in a waste of resources. Either outcome is untenable. Suspending impasse procedures, however, will not be taken lightly. The Board is wary of parties filing unfair practice cases to delay impasse procedures, particularly given the new timelines on impasse procedures and contract duration. *See* Ind. Code §§ 20-29-6, 20-29-8.

We seek to balance these concerns by adopting a test similar to IEERB's suspension of representation cases. *See* 560 IAC 2-2-13. Impasse procedures (including declaration of impasse, mediation, and fact finding) shall be suspended where an unfair practice complaint is filed and:

- (1) the complaint requests a stay of impasse procedures; and
- (2) the complaint alleges that:
 - a. the school employer violated IC 20-29-7-1(a)(1) by interfering with, restraining, or coercing school employees in the exercise of the rights guaranteed in IC 20-29-4; or
 - b. the school employer violated IC 20-29-7-1(a)(5) by refusing to bargain collectively with an exclusive representative as required by IC 20-29; or
 - c. the school employee organization or the organization's agents violated IC 20-29-7-2(1)(A) by interfering with, restraining, or coercing school employees in the exercise of the rights guaranteed in IC 20-29; or
 - d. the school employee organization or the organization's agents violated IC 20-29-7-2(3) by refusing to bargain collectively with a school employer if the school employee organization is the exclusive representative; and
- (3) the complaint alleges that a stay is required because the case implicates impasse procedures.

The stay will continue until a determination of the unfair practice complaint is made. The complaint shall be placed on an expedited track. The Board or its agent may proceed with the impasse procedures where:

- (1) the complaining party in the unfair practice complaint does not request a stay; or
- (2) the complaining party in the unfair practice complaint later requests that impasse procedures proceed; or
- (3) the Board or its agent determines that a stay is inappropriate given the nature of the allegations.

III. Impasse Settlement

This case also presents a matter of first impression regarding the parties' ability to settle during the impasse process. The parties may settle outside the confines of an LBO, but within the confines of Indiana Code section 20-29-6, until the fact finding process begins with the appointment of a fact finder. Once that process begins, the parties may settle by submitting identical LBOs to the fact finder. *See* 560 IAC 2-4-4.

IV. Standard of Review

The parties disagree about the appropriate standard for the Board's review of hearing examiner reports. The Association argues that the Board should continue its practice of making a decision based on its review of the record. The School argues that the Board should follow the standard stated in *Nettle Creek School Corporation*, F-11-02-8305, at 15-16 (IEERB Bd. 2012). That standard is the Seventh Circuit review of National Labor Relations Board decisions, which is substantial evidence on the record and reasonable basis in the law.

No formal standard of review is provided in Indiana's teacher collective bargaining statute or the Administrative Orders and Procedures Act. *See* Ind. Code §§ 4-21.5-3, 20-29-7. Nor do we believe one is necessary. Although the Board is not retrying the case, the Board's review of a hearing examiner's report is not the same as a court's review of a lower court or agency decision. The hearing examiner's report is a non-final order, and contains only recommended findings and order. The Board must then affirm, modify, or dissolve the hearing examiner's report on the record to create the agency's decision. 560 IAC 2-3-22, 23. Therefore, the Board will continue its practice of making decisions on the record, using the hearing examiner's report as a guide, and giving deference to findings involving witness credibility.

V. Bypass

A. Introduction to Bypass

Bypass occurs when an employer communicates with bargaining unit members with the intent that the members will accept their offer or exert pressure on the exclusive representative to accept their offer. *New Albany-Floyd*, U-84-3-2400, 1984 IEERB Ann. Rep. 84, 1984 WL 922745 (IEERB Bd. 1984). It is a violation of the refusal to bargain collectively, and generally includes the derivative violations of interference with collective bargaining rights and failure or refusal to comply with a provision of the law. Ind. Code § 20-29-7-1(a)(1), (5-6).

The classic bypass cases involve a school employer not even pretending to bargain with the exclusive representative. *Ft. Wayne Educ. Assoc.*, U-79-43-0235, 1980 IEERB Ann. Rep. 834, 1980 WL 581226 (IEERB H.E. Rep. 1980) (bypass found when a school board unilaterally determined a teacher's salary). Most cases are less clear. This case not only presents a unique set of facts, but also is a case of first impression regarding the new impasse procedures under Public Law 48-2011. We will attempt to provide a clear path for parties to navigate the issue of bypass in the future.

Bypass doctrine balances the rights of the exclusive representative to exclusively represent their bargaining unit with the employer's right to inform and confer with the public – including bargaining unit members – regarding the status of collective bargaining. *Compare* Ind.

Code §§ 20-29-4-1, 20-29-7-1 with Ind. Code §§ 5-14-1.5-6.5(1), 20-29-6-9. Prior to amendments under Indiana's Open Door Law, ("ODL"), matters of bypass often revolved around the timing of various communications.⁷ However, ODL now allows any party to "inform the public of the status of collective bargaining or discussion as it progresses by release of factual information and expression of opinion based upon factual information." Ind. Code § 5-14-1.5-6.5(1); see *New Albany-Floyd*, U-84-3-2400. Moreover, the "obligation to bargain collectively or discuss a matter does not prevent . . . the school employer or superintendent from conferring with a citizen, taxpayer, student, school employee, or other person considering the operation of the Schools and the School corporation." Ind. Code § 20-29-6-9(2); see *Evansville-Vanderburgh Sch. Corp. v. Roberts*, 405 N.E.2d 895, 901 (Ind. 1980) (holding that nothing in the statute prohibits employers from conferring with any persons they wish in order to gather and receive information). Therefore, recent cases concerning bypass have focused on the substantive allegations of the underlying claim; specifically, whether the communications were substantially accurate or denigrated the exclusive representative.

To show bypass, the exclusive representative must prove (1) the subject matter is a mandatory subject of bargaining/discussion; (2) the school employer had the specific intent to bypass the Association; and (3) the school employer's words or actions demonstrated that the school employer circumvented the exclusive representative by making an offer with an expectation of a response to it by bargaining unit members. *New Albany-Floyd*, U-84-3-2400. As actions can show intent, the second and third elements are often collapsed into one. Communications are evaluated together under an objective standard. *West Noble Sch. Corp.*, U-77-42-6065, 1978 IEERB Ann. Rep. 686, 687 (IEERB H.E. Rep. 1978), *cause dismissed by IEERB* (Dec. 20, 1978) (the analysis "must be based on the communication itself, considering the circumstances of the communication and the context in which it is made, not based upon the effect that the communication actually brought").

B. Did Carmel Clay School Corporation commit bypass?

The Association alleged the School bypassed it through School Board meetings, emails by School Board members and administration, and handouts.⁸ The Association alleges these actions constituted bypass, a refusal to bargain, and a refusal to comply with Ind. Code § 20-29-7 *et seq.*

This case was difficult. Ultimately, we agree with the Hearing Examiner that the record does not support a definitive finding of bypass. The School's communications were substantially correct and did not denigrate the Association. Moreover, the exhibits did not on

⁷ Timing was considered critical prior to the Open Door amendments providing that the public may be informed at any time regarding the status of collective bargaining or discussion. For cases decided before this amendment, see *The Lafayette School Corporation Board of School Trustees*, U-78-50-7855, 1978 IEERB Ann. Rep. 448, 1979 WL 406872 (IEERB H.E. Rep. 1979). See also *MSD Washington Twp.*, U-77-50-5370, 1977 IEERB Ann. Rep. 672 (IEERB H.E. Rep. 1977) *affirmed at* 1977 IEERB Ann. Rep. 677 (IEERB Bd. 1977).

⁸ The Association's Amended Complaint also included an allegation about a department chair meeting. (Petitioners' Amended Complaint, ¶30). However, no evidence regarding this allegation was produced, and therefore it will not be considered.

their face show intent to bypass, and most of them were not explained by any witnesses or other documents. Indeed, it is not always clear from the record who received what communications.⁹

However, we believe the School pushed the line with its communications, particularly the emails from administrators to teachers. Given the numerous other means of communication available and used by the School, these emails were likely unnecessary to inform teachers, and such direct communications may have been confusing to or misinterpreted by them. As discussed in greater detail below, we caution future parties that similar communications in the future may result in bypass.

1. Mandatory subject of bargaining

The subject matter of an unfair bypass must be a mandatory subject of bargaining or of discussion, and thus must be found within Indiana Code §§ 20-29-6-4 or 20-29-6-7. It is undisputed that the subject matter in this case involves mandatory subjects of bargaining.

