COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 90	:	
	:	
	:	
v.	:	Case No. PERA-C-00-11-E
	:	
	:	
DAUPHIN COUNTY	:	

FINAL ORDER

On June 15, 2000,[1] Dauphin County[2] (County) filed timely exceptions and a brief in support of exceptions to a proposed decision and order (PDO) issued on May 25, 2000. In the PDO, the hearing examiner sustained AFSCME's unfair practice charge and concluded that the County violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by not reinstating two employes as directed by a panel sitting at the third step of the grievance procedure set forth in the parties' collective bargaining agreement. Based on this conclusion, the hearing examiner directed the County to, inter alia, comply with the step three panel's responses and pay interest at the simple rate of six per cent per annum on any back pay accrued by the two employes since those responses. On July 13, 2000, AFSCME filed a response along with a brief in opposition to exceptions.

The essential facts of this case, which the County does not specifically challenge in its exceptions, are as follows. The County operates Dauphin Manor with employes who are members of a bargaining unit represented by AFSCME. The County and AFSCME are parties to a three-year collective bargaining agreement covering that bargaining unit for the period of January 1, 1998 through December 31, 2000. Article 15 of the collective bargaining agreement is entitled "Grievance and Arbitration Procedure" and provides as follows:

> Section 1. Any grievance or dispute which may arise between the parties to this Agreement, including application

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[1] Although the Board originally dismissed the exceptions as beyond the 20-day filing period of 34 Pa. Code § 95.98(a), the Board after the County's timely motion for reconsideration granted reconsideration by order dated September 19, 2000, because June 15 (Flag Day) is a legal holiday under the laws of the Commonwealth, 44 P.S. § 11, and is therefore excluded from the computation of time. 34 Pa. Code § 95.100(b).

[2] The exceptions were originally filed on behalf of "Dauphin County-Dauphin Manor" as Respondent. The hearing examiner, however, dismissed Dauphin Manor as a respondent and no exceptions were filed to that part of the PDO. Counsel who filed the exceptions subsequently entered his appearance on behalf of Dauphin County and supported that appearance with a power of attorney. The Board will therefore address the exceptions as if filed on behalf of Respondent Dauphin County alone.

or interpretation of this Agreement shall be settled in the following manner:

Step 1: There shall be a meet and discuss meeting of an equal number of Union and Employer representatives to review and resolve, if possible, any tentative grievance arising between the Employer and Employees.

Step 2: Should the grievance remain unsettled after Step 1 it may be presented to Administrator or his/her designee within seven (7) days. The Administrator or his/her designee shall respond in writing to the Union Steward and the Union's Area Office within seven (7) days.

Step 3: If the grievance is not settled at Step 2 it may be presented in writing within seven (7) days after the Administrator's response is received to a panel in the Office of County Personnel. Said Personnel Panel shall respond to the Union Steward within seven (7) days of receipt of the grievance. Said time limit may be extended by mutual agreement.

Step 4: If agreed to by both the County and the Union, grievances not resolved at the third (3rd) step may be presented to the Pennsylvania Bureau of Mediation in lieu of Step 5 (Arbitration).

Step 5: Arbitration: If a dispute exists relative to the interpretation or application of the instance (sic) agreement, either party may, upon notification to the other, request arbitration. If the parties cannot agree on the selection of an arbitrator within seven (7) days, either party may request the Pennsylvania Bureau of Mediation to submit a panel of arbitrators. Within seven (7) days after receipt of such list, the parties shall alternately strike names from the list, the Employer striking first until one name remains. The remaining name shall be the arbitrator.

The arbitrator shall render his decision with dispatch after hearing the arguments of the parties.

The decision of the arbitrator shall be final and binding on both parties consistent with Act 195.

(Union Exhibit 1, F.F. 3).

In March 1999, AFSCME filed two grievances, one on behalf of Tonya Tippett and one on behalf of Doree Clark, alleging that the two employes had been discharged from their positions at Dauphin Manor without just cause. AFSCME presented the grievances to a panel at the third step of the grievance procedure. By letters dated December 6, 1999, the County informed Tippett and Clark of the panel's decisions regarding their respective grievances. The panel sustained Clark's grievance and directed that she be returned to work and made whole for lost wages, benefits, and seniority minus any interim earnings or unemployment compensation. The panel sustained Tippett's grievance in part, concluding that her actions did not warrant discharge but were serious enough to justify suspension. Thus, the panel directed that Tippett be returned to work as a Certified Nursing Assistant (C.N.A.) at the earliest mutually convenient opportunity and that she also be made whole for wages, benefits, and seniority, at straight time, but for 30 work-days, which the panel deemed a disciplinary suspension, and minus any interim earnings and unemployment compensation.