2. Intent to bypass the exclusive representative

The exclusive representative must prove that the alleged communications were made with the impermissible purpose of bypassing it. *New Albany-Floyd*, U-84-3-2400; *Porter County Special Educ. Coop.*, U-85-2-6455, 1985 IEERB Ann. Rep. 84, 1985 WL 1095238 (IEERB H.E. Rep. 1985); *Rensselaer Central Sch. Corp.*, U-85-7-3815, 1985 IEERB Ann. Rep. 94, 1985 WL 1095222 (IEERB H.E. Rep. 1985). An exclusive representative may show intent through, among other methods, direct bargaining,¹⁰ making an offer to bargaining unit members not previously made to the exclusive representative, or other communications that undermine or denigrate the exclusive representative. See *New Albany Floyd*, U-84-3-2400. The Association claims intent to bypass was shown through the making of an offer not previously made to the Association, communications that undermined and denigrated the Association, and intra-administration emails. We agree with the Hearing Examiner that the Association failed to meet its total burden of proving intent through these communications.

a. Offer as Proof of Intent

The Association claims that when Klein presented the School's TBO at the November School Board meeting, he bypassed the Association because the TBO had never been made to the Association, and regardless, the TBO was not available because the exchange of LBOs rescinded any prior offers. Klein stated at the November School Board meeting that the TBO had been left on the table and "remains on the table," and sent an email to that effect. Klein also testified that the School's TBO was presented to the Association during mediation and remained available for acceptance by the Association because the language rescinding prior offers was simply boilerplate language that did not affect the parties' ability to settle on their own terms.

This is a case of first impression regarding when and how parties can settle during the new impasse procedures. Under traditional labor law and IEERB precedent, the making of an offer to bargaining unit members before the offer is made to the bargaining team shows intent because the employer avoids dealing with the exclusive representative. However, given the

⁹ This case reminds us of the famous quote: "judges are not pigs hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991).

¹⁰ For a discussion of direct bargaining see *Ft. Wayne Education Association*, U-79-43-0235.

evidence surrounding the TBO and the uncertainty under the new law regarding whether a prior offer survives the exchange of LBOs, we do not find that Klein's recitation of the TBO at the November Board meeting demonstrated intent to bypass. We warn parties that this holding is not precedential, and that in the future, parties wanting to settle after the exchange of LBOs must make or remake offers to avoid demonstrating intent to bypass.

b. Undermining or Denigrating the Exclusive Representative

School employers are allowed to inform and confer with the public regarding collective bargaining. However, this right does not allow school employers to bypass the exclusive representative.

Prior IEERB case law focused on whether communications were substantially accurate or denigrated¹¹ the exclusive representative. *Compare MSD Pike Twp.*, U-85-28-5350, 1985 IEERB Ann. Rep. 71, 1985 WL 1095231 (IEERB H.E. Rep. 1985) (no bypass found where the school board distributed to all teachers in their mailbox a copy of the "School Board Review," which contained substantially accurate information on the school's latest salary schedule proposal); *and MSD Perry Twp.*, U-84-19-5340, 1985 IEERB Ann. Rep. 71, 1984 WL 922726 (IEERB H.E. Rep. 1985), *aff'd by MSD Perry Twp.*, 1985 WL 1095232 (IEERB Bd. 1985) (no bypass found where the superintendent responded to a letter by the president of the local association in a newsletter containing substantially correct information that was distributed to teachers and the public) *with Sw. Jefferson*, U-91-10-4000, 1991 IEERB Ann. Rep. 142, 1991 WL 11695018 (IEERB H.E. Rep. 1991) (bypass found where a school board member vented to a bargaining unit member's spouse about how the bargaining team was looking out for itself more than the teachers, and a school board member stated at a school board meeting that negotiations could have been concluded had there been a different bargaining team and the teachers got to vote); *and Nw. Allen*, U-85-29-0225, 1986 IEERB Ann. Rep. 152, 1986 WL 1180158 (IEERB H.E. Rep. 1986) (bypass found where the superintendent sent a letter to all teachers individually in response to the exclusive representative stating that it is "unfortunate that meaningful salary negotiations have been delayed because of the request for language that is not a subject of mandatory bargaining"); *and New Albany-Floyd*, U-84-3-2400 (bypass found where the superintendent both held building level meetings with teachers in which he was critical of the exclusive representative, their philosophy, and their bargaining position, and read a nine page statement to the public and later at a school board meeting that contained several inaccuracies, mischaracterized the exclusive representative's offer, and denigrated the exclusive representative's main negotiator); *and Michigan City*, U-83-2-4925, 1983 WL 824932 (IEERB H.E. Rep. 1983), *aff'd by Michigan City*, 1983 WL 824946 (IEERB Bd. 1983) (bypass found when the school board sent a letter to the press and each teacher blaming the exclusive representative for halting negotiations, implying that the teachers and its exclusive representative had different interests, and that the exclusive representative rejected its offer without any logical explanation).

The Association claims the School undermined and denigrated it during the October and November School Board meetings. Although School Board members should exercise caution in their discussion of collective bargaining, School Board members must be free to discuss the

¹¹ To denigrate is to attack the reputation of or to defame. Merriam-Webster's Collegiate Dictionary 332 (11th ed. 2005).

status of collective bargaining without constant fear of bypass claims. The Association claims intent should be found because the information presented at the meetings was inaccurate. Although intent can be found if information presented is not substantially accurate, the Association's testimony revolves around the fact that the School presented only a summary of the School's offer.¹² However, the Association did not prove that the summary was substantially inaccurate. To the extent the Association wanted bargaining information to be provided in a different manner, the Association could have provided it.

The Association also claims intent because a School Board member commented that the Association should explain doing without the additional financial benefits provided by the School's TBO, and the School's statement that it was relying upon the advice of various state agencies to develop its offers implied that the Association was not following the law. These comments involved the changes in the bargaining law, and the School Board has to be given some leeway in explaining to the public the changes in the new law and addressing why they made the offers they did. Moreover, unlike the denigrating remarks in cases where bypass was found, Klein publically praised the Association's bargaining team as a "hard working group of teachers representing the Association." Thus, while we caution School Board members against making any comments about an exclusive representative or their offer that could be viewed as negative, when the School Board meetings are viewed as a whole, we do not find the comments here undermined or denigrated the Association.

As for the direct communications with bargaining unit members, there were three types: (1) School Board meeting summaries/CCSpotlight; (2) individual responses to teacher inquiries; and (3) emails from administrators to all staff/groups of teachers. School newsletters or other periodic updates sent to various groups (which may include bargaining unit members) that include information from School Board meetings are entitled to similar protection as School Board meetings. The emails in question provided, among other items, the information given by Phillips and Klein at the School Board meetings, which contained factual information or opinion based on factual information. As such, the Association did not prove these emails undermined or denigrated it.

The individual responses to teacher inquiries also did not undermine or denigrate the Association. Similar to the communications in *Marion Community School Corporation*, U-91-17-2865, 1991 IEERB Ann. Rep. 87, 1991 WL 11695024 (IEERB H.E. Rep. 1991), School Board members directly responded to communications by teachers. These personal responses provided factual information and did not denigrate the Association. For example, School Board member Knowles emailed a response to concerns regarding collective bargaining in which she accurately explained the changes in law regarding collective bargaining, the School's position regarding negotiations, and the School's offer. Moreover, the email stated "[a]t the outset, I should note that board members must exercise caution in communicating with faculty [about negotiations]. By law, the [Association] represents teachers in bargaining with the district, and it would be inappropriate for me to bypass the [A]ssociation's role in the process." Similarly, in response to a teacher's inquiry, Klein stated ". . . I want to exercise caution and make sure that any answers I give hew closely to the information we've provided in public." Although the

¹² For example, that the School represented an average salary increase without providing the average teacher salary in the district.

template and disclaimer would not save otherwise unlawful communications, they reminded the teachers receiving the emails that it is the Association who represents them.

Finally, there were emails from administrators to groups of teachers at four schools as well as bargaining information placed in school buildings relating to the status of collective bargaining, including information on Klein's statement and the TBO. The record is silent as to whether these actions were unsolicited. School employers must be careful when directly – and without solicitation – communicating with teachers regarding collective bargaining. Such communication must be substantially accurate, based on factual information that is publicly available, and should not state or imply that the exclusive representative is not adequately representing its teachers.

The Association claims that intent was shown because these emails were sent, and materials left out, after Swensson emailed principals and assistant principals and asked them to share information with colleagues regarding the current bargaining status. However, the Association provided no other link between Swensson's email and the principals' actions. Swensson, the principals, and the recipient teachers (except Lyday) did not testify. As such, the record is silent as to whether Swensson intended to put pressure on the Association, or simply intended to inform teachers of the status of collective bargaining. Moreover, as not all principals emailed their teachers, it is possible those emails were sent in response to teachers' requests for information. As the only support for the Association's contention that these emails showed intent to bypass is Swensson's email, and that email itself does not undermine or denigrate the Association, intent cannot be inferred.

However, the School pushed the line with these emails. Although a school employer has the right to communicate directly with bargaining unit members, and the communications were substantially correct and did not denigrate the Association, the School had already placed this information onto a public forum by way of its School Board meetings, use of its website, and e-newsletter distribution. As such, we caution future administrations against corresponding in the same manner.

c. Intra-administration Emails

The Association claims intent based on intra-administration emails. The School claims that these emails are not relevant because they are not communications with teachers. We agree with the Association that these emails are relevant because they could show intent; however, no such finding is made here. On October 9 and November 27, 2012, Swensson sent emails to the School's principals and assistant principals with information about the status of collective bargaining, and asked the group to review the TBO to answer questions. Swensson also forwarded to School Board members an email from Lyday regarding the Association's problems with the School's LBO, stating his disagreement with the Association's position and advocating for the School Board to present a statement at the upcoming School Board meeting explaining the bargaining process and the nature of the LBO. School Board member Tricia Hackett ("Hackett") responded that she agreed because "teachers [will be] in attendance. They, along with the rest of the community, deserve facts."

These communications on their face are insufficient to constitute intent to bypass the Association as they simply indicated that the authors wanted the teachers to know the facts, not that the teachers should or must accept a certain position. Although the school employer must bargain with the exclusive representative, the exclusive representative does not have the

exclusive right to inform teachers about bargaining. Part of a school employer's right to inform the public about bargaining must include the administration's ability to explain their offer, particularly when the school employer believes its offer is being misconstrued. The exclusive representative then has a right to counter that information with its own communications to bargaining unit members.

3. Offer

As the Association did not meet its burden of proving intent, we need not decide whether an offer was made. However, we will do so to give guidance to the parties. The exclusive representative must prove that the school employer's words or actions demonstrated a circumvention of the exclusive representative by making an offer with the expectation of a response to that offer by bargaining unit members. That response can be generated directly from the bargaining unit members themselves, or indirectly by having the unit members exert pressure onto their bargaining team. *Compare Indianapolis Pub. Sch.*, U-07-02-5385, 2008 WL 5725510 (IEERB H.E. Rep. 2008) *aff'd* by 2009 WL 5210519 (IEERB Bd. 2009) (bypass committed where the corporation requested each teacher to sign acceptance of a unilateral change to the school calendar) *with Marion Cmty. Sch. Corp.*, U-91-17-2865 (no bypass found when the superintendent individually responded to teachers who wrote him about pending budgetary cuts when the letter did not solicit a response or make an offer with an expectation of a response by bargaining unit members). Mere words are insufficient to establish bypass. For example, in *Rensselaer*, U-85-7-3815, no bypass was found when the superintendent distributed a letter to all teachers which contained the details of a new incentive award for teachers with perfect attendance because the "communication [. . .] was merely informational. . . It was not an attempt to bargain with individual teachers, nor was it an effort to present a bargaining or discussion proposal to the teachers generally in an effort to circumvent the exclusive representative."

The parties disagree about what offers were made and were available. The Association's first argument is that the TBO was not made prior to the November School Board meeting. Only two witnesses testified on this issue, and they disagreed. Indeed, both witnesses could be right if the offer was made to the mediator but not to the Association. Given this conflict, and the additional evidence from the time including Klein's statement at the School Board meeting, Klein's email stating that the TBO was still on the table, and the Association's lack of response regarding the TBO after the November School Board meeting, we cannot find that the School had not made the TBO prior to the November School Board meeting.

The Association also claims that the School made the TBO to teachers before the bargaining team because the parties exchanged LBOs, and no offer was made after the LBO until the November School Board meeting. The Association argues that under the LBO's own terms and general contract principles, once the LBOs were exchanged, those were the only offers on the table. The School argues that as the parties can settle outside the LBOs until fact finding is initiated, the LBO is separate from the parties' negotiations. Therefore, the exchanging of LBOs did not interfere with the parties' negotiations, and the TBO was still on the table.

This is a case of first impression regarding how LBOs fit into party negotiations. The School is correct that the parties can settle outside the LBO until a fact finder is appointed. As such, the School and Association could have agreed to the TBO. However, the LBOs are still offers. Unlike traditional contract negotiations where the exchange of an offer or counter-offer revokes prior offers, the LBO process results in two viable offers. As the LBOs do not act as

traditional offers, IEERB's "sample LBO" included revocation language to alert the parties that the LBO was revoking all prior offers. Therefore, the School should have remade the TBO after the parties exchanged LBOs. However, as the Association did not prove intent, we do not find an expectation of a response.

4. Communications as a Whole

The record reflects that over the course of seven weeks after the formal bargaining season was over, bargaining information was given to teachers by the School via two School Board meetings, two School Board meeting summaries, one CCSpotlight, and potentially one (depending on the teacher's school) additional email. The exhibits as presented do not substantiate intent and the limited testimony did not overcome the Association's burden. The public communications were substantially accurate bargaining updates that did not denigrate the Association. While the sending of public information could constitute bypass in some situations, in this case the direct communications did not advocate a position, make an offer, tell the members to accept a certain offer, or ask for a vote to be taken. Instead, these direct communications contained substantially accurate information apprising teachers of the bargaining status of the parties, and did not denigrate the Association.

Based on the record, we agree with the Hearing Examiner that the Association did not meet its burden of proving that the School either intended to bypass the Association or made an offer with the expectation of a response.

However, we caution future parties that additional evidence in this matter may have tipped the scale in the other direction. Moreover, although recent cases have focused on whether communications were substantially accurate or denigrated the exclusive representative, such analysis may encourage school employers to undermine the exclusive representative under the guise of informing the public. To prevent such actions in the future, the Board will consider the substance, type, frequency, and timing of communications in determining whether bypass occurred. School employers must have some leeway in informing the public about the status of collective bargaining. That includes the ability to counter perceived inaccuracies with other reports on the status of collective bargaining. However, this right is not absolute. School employers must use caution when communicating about bargaining to the public, and use additional caution when communicating with bargaining unit members, even if that information has been made public.

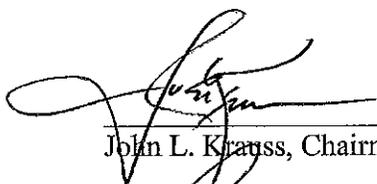
VI. Remedy

Another issue of first impression raised in this case is whether the acceptance of an LBO can be the remedy for an unfair practice. As no bypass was found, we will not decide this issue. If the Board were to fashion such an extraordinary remedy, it would require extraordinary circumstances.

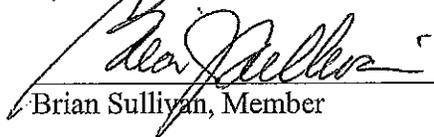
Board Order

We therefore find that Respondent Carmel Clay Schools has not committed the alleged unfair labor practices of interference with school employees' exercise of their right to be represented during bargaining by the Association, failure to bargain, and failure to comply with Indiana Code § 20-29-7, in violation of Indiana Code § 20-29-7-1(a)(1), (5-6). This case is hereby dismissed.

Dated this 28th of October, 2013.



John L. Krauss, Chairman Pro Tempore



Brian Sullivan, Member

Modified and Additional Findings of Fact¹³

7. Mediation sessions were conducted on November 1, 2012, and November 5, 2012, but were unsuccessful.

10A. On December 4, 2012, IEERB suspended fact finding between the parties, Case No. F-12-01-3060.

11. On December 10, 2012, the parties jointly requested that the summary hearing scheduled on Petitioners' request for interlocutory relief be cancelled and a hearing examiner appointed to hear the case on the merits. The parties agreed that fact finding should continue to be suspended. The request for interlocutory relief was subsequently withdrawn. By Order dated on December 11, 2012, the IEERB continued the suspension of fact finding and transferred the Complaint to the Hearing Examiner for a final decision on the merits pursuant to Indiana Code § 20-29-7.