AFSCME was satisfied with the panel's disposition of the grievances and therefore did not request mediation or arbitration. However, by letter dated December 16, 1999, Barry Ramper, the Administrator of Dauphin Manor, requested that AFSCME accept its letter as Dauphin Manor's request for mediation of the two grievances, and further stated that should the union reject the request, the letter would serve as Dauphin Manor's notification of intent to proceed with arbitration. The Union did not proceed with mediation or arbitration, nor did the County reinstate Tippett and Clark.

The County has filed five separately enumerated exceptions to the PDO. In its first exception, the County contends that the hearing examiner erred in concluding that the Board has jurisdiction over AFSCME's charge. The County contends that the issue before the Board involves a matter of interpretation of the collective bargaining agreement, which is reserved for an arbitrator and/or a mediator as provided in the agreement. The County asserts that the proper forum for resolution of the procedural question of whether or not the panel's response was binding on the County is arbitration.

As pointed out by AFSCME, however, the employer in Moshannon Valley School Dist. v. PLRB, 597 A.2d 229, 231 (Pa. Cmwlth. 1991), one of the cases relied upon by the hearing examiner in the PDO here, made the very same argument, which the Commonwealth Court rejected. Consistent with Moshannon Valley then, the Board will dismiss the County's first exception. The law is well-settled that the Board has exclusive jurisdiction to determine whether an unfair practice has been committed and, if so, to issue a remedy to address that unfair practice. Hollinger v. Dep't of Public Welfare, 469 Pa. 358, 365 A.2d 1245 (1976). Although the same action by a public employer may constitute both a violation of the collective bargaining agreement (grievance) and an unfair practice, the Board is not divested of its statutory jurisdiction over unfair practices simply because that action may also violate the contract. Pennsylvania State Troopers Ass'n (State Troopers) v. PLRB, __ A.2d __ (Pa. Cmwlth. 2931 C.D. 1999, filed November 6, 2000); Millcreek Township School Dist. v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993); York County Home and Hosp. v. AFSCME, 426 A.2d 1224 (Pa. Cmwlth. 1981). Repudiation is the classic example of the just-described situation. FOP v. Hickey, 499 Pa. 194, 452 A.2d 1005 (1982); State Troopers; Millcreek; Upper Chichester Township v. PLRB, 621 A.2d 1134 (Pa. Cmwlth. 1993).

It is the presence of the statutory violation that is the key to the Board's jurisdiction in cases that, at first blush, may appear as purely a matter of contract to be resolved in arbitration. Thus, absent a violation of the applicable labor statute (PERA in this case), the matter most assuredly is one for an arbitrator. Unlike other cases like State Troopers, supra, or Port Authority of Allegheny County v. Amalgamated Transit Union Local 85, 27 PPER ¶ 27184 (Final Order, 1996), where the public employers had a sound basis for contending that they acted consistent with the collective bargaining agreement and therefore did not clearly unilaterally change the terms and conditions of employment (i.e. no statutory unfair practice), the County's actions in the present case violated the applicable statute.

The County's refusal to abide by the decision of its panel at step three of the contractual grievance procedure constitutes a clear repudiation of that collectively bargained provision. By repudiating that contractual provision, the County unilaterally altered the employes' terms and conditions of employment in direct violation of Section 1201(a)(5) of PERA. The County violated its statutory bargaining obligation, and whether the County also violated the contract does not divest the Board of jurisdiction. The third step panel, which consisted of not union, but solely County personnel, including the chief county administrator/chief clerk, the assistant director of personnel and a personnel analyst, resolved the grievances in favor of the employes and directed that they be reinstated with back pay. (Union Exhibits 2a, 2b). Step three provides that grievances not settled at step two may be presented "to a panel in the Office of County Personnel," which "shall respond to the Union steward within seven (7) days of the receipt of the grievance." (Union Exhibit 1, F.F. 3). The panel in this case responded in the employes favor and AFSCME decided not to pursue the matter any further (mediation or arbitration). By now contending that it has the right under the grievance procedure to unilaterally move AFSCME's grievances to arbitration, the County is ignoring the clear and express language of its agreement with AFSCME and is therefore repudiating terms and conditions of employment in violation of PERA. This conclusion is supported by substantial evidence and is indeed based on well-settled precedent.