19. The verbal statement and documents from Phillips' October 8th comments referenced specific subjects Phillips believed were prohibited subjects of bargaining under the newly-amended collective bargaining law (Indiana Code § 20-29-6), and specific terms of the most recent economic offer made to the Association. Phillips acknowledged disagreement between the parties regarding the scope of bargaining and stated the School Corporation's offer was based upon various agencies' advice. (Petitioners' Exhibit 4).

21. On October 9, 2012, a five (5) page "School Board Meeting Summary", including a summary of events and links to Phillips' entire statement was sent via "school messenger." The record is unclear who the recipients of this communication were. Lyday testified that this message is forwarded to "all the stakeholders, including the teachers." (Petitioners' Exhibit 5) (TR 37).

24. On October 9, 2012, Superintendent Dr. Jeffrey Swensson ("Swensson") sent an email to all principals and assistant principals, referring them to a negotiations update on the School Corporation's webpage, asking them to "[t]ake time to read [the update] so [they] can respond to questions or concerns that might develop in conversations that [they] have with colleagues," and to "refer colleagues to this important posting." (Petitioners' Exhibit 6) (TR 41).

25. Lyday considered these emails to be inappropriate because he believed principals and assistant principals have no role in negotiations, nor receive benefits from the negotiations process, and therefore should not be inserting themselves into negotiations between teachers and the school board. (TR 41-42).

27. On November 16, 2012, each side submitted and exchanged their LBO. Petitioners' Exhibit 8 is the School's LBO, and Petitioners' Exhibit 9 is the Association's LBO. The last sentence of the first paragraph of each LBO states that all previous offers are rescinded and replaced by the LBO. (TR 55).

¹³ Findings of fact labeled 'A' should be read after the initial numbered finding (e.g., 1 comes before 1A).

29. On November 19, 2012, Lyday sent an email to all teachers with the subject "CCS Kudos" which contained a "short list" of items that caused him concern from the School Corporation's proposal. (Petitioners' Exhibit 10) (TR 58-72).

31A. On November 19, 2012, after receiving a copy of Lyday's email, Swensson forwarded the email to school board members and stated that he believed a statement reporting on the nature of the LBO and the bargaining process at the November school board meeting was in order to "correct" Lyday's email. (Petitioners' Exhibit 11). On November 20, 2012, school board member Tricia Hackett ("Hackett") responded to Swensson's email, concurring with Swensson that a statement at the upcoming school board meeting was important because "[w]e will have teachers in attendance. They, along with the rest of our community, deserve facts." (Petitioners' Exhibit 11).

32. Lyday testified that his description of items was and is accurate (TR 78), despite his subsequent testimony which showed inaccuracies (TR 196-199), and showed that not all items in the short list were bargainable. (TR 212).

33A. On November 25, 2012, in response to receiving a postcard with concerns from teachers at Prairie Trace elementary, school board member Pam Knowles sent an email to Shelly O'Malia with the salutation "Dear Shelly and the Teachers at Prairie Trace" explaining the changes in the law regarding collective bargaining, the School Corporation's position regarding negotiations, and the School Corporation's offer. The template sent by Knowles stated "[a]t the outset, I should note that board members must exercise caution in communicating with faculty [about negotiations]. By law, the [Association] represents teachers in bargaining with the district, and it would be inappropriate for me to bypass the [A]ssociation's role in the process." (Petitioners' Exhibit 3).

38. At the conclusion of his remarks, Klein answered questions from school board members. (TR 102-103; Petitioners' Exhibit 1). Phillip asked why the Association would not want to take the TBO as it provided a greater benefit to teachers than the School Corporation's LBO, and that he "hope[d] the Association can answer that question for their teachers." (Petitioners' Exhibit 1).

43. Lyday testified that the November 26, 2012, school board meeting was the first time the Association had seen the TBO, although the Association "had seen some of these concepts" in previous offers. (TR 87-88). Lyday also testified that he does not believe that any offer other than the School Corporation's LBO was available. (TR 87-88).

45. The transcript of the sworn deposition of Klein taken by the Association's counsel on March 20, 2013, was admitted as Respondent's Exhibit A. Klein, who served as the school board's liaison to the bargaining team (pg. 9, ls.10-11), testified that in regards to the October board meeting "the board wanted to make sure that we provided accurate information to the public regarding the state of collective bargaining at that point in time." (pg. 11, ls. 6-9). In reference to both the October and November school board meetings, Klein testified that "[he] was certainly concerned that we do nothing that would constitute a bypass. I was comfortable with the statements we made in public at the board meetings did not constitute bypass." (pg. 18, ls. 24-25; pg. 19, ls.1-2). Klein testified that the School Corporation's "true best offer" was presented

to the Association during mediation (pg. 38, ls. 12-16) and was still available to the Association during the November school board meeting. (pg. 33, ls. 9-12). Finally, Klein testified that the statement in the LBO that all previous offers were rescinded was “technical language” required to be part of the LBO, but did not prohibit the parties from settling prior to fact finding (pg. 34, ls. 3-19), and the School Corporation was willing to settle under the terms of the “true best offer” he described at the November 26, 2012 school board meeting (pg. 36, ls. 20-22).

49. On November 27, 2012, after receiving Swensson’s email, Tim Phares (“Phares”), Principal at Towne Meadow Elementary, sent an email to his staff containing links to Klein’s statement and other negotiation documents shared at the school board meeting. (Petitioners’ Exhibit 14).

51. Phares then emailed Swensson, who responded that the email was fine because the information contained in the email was previously shared at public school board meetings. (Petitioners’ Exhibit 15). Lyday felt personally attacked by Swensson’s reference in an e-mail back to Phares. (TR 114-115).

52. On November 27, 2012, Kim Barrett, Principal at Smoky Row Elementary, sent an email to “SRE Staff” attaching a negotiations fact sheet and encouraging staff to read Klein’s statement from the November school board meeting in order to be informed. (Petitioners’ Exhibit 16).

53. On November 28, 2012, Jennifer Szuhaj (“Szuhaj”), Principal at West Clay Elementary, sent an email to “WCE All Staff” attaching a negotiations fact sheet and encouraging staff to read Klein’s statement from the November school board meeting in order to be informed. (Petitioners’ Exhibit 17).

54. On November 29, 2012, Deanna Pitman, Principal at Forest Dale Elementary, sent an email to “FDE Staff” stating that she placed copies of the School Corporation’s most recent proposal and board member comments in the workroom for people to read. (Petitioners’ Exhibit 18).

54A. Lyday testified that copies of the TBO and Klein’s comments at the November school board meeting were laid out in approximately one-third (1/3) of all school buildings. (TR 119).

57A. On November 29, 2012, the School Corporation sent an email through its school messenger system which provided a “School Board Meeting Summary”. The email contained, among other items, a link to Klein’s statement, the TBO, and other pieces of information regarding negotiations. The record is unclear who the recipients of this communication were. Lyday testified that all teachers would have received this email. (Petitioners’ Exhibit 22) (TR 132).

58. On November 30, 2012, the School Corporation sent an email through its school messenger system titled “CCSpotlight 11.30.12” which contained, among other items, a link to “Teacher Contract Negotiations Update.” The record is unclear who the recipients of this communication were. Lyday testified that teachers received this email and believed that “families” received this communication as well. (Petitioners’ Exhibit 25) (TR 139).

59. Lyday testified that after the school board's statement at the November meeting and the emails sent by principals, Lyday and other members of the negotiating team constantly received emails, calls, and texts from teachers. (TR 123; 146-47).

65. The Association offered emails from teachers between approximately November 28, 2012 to December 6, 2012, asking why the Association was not accepting the School Corporation's "true best offer" and asking whether the teachers will be allowed to vote on whether to take the School Corporation's "true best offer." (Petitioners' Exhibits 19, 26, 28-31, 33-37).

66. During this same time period, Klein responded by email to a question from teacher Michelle Foutz in which he told her on December 2, 2012, that "the short answer to your questions is YES. The 'true best offer,' as I called it last Monday night, is still on the table in its entirety." In addition, Klein noted ". . . I want to exercise caution and make sure that any answers I give hew closely to the information we've provided in public." Michelle Foutz then emailed numerous teachers and repeated what Klein had said about the "true best offer" still being available. (Petitioners' Exhibit 32).

66A. On December 3, 2012, Szuhaj sent emails to Swensson concerned about any potential relationship between her prior email to her staff regarding the status of bargaining and the staff being "up in arms." On December 3, 2012, Swensson sent two responses to Szuhaj stating "[i]nformation that's publically available has ALWAYS been something that we share. You did what we've always done. There's not one thing that we need to be concerned about in this regard." Swensson later stated "[o]ur colleagues need to work this out. We truly don't have any role except to continue, where appropriate, sharing publically available information that has been presented in open session during our Board of Education meetings." (Petitioners' Exhibit 38).

73. The fall of 2012 was the first time the parties formally bargained under the new collective bargaining laws which were implemented in 2011. (TR 182).

Superintendent for Business Affairs, as its witness. The parties waived closing arguments and instead submitted lengthy and detailed post hearing briefs and proposed findings of fact and conclusions of law on Friday, May 3, 2013.

The matter is now before the Hearing Examiner for a decision and recommended order pursuant to 560 IAC 2-3-21.

FINDINGS OF FACT

1. Petitioner Carmel Clay Education Association ("Association") is a "school employee organization" as that term is defined at Indiana Code § 20-29-2-14.
2. Petitioner Brian Lyday ("Lyday") is a "school employee" as that term is defined by Indiana Code § 20-29-2-13. Lyday is and was, at all relevant times, President of the Association.
3. Respondent Carmel Clay Schools ("School Corporation") is a "school employer" as that term is defined by Indiana Code § 20-29-2-15.
4. The Indiana Education Employment Relations Board ("IEERB") has jurisdiction over the parties and the matter in controversy herein.
5. Prior to October 1, 2012, the Association and School Corporation conducted formal and informal bargaining sessions. After at least twelve (12) bargaining sessions, the parties failed to reach an agreement in the negotiation of the 2012-13 Master Contract.
6. The IEERB declared an impasse on October 10, 2012 as mandated by Indiana Code § 20-29-6-13.
7. Under current Indiana law, mediation commenced on November 1, 2012, resumed on November 5, 2012, but was unsuccessful.
8. On November 16, 2012, the Association and the School Corporation submitted and exchanged their Last Best Offers ("LBO") to each other and submitted them to IEERB on November 18, 2012.
9. While waiting for fact finding to commence, the Association and Lyday became aware of communications being made by school board members and administrators to the public addressing the status of bargaining.
10. The Association and Lyday filed a Complaint of Unfair Practice and Request for Interlocutory Relief, under oath, on December 3, 2012, with the IEERB.

11. On December 10, 2012, the parties jointly requested that the interlocutory relief sought by the Petitioners be cancelled. As a result, by Order dated December 11, 2012, the IBERB suspended fact finding and transferred the Complaint to the Hearing Examiner for a final decision on the merits pursuant to Indiana Code § 20-29-7.

12. During 2012, there were 942 teachers in the Carmel Clay Schools. (TR 14)¹ Approximately one-third (1/3) are at the Carmel High School. (TR 165)

13. Membership in the Association is voluntary. (TR 14) Approximately forty percent (40%) of teachers are members of the Association. (TR 181) Approximately 565 teachers are not members.

14. Several years ago, the Carmel School Board (the "Board") began posting their school board meetings online via YouTube available to the public. (TR 195)

15. On October 8, 2012, two (2) days before an impasse was declared, school board member Greg Phillips ("Phillips") spoke at a school board meeting updating the board and members of the public on the status of bargaining and presented a seven (7) page "Bargaining Status Report". (Petitioners' Exhibit 4)

16. Phillips' statement included a description of what he described as the "most recent economic offer the Board made to the CCEA."

17. At the conclusion of his statement, Phillips said that if the parties went to fact finding, the law required the Board to reduce its offer and none of the \$3 million dollars from its cash reserves could be used.

18. Lyday was present at the October 8, 2012 meeting and had concerns about the accuracy of Phillips' remarks describing the Board's proposal on salary schedule, compensation, bonus pool, and paid professional days. (TR 21-36)

19. The verbal statement and documents from Phillips' October 8th comments referenced specific subjects Phillips believed were prohibited subjects of bargaining under the newly-amended collective bargaining law (Indiana Code § 20-29), and specific terms of the most recent economic offer made to the Association.

20. According to the Amended Complaint, the "first" alleged instance of bypassing took place on October 8, 2012 at that public school board meeting when school board member Greg Phillips read the school board's "Bargaining Status Report". (paragraph 12 of Petitioners' Exhibit 2)

¹ References to pages in the official transcript from day one of the hearing are referred to as "TR ___".

21. On October 9, 2012, a five (5) page school board recap, including a summary of events and link to Phillips' entire statement, was sent via "school messenger" email to all teachers. (Petitioners' Exhibit 5).

22. Lyday received the "school board recap" via email.

23. Phillips remarks caused a "series of people" to email Lyday with questions resulting in him conducting meetings with teachers through October (TR 36) at "nearly all" fifteen (15) school buildings to update them on the status of the bargaining. However, none of these emails were offered into evidence. (TR 73)

24. Superintendent Dr. Jeffrey Swensson ("Swensson") sent an email on October 9, 2012 to all Principals and Assistant Principals with a negotiations update and asked them to respond to questions from colleagues. (Petitioners' Exhibit 6) (TR 41)

25. Lyday considered these emails to be continued inappropriate efforts by the School Corporation in the negotiations.

26. Nothing in the record indicates that any complaint about Phillips' statement or Swensson's October 9, 2012 email was registered by the Association or Lyday for two (2) months until they filed their Complaint on December 3, 2012.

27. On November 16, 2012, each side submitted and exchanged their LBO. Petitioner's Exhibit 9 is the Association's LBO, and Petitioners' Exhibit 8 is the School Corporation's LBO. The last sentence of the first paragraph of each LBO states that all previous offers are rescinded and replaced by the LBO. (TR 58)

28. IEERB posted a recommended format for LBO which contained a boilerplate statement that all previous offers were rescinded and replaced by the LBO.²

29. On November 19, 2012, Lyday sent an email to all teachers with the Subject "CCS Kudos to the Association's bargaining team" containing a "short list" of items that caused him concern from the School Corporation's proposal. (Petitioners' Exhibit 10) (TR 58-72)

30. Lyday's November 19 email concluded "the whole proposal reminds us of a quote by John F. Kennedy . . . 'modern cynics and skeptics see no harm in paying those to whom they entrust the minds of their children a smaller wage than is paid to those to whom they entrust the care of their plumbing'. If only he had met our administration . . ."

31. Lyday intended that his email only be received by members of the Association. However, on November 19, 2012, a copy was provided to the Principal at the High School, who forwarded it to Swensson.

² The IEERB requirements for LBO's for 2012-2013 bargaining season and sample LBO, include a sentence that "all previous offers" . . . "are rescinded and replaced by this LBO" are posted on the IEERB website (www.in.gov/ieerb) to provide guidance to the parties.

32. Lyday testified that his description of items 1 through 17 was and is accurate (TR 78) despite his subsequent testimony that two (2) items in his "short list" were clearly not accurate. (TR 196-199)

33. Thanksgiving fell on Thursday, November 22, 2012.

34. At the beginning of the school board meeting on Monday, November 26, 2012, which was ten (10) days following the exchange of LBO's, and seven (7) days after Lyday's "Kudos" email, Board member Andrew Klein ("Klein")³ explained recent changes in the collective bargaining law in Indiana, and described the status of ongoing negotiations. (Petitioners' Exhibit 1 is a DVD recording of the publically posted remarks and Petitioners' Exhibit 12 is a hard copy made available to the public at the meeting).⁴

35. In his remarks, Klein praised the Association's bargaining team as a "hard-working group of teachers representing the CCEA."

36. Klein stated that the School Corporation's "true best offer" was left on the table when mediation ended and "it remains on the table as I speak." This "true best offer" included \$3.5mm from cash reserves. (Petitioners' Exhibit 12, page 5) This "true best offer" was worth more to the teachers than the School Corporation's LBO.

37. Lyday was present at the Board meeting on November 26, 2012, (TR 79-80)

38. At the conclusion of his remarks, Klein answered questions from Board members Tricia Hackett and Phillips. (TR 78)

39. Lyday believes these questions were orchestrated to point out certain benefits could not be provided to all employees until the Association agreed to a contract.

40. Lyday testified that he was concerned about Klein's statement and accompanying document because he questioned the accuracy of:

- a. the description of the Board's salary offer;
- b. the implication that a stipend had previously been offered to the Association;
- c. the implication that a flat dollar as opposed to a percentage raise had previously been offered to the Association;
- d. the lack of detail on the functioning of the bonus pool;
- e. the implication that the Board could honor, despite contractual time constraints, the offer to make adjustments to insurance plans;
- f. the implication that the Board's, but not the Association's, previous offer utilized cash balance; and

³ Klein is a lawyer and then a professor at the Indiana University McKinney School of Law.

⁴ On Wednesday afternoon, April 24, 2013, counsel emailed the Hearing Examiner and requested that he view the first 22 minutes of the November 26, 2012 school board hearing including the presentation of Andrew Klein prior to the scheduled hearing.

g. the description of the Board's proposal on health insurance contributions. (TR 80-86)

41. Lyday believes that only ten (10) teachers would qualify for all benefits in the "true best offer". (TR 201)

42. No other teacher besides Lyday testified during the hearing about the accuracy of Klein's remarks.

43. Lyday does not believe the School Corporation made any offer other than its LBO. (TR 87-88) Lyday believes that the November 26, 2012 board meeting was the first time that the School Corporation made this "true best offer." (TR 127) However, Lyday testified that "we had seen some of these concepts" described by Klein in previous offers. (TR 88) Lyday testified that the School Corporation's LBO stated that all prior offers were suspended.

44. Klein and Lyday disagree as to whether the "true best offer" was ever made to the Association.

45. The transcript of the sworn deposition of Klein taken by counsel for Petitioners on March 20, 2013 was admitted as Respondent's Exhibit A. Klein, who served as the Board's liaison to the bargaining team (pg. 9, ls.11-12), testified that "the board simply wanted to make sure that we provided accurate information to the public regarding the state of collective bargaining at that point in time." (pg. 11, ls.6-9) Klein testified that "I was certainly concerned that we do nothing that would constitute a bypass." (pg. 18, ls. 24-5) Klein testified that the School Corporation's "true best offer" before the LBO had been communicated during mediation (pg.38, ls.4-6) and was still available to the Association (pg.33, ls. 9-12). Finally, Klein testified that the statement in the LBO that all previous offers were rescinded was "technical language" required to be part of the LBO, but did not prohibit the parties from settling prior to fact finding (pg. 34, ls. 3-19), and the School Corporation was still willing to settle under the terms of the "true best offer" he described at the November 26, 2012 school board meeting (pg. 36, ls. 20-22).

46. At 5:58 a.m. the next morning, November 27, 2012, Swensson sent an email to all Principals and Assistant Principals (Petitioners Exhibit 13) stating, in part, that:

At last night's Board meeting, our Board made a concerted effort to share with stakeholders the BEST Offer that they have made to the CCEA during formal negotiations and mediation.

The Best Offer is the offer that's been on the table during both Formal Negotiations and Mediation and that is STILL on the table.

As you have a chance to chat with colleagues, tell them that the BEST Offer is still alive and can still be activated if/when the CCEA agrees to it. But, the Last Best Offer (LBO) will be activated as the only choice if/when the CCEA continues to ignore the BEST Offer and once the Fact-Finder makes a decision. The window in which the Fact-Finder must act, by law, is closing very fast.

To ensure that the BEST Offer is clear, it's now POSTED at the CCS Homepage. Please read it.

In the Pony, you will receive paper copies of both the BEST Offer and the remarks made by Mr. Klein. Please make them available for the public since they were distributed at last night's meeting.

47. Lyday never issued a statement to the Association members disputing Klein's or Swensson's statement that the best offer was previously made during mediation.

48. Lyday testified that he had concerns with Swensson's November 27, 2012 email because it is the Association's role to educate staff in regard to bargaining and it implies that the staff is not educated.

49. On November 27, 2012, Tim Phares, Principal at Towne Meadow Elementary sent an email to all certified staff at the school regarding negotiations. (Petitioners' Exhibit 14)

50. Lyday is a fifth grade math teacher at Towne Meadow Elementary. (TR 13) Tim Phares performs an annual evaluation of Lyday's performance as a teacher. Upon receipt, Lyday went directly to Tim Phares and advised that he did not believe it was appropriate for Tim Phares to send emails directly to teachers.

51. Tim Phares then emailed Swensson, who responded. Lyday felt personally attacked by Swensson's references in an e-mail back to Tim Phares.

52. On November 27, 2012, Kim Barrett, Principal at Smoky Row Elementary sent an email to "SRE Staff" attaching a negotiations fact sheet. (Petitioners' Exhibit 16)

53. On November 28, 2012, Jennifer Szuhaj, Principal at West Clay Elementary sent an email to "WCE All Staff" attaching a fact sheet. (Petitioners' Exhibit 17)

54. On November 29, 2012, Deanna Pitman, Principal at Forest Dale Elementary sent an email to "FDE Staff" offering copies of the School Corporation's recent proposal. (Petitioner's Exhibit 18)

55. Lyday testified that these emails were interference since the School Corporation was dealing directly with teachers on bargaining issues. Lyday also believed these emails weakened the Association's ability to represent them.

56. None of these Principals testified at the hearing. Petitioners failed to offer any evidence that any of these Principals were instructed to communicate such information to their staffs or that the Principals advocated a position or made an offer to teachers. (TR 184) Petitioners failed to offer any evidence that there were any other principals in the School Corporation who made similar communications with staff.⁵

⁵ Respondent's Post Hearing Brief erroneously argues that only three emails from Principals are in the record, (Pgs. 27-28).

57. None of the Principals or Assistant Principals are covered by the collective bargaining agreement.

58. On November 30, 2012, the School Corporation sent out an email to all staff that was titled "CCSpotlight 11.30.12" containing a link to "Teacher Contract Negotiations Update". (Petitioners' Exhibit 25)

59. Lyday received multiple inquiries and emails from members of the bargaining unit asking why the Association was not accepting the School Corporation's "true best offer" and asking whether the teachers will be allowed to vote on whether to take the School Corporation's "true best offer." (Petitioners' Exhibits 3, 19, 26, 28, 30, 31, 33, 34, 35, 37) Lyday testified that he had no other emails from teachers about this topic.

60. According to Lyday, on a scale of 1 to 10, with zero being calm and 10 being pandemonium, the mood of teachers after Phillips' statements on October 8, 2012, was a 4. After Lyday went to nearly all the buildings for meetings, things cooled down to a 1. After Klein's statements at the November 26, 2012, school board meeting, and Swensson's and the Principals' emails went out, things went to a 10 or 11.

61. Lyday testified that a larger than usual number of teacher inquiries hindered the Association's ability to provide good representation and prepare for fact finding.

62. Fact finding was scheduled for December 10, 2012.

63. On December 4, 2012, the IBERB suspended the fact-finding process after the Association filed an unfair labor practice against the School Corporation. Lyday testified that shortly after the fact finding process was suspended, the level of questions, concerns, calls, texts, emails and inquiries fell to a 4 on a 1 to 10 scale. Shortly thereafter, it fell to a 1 and has remained very quiet.

64. After the November 26, 2012 school board meeting, Lyday met with "probably ten" teachers at the high school and "around six" at Carmel Elementary School (TR 186-187) to "calm" them down.

65. Only two (2) teachers, Amy Bannister and Michelle Foutz, requested a vote. (Petitioner's Exhibits 28 and 36)

66. During this same time period, Klein was having communications with teacher, Michelle Foutz, in which he told her on December 2, 2012, that "the short answer to your questions is YES. The "true best offer," as I called it last Monday night, is still on the table in its entirety." Michelle Foutz then emailed numerous teachers and repeated what Klein had said about the "true best offer" still being available.

67. Neither Lyday or the Association's bargaining team ever asked its membership to vote on the "true best offer". (TR 171)

68. Contrary to Lyday's fear that public statements by school board members were harming the Association, less than five (5) members of the Association (approximately 1.37% of its total membership) have asked to stop deducting association fees since November 26, 2012. (TR 188) Nothing in the record indicates the actual reason why these teachers wanted deductions to stop.

69. Lyday testified that the only remedy that will allow the Association to be back in a position of status with the bargaining unit that it held before the School Corporation's actions would be for the School Corporation's LBO to be rejected and the Association's LBO to be accepted.

70. Lyday agrees that if the Association's LBO (Petitioners' Exhibit 8) resulted in deficit financing, it cannot be accepted under state law. (TR 204)

71. Roger McMichael, who has served as Carmel's Assistant Superintendent for financial affairs for nineteen (19) years, testified that the Association's LBO would result in deficit financing when comparing current year revenue against current or projected expenses. (TR 220)

72. Indiana Code § 20-29.6-4.7 (b) prevents the parties from entering into an agreement that extends past the end of the state's budget biennium on June 30, 2013.

73. This was the first collective bargaining effort between the Association and the School Corporation since the general assembly handled the collective bargaining laws in 2011.

ISSUE #1

Did the school corporation commit an unfair practice in violation of Indiana Code § 20-29-7-1 (a) 1 by interfering with, restraining, or coercing school employees in the exercise of their rights under Indiana Code § 20-29-4-1 when either:

- (a) Phillips made his public statement on October 8, 2012 about the status of bargaining at a school board meeting and thereby bypass the Association's bargaining team;
- (b) Klein made his public statement about the status of bargaining at a school board meeting on November 26, 2012, and thereby bypass the Association's bargaining team;
- (c) Swensson and/or Principals at four (4) schools sent an email to teachers with a link to Klein's public statement during the November 26, 2012 school board meeting
- (d) Did any of these statements also result in a refusal to bargain pursuant to Indiana Code § 20-29-7-1 (a) (5) (A) and Indiana Code § 20-29-7-1(a) (6)?

Relevant Law

Indiana Code § 20-29-7-1 provides that it is an unfair practice for a school employer to do any of the following:

- (1) Interfere with, restrain, or coerce school employees in the exercise of the rights guaranteed in IC 20-29-4.
- (2) Dominate, interfere, or assist in the formation or administration of any school employee organization or contribute financial or other support to the organization. Subject to rules adopted by the governing body, a school employer may permit school employees to confer with the school employer or with any school employee organization during working hours without loss of time or pay.
- (3) Encourage or discourage membership in any school employee organization through discrimination in regard to:
 - (A) hiring;
 - (B) tenure of employment; or
 - (C) any term or condition of employment.
- (4) Discharge or otherwise discriminate against a school employee because the employee has filed a complaint, affidavit, petition, or any information or testimony under this article.
- (5) Refuse to:
 - (A) bargain collectively; or
 - (B) discuss with an exclusive representative as required by this article.
- (6) Fail or refuse to comply with any provision of this article.

Indiana Code § 20-29-7-2 provides that it is an unfair practice for a school employee organization or the organization's agents to do any of the following:

- (1) Interfere with, restrain, or coerce:
 - (A) school employees in the exercise of the rights guaranteed by this article; or
 - (B) a school employer in the selection of its representatives for the purpose of bargaining collectively, discussing, or adjusting grievances. This subdivision does not impair the right of a school employee organization to adopt its own rules with respect to the acquisition or retention of membership in the school employee organization.
- (2) Cause or attempt to cause a school employer to discriminate against an employee in violation of section 1 of this chapter.
- (3) Refuse to bargain collectively with a school employer if the school employee organization is the exclusive representative.
- (4) Fail or refuse to comply with any provision of this article.

Indiana's Open Door Law is found at Indiana Code § 5-14-1.5-6.5 (a) (1). It was amended in 1979 with the passage of Public Law 39-1979 and currently provides, in part, that any party may inform the public of the status of collective bargaining or discussion as it progresses by release of factual information and expression of opinion based upon factual information.

The test as to whether a communication would constitute interference, restraint, or coercion must be based on the communication itself, considering the circumstances of the communication and the context in which it is made, not based upon the effect that the communication actually brought. The test is based on an objective standard, not a subjective standard. *West Noble*

School Corp, U-77-42-6065, 1978 IEERB Ann. Rep. 686, 687; cause subsequently dismissed by IEERB (Dec. 20, 1978).

ISSUE #2

If any of the statements described in issue #1 were an unfair practice, were they made with the intent to interfere with, restrain, or coerce school employees in the exercise of their rights to collective bargaining?

ISSUE #3

Assuming there was an unfair practice committed, the Association asks that IEERB reject the School Corporation's LBO and accept its LBO. If so, would the Association's LBO result in deficit financing? In making that determination, must the Association's LBO be analyzed as of the date it was made- November 16, 2012?

Relevant law:

Indiana Code § 20-29-2-6 provides:

“Deficit financing” for a budget year means expenditures exceeding the money legally available to the employer.

Indiana Code § 20-29-6-3 (as amended by P.L. 48-2011, Sec 13) prohibits Unlawful Deficit Financing:

- (a) It is unlawful for a school employer to enter into any agreement that would place an employer in a position of deficit financing due to a reduction in the employer's actual general fund revenue or increase in the employer's expenditures when the expenditures exceed the employer's current year actual general fund revenue.
- (b) A contract that provides for deficit financing is void to that extent, and an individual teacher's contract executed under the contract is void to that extent.

(emphasis added)

RECENT CHANGES IN THE COLLECTIVE BARGAINING LAWS

The Indiana General Assembly drastically changed the ground rules for collective bargaining during 2011. For over 300 school corporations and the employee organizations engaged in contract bargaining under the old laws that had very few changes for over 35 years, the playing field changed dramatically. Many school corporations were simply not prepared for the new world of bargaining.

Under the current law, IEERB is the exclusive body that can declare an impasse after September 30; not the parties. Indiana Code § 20-29-6 lists subjects that must, can, and cannot be bargained. The legislative intent was made very clear under the 2011 amendments. The General Assembly restricted the scope of mandatory and permissive bargaining as well as the scope of mandatory discussions.

Within fifteen (15) days of the declaration of an impasse, mediation must begin. Indiana Code § 20-29-6-13 provides for the Appointment of a Mediator. Mediation can consist of 1-3 sessions but must be completed within thirty (30) days. If an agreement is not reached, the parties must exchange their LBO's and submit them to IEERB.

If the parties do not settle during mediation, IEERB will review the parties' LBO's to ensure compliance with the required format, documentation, and information. IEERB then appoints a fact finder and a financial consultant. The fact finder must then investigate the LBO's and conduct a public hearing. The parties are allowed three (3) hours to present their respective case. No public comment will be accepted. The fact finding process will last no more than 15 days and culminates in the fact finder imposing contract terms on the parties by selecting one of the two LBO's.

This new law redefined "deficit financing" to mean actual expenditures exceeding current year actual general fund revenues. Therefore, the inclusion of any cash operating balance is prohibited in the calculation of deficit financing. Indiana Code § 20-29-2-6. A fact finder cannot approve an offer that places the employer in a position of deficit financing as defined in Indiana Code § 20-29-2-6 or including items that cannot be bargained under Indiana Code § 20-29-6-4.

In the present case, IEERB declared an impasse on October 10, 2012. Mediation commenced on November 1, 2012, resumed on November 5, 2012, but was unsuccessful. On November 16, 2012, the Association and the School Corporation submitted and exchanged their LBO's and submitted them to IEERB on November 18, 2012. While waiting for fact-finding to commence, the Association and Lyday filed an Unfair Practices Complaint which resulted in fact finding being suspended by agreement of the parties.

DISCUSSION

Indiana Code does not define the word "bypass". However IEERB discussed this very important concept in *New Albany-Floyd County Education Association*, Case No. U-84-3-2400 (Board Order, August 23, 1984)⁶ and announced that a claim for bypass/unfair practice must contain five elements:

1. "Bypass is a Section 7(a)(5) violation because it is, in fact, a failure or refusal to bargain and/or discuss in good faith with the exclusive representative;

⁶ The parties in the Post-Hearing Briefs agree that the New Albany case spelling out required elements for a bypass is controlling. However, it is critical to remember, in that case, fact finding had already occurred.

2. Bypass violations are also derivative violations of Sec. 7(a)(1) and Sec. 7(a) (6), and a direct violation of Sec. 7(a)(1) in that a bypass interferes with, restrains, or coerces school employees in the exercise of rights guaranteed by Indiana Code § 20-29-4-1, specifically the right to participate in collective bargaining through representatives of their own choosing (the exclusive representative);

3. The subject matter of the bypass must be a mandatory subject of bargaining or of discussion;

4. An intent to bypass the exclusive representative must be proved. This may be by an offer with expectation of a response or by undermining or denigrating the exclusive representative. Or, it may be reaching agreement with bargaining unit members without discussing or negotiating with the exclusive representative;

5. More than a mere statement is necessary; the school employer's words or action must demonstrate- on their own or in a factual context- that the school employer circumvented the exclusive representative by making an offer with the expectation of a response to it by the bargaining unit members."

Therefore, to prevail on its Amended Complaint, the Association must prove the following three elements:

1. The subject matter must be a mandatory subject of bargaining or discussion;
2. The school employer must have an intention to bypass the exclusive representative; and
3. The school employer made an offer to the bargaining unit members with the expectation that the members would respond to it.

In the *New Albany* case, the IEERB recognized the importance of the Indiana Open Door Law stating that "the bypass doctrine and this Open Door Law may exist side by side". (at pg. 3) IEERB further made it clear in *New Albany* (at pgs 87-88) that "It is not, and never has been, the IEERB's intent to preclude free speech or say that school employers are not free to inform the public. We also believe teachers are part of the public with respect to informing the public that does not give the school employer license to avoid dealing with the exclusive representative by dealing directly with school employees . . ."

Here, the evidence is clear that the Association did not prove its case.

Petitioners' LBO

On Monday afternoon, April 22, 2013, counsel for the Petitioners requested a conference call with the Hearing Examiner to discuss the admissibility of certain evidence. Counsel for the Petitioners questioned the relevancy of testimony that the Association's LBO resulted in deficit financing. Since the Petitioners included a request for relief that IEERB reject the School

Corporation's LBO and accept it as a remedy, the Hearing Examiner indicated preliminarily that such evidence was relevant.

A substantial amount of time during the hearing evolved into a "debate" between Lyday and Roger McMichael about this issue during their testimony. McMichael broke down specific reasons he believed the Association's LBO would result in deficit financing. (Respondent Exhibits B, C, D, E, and F)

Petitioners, during cross examination, began picking and choosing from various public documents (Petitioners Exhibits 40 and 43) and then offered its updated analysis prepared the day before the hearing to justify its position that the Association's LBO did not violate the law. (Petitioners Exhibits 40, 41, 44, 46 and 48)

While the Association criticizes McMichael for picking and choosing numbers for his analysis (Post hearing Brief page 22, footnote 8), Lyday did exactly the same during his testimony about the matter on Friday morning. For example, to justify its position, the Association used the School Corporation's estimates (Petitioner Exhibit 43) with two (2) exceptions. (TR, Day 2, at 32)

In the midst of this analysis, the Hearing Examiner, pursuant to 560 IAC 2-3-14 (14) posed a question to both sides seeking to clarify their respective positions. Should the Association's LBO submitted on November 16, 2012 be analyzed as of that day, or can the Hearing Examiner "Monday Morning Quarterback" and make an analysis five (5) months later, with all new updated financial information and projections? Needless to say, the parties were in total disagreement.

Although the statute is silent as to this issue, it would defy logic to analyze a LBO five (5) months after the fact using new and updated financial information and/or projections. Therefore, any analysis of the Association's LBO must be made as of the date it was submitted-November 16, 2012.

Finally, the School Corporation in its Post Hearing Brief (page 39) argues that Indiana Code § 20-29-8-5 does not give a Hearing Examiner authority to impose a LBO upon the parties.

CONCLUSIONS OF LAW

Based upon the pleadings, the evidence received at the hearing in Carmel, Indiana, an evaluation of the credibility and demeanor of the witnesses, along with consideration of the pre and post hearing briefs, the Hearing Examiner now makes the following conclusions of law:

1. The Indiana Education Employment Relations Board ("IEERB") has jurisdiction over the parties and the matter in controversy herein pursuant to Indiana Code § 20-29-7-4.
2. Indiana's Open Door law (Indiana Code § 5-14-1.5-6.5 (a) (1) allows school corporations to inform the public of the status of collective bargaining.

3. The standard for proving that a bypass unfair practice took place is found in *New Albany-Floyd County Consolidated School Corporation*, U-84-3-2400, 1984 IEERB Ann. Rep. 84, 85-86 (1984), where the IEERB Board established five (5) elements of a bypass unfair practice:

- Bypass is a Sec. 7(a)(5) violation because it is, in fact, a failure or refusal to bargain and/or discuss in good faith with the exclusive representative.
- Bypass violations are also derivative violations of Sec. 7(a)(1) and Sec. 7(a)(6), and a direct violation of Sec. 7(a)(1) in that a bypass interferes with, restrains, or coerces school employees in the exercise of rights guaranteed by Section 6, specifically the right to participate in collective bargaining through representatives of their own choosing (the exclusive representative).
- The subject matter of the bypass must be a mandatory subject of bargaining or of discussion.
- An intent to bypass the exclusive representative must be proved. This may be by an offer with expectation of a response or by undermining or denigrating the exclusive representative. Or, it may be reaching agreement with bargaining unit members without discussing or negotiating with the exclusive representative.
- More than a mere statement is necessary, the school employer's words or actions must demonstrate – on their own or in a factual context – that the school employer circumvented the exclusive representative by making an offer with the expectation of a response to it by the bargaining unit members.

4. The Amended Complaint alleges that the Respondent committed a bypass unfair practice under Indiana Code § 20-29-7-1(a)(1) through:

- a. Emails from the Superintendent to administrators, from principals to teachers, and from board members to teachers on bargaining status and issues;
- b. Two reports made by Board members at regular school board meetings on bargaining status and issues;
- c. Distribution of documents accompanying the board member reports that were distributed to members of the public, including teachers, through the school email system "messenger" distribution list and through placement of hard copies in at least one school building location.

5. Petitioners have the burden to prove the existence of an unfair practice.

6. To prevail on a bypass claim, the Petitioners must provide sufficient evidence to prove that the alleged bypass's subject matter was a mandatory subject of bargaining or discussion; that the Respondent intended to bypass the Association; *and* that the Respondent made an offer to bargaining unit members with the expectation that the members would respond to it.

7. Indiana Code § 20-29-6-4 defines mandatory subjects of bargaining including (1) salary, (2) wages, (3) salary, and wage related fringe benefits, including accident, sickness, health, dental, vision, life, disability, retirement benefits, and paid time off as permitted to be bargained under Indiana Code § 20-28-9-11.

8. Indiana Code § 20-29-6-4.5 spells out prohibited subjects for any contract entered into after June 30, 2011.

9. School employers are permitted to communicate with members of the public, including teachers, about areas of public concern such as collective bargaining.

10. Petitioners failed to present sufficient evidence to demonstrate an intent by the School Corporation to bypass the Association.

11. Petitioners failed to present sufficient evidence that the School Corporation made an offer to members of the Association.

12. Petitioners failed to present sufficient evidence to fulfill the required element of intent.

13. Petitioners failed to present sufficient evidence of any intent or effort to undermine or denigrate Lyday or the Association.

14. Petitioners have not met their burden or proven that Respondent committed any unfair practice.

15. Petitioners also allege in their Amended Complaint that the Respondent committed a refusal to bargain unfair practice pursuant to Indiana Code § 20-29-7-1(a)(5)(A) and Indiana Code § 20-29-7-1(a).

16. Petitioners failed to present any evidence that constituted a refusal to bargain by the School Corporation.

17. The School Corporation did not commit an Unfair Labor Practice of failure to bargain, in violation of Indiana Code § 20-29-7-1(5) and (6).

18. Indiana Code § 20-29-6-3 prohibits unlawful deficit financing and provides that a contract in contravention of the statute is void.

19. The Association's LBO included terms in its LBO that may not be included such as a salary schedule based solely on a teacher's academic history and experience.

20. The Association's LBO as of November 16, 2012, violated the prohibition against unlawful deficit financing.

RECOMMENDED ORDER

The recommended order of the Hearing Examiner is that Respondent Carmel Clay Schools be found to have **not** committed Unfair Labor Practices, to-wit, interference with school employees exercise of their right to be represented during bargaining by the Association thereby bypassing the Association, or failed to bargain in violation of Indiana Code § 20-29-7-1(5) and (6).

Pursuant to the Rules of the Indiana Education Employment Relations Board, and specifically Rules 560 IAC 2-3-21 and 2-3-22, this case is transferred to the Indiana Education Employment Relations Board.

To preserve an objection to the Hearing Examiner's Report, a party must file a notice of intent to file exceptions to the Hearing Examiner's Report within fifteen (15) days of receipt of the Report. The notice of intent must identify the basis of the objection with reasonable particularity. *See* Indiana Code § 4-21.5-3-29(c) and (d) and 560 IAC 2-3-22 and 23.

Issued this 15th day of May, 2013.



Bernard L. Pylitt, Hearing Examiner

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been duly served, this 15th day of May, 2013 via email and U.S. Mail to the following counsel of record:

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IEERB Case No. U-12-04-3060

HEARING EXAMINER'S REPORT

Mailed May 16, 2013

VIA Certified, Return Receipt Requested US Mail

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