In Moshannon Valley, the Board faced an almost identical situation wherein a school principal, as the employer's designated supervisor responsible for responding to grievances at step one of the parties' collectively bargained grievance procedure, sustained an employe's grievance and granted the requested relief. The school district argued that the first level response was not binding on the district and the Board should have deferred the matter to arbitration. The Board rejected the district's argument and concluded, based in part on its prior decision in PLRB v. Old Forge School Dist., 11 PPER ¶ 11318 (Nisi Decision and Order, 1980), that the parties expressly agreed to initially submit grievances to the principal for resolution and the district could not disregard that agreement simply because its designated representative decided in the grievant's favor. 21 PPER ¶ 21126 (Final Order, 1990). The Commonwealth Court affirmed the Board's order and also noted that the district's opposition to the first level supervisor's authority to unilaterally decide grievances "should have been advanced, argued for, and negotiated at the time of collective bargaining." 597 A.2d at 234 n.7. The employer in Moshannon Valley, like the employer here, conveniently ignored the fundamental fact that the decision it sought to appeal was its own decision made by its designated manager or agent. The County cannot ignore the decision of its own agent, who acted in accordance with the express authority of the agreement. Thus, the County's first exception is dismissed.

In its second and third exceptions, the County makes much ado about the fourth and fifth steps of Article 15, essentially arguing that the parties can mutually agree to mediation or either party may proceed with arbitration as the County now insists on doing. However, the County's view of the last two steps ignores the express language of step three, which requires the panel to decide the grievances. If not to render a decision that may, based on the circumstances of the case, be favorable to the grievants, then the panel at step three serves no

purpose in the grievance process. For the City to read step five as granting either party the right to arbitration in spite of the step three panel's decision, favorable to the grievants or not, would make step three a nullity. Moreover, step four provides that grievances not resolved at step three may be submitted to the Pennsylvania Bureau of Mediation "in lieu of Step 5 (Arbitration)" upon mutual agreement by the County and AFSCME. (F.F. 3). Based on this conditional language, neither party gets to step four or five if the grievance is resolved at step three. The language of the grievance procedure is clear on its face and the County has no sound basis to argue that it somehow has the right under the contract to proceed with arbitration of AFSCME's grievances, which were resolved in favor of the employes. Thus, the hearing examiner's conclusion that the County does not have a sound arguable basis in defense of the charge will not be disturbed.

The County further asserts that the panel's decision was only a recommendation and the hearing examiner should not have excluded the testimony of Barry Ramper, the Administrator of Dauphin Manor, on this point. The district in Moshannon Valley raised a similar argument, contending that the principal's decision at level one was merely his opinion and not a resolution of the grievance. 21 PPER at 318. However, the Board concluded that the parties' agreement expressly provided for the school principal's "reply" to constitute the resolution of the grievance at that step. Id. Moreover, the Board in Moshannon Valley found significant the fact that the principal's response appeared as a "Grievance Disposition Report" and appeared below the heading "Disposition of Alleged Grievance." Id. Similarly, the agreement in this case requires the panel's "response," not merely a recommendation, and the responses here repeatedly referred to "Disposition of the Grievance" and included a "Disposition" at the end of each response. As in Moshannon Valley then, the County's argument is without merit.

As to the alleged error in excluding Ramper's testimony, which the County claims would have shed light on the negotiation of Article 15 and the parties' intentions behind step three, as well as on the their past practice regarding that step, this argument must also be dismissed. The hearing examiner astutely recognized that testimony as to the alleged intent of step three is irrelevant; the contract language is clear on its face and any intent is gleaned from those express, unambiguous words. Likewise, any testimony of an alleged past practice (the panel only "mediated" and did not have authority to dispose of grievances), is irrelevant because the contract expressly grants the panel the authority to issue a decision and the County must abide by its contract. Old Forge School Dist., supra. In addition, whether prior step three panels did not resolve grievances is irrelevant because this panel in fact disposed of the grievances in favor of the employes involved. The hearing examiner properly excluded the County's proposed testimony.

Finally, in its fifth and final exception the County asserts that its demand for mediation/arbitration moves this case from the Board's jurisdiction to the jurisdiction of the arbitrator. Thus, the County claims the Board should defer this proceeding to arbitration. As previously stated, however, the County's refusal to abide by the panel's decisions and its subsequent demand for arbitration constitutes a repudiation of Article 15 of the contract. That repudiation violates the County's bargaining obligation under PERA over which the Board has exclusive statutory jurisdiction; jurisdiction an arbitrator does not

have. Furthermore, deferral, as provided under the Board's deferral policy, is not available in this case. Deferral is discretionary with the Board and a party is not entitled to deferral as a matter of law. PLRB v. Pine Grove Area School Dist., 10 PPER ¶ 10167 (Deferral Order, 1979). Nor is deferral available where discrimination is alleged as in AFSCME's charge. Id. Lastly, in order for the Board to apply its deferral policy, there must be a grievance pending to which the Board may defer; the grievances here were resolved. Indeed, the grievances were filed by AFSCME, not the County, and AFSCME chose not to proceed beyond the third step. The County's final exception is therefore dismissed.

After a thorough review of the statement of exceptions, the brief in support of those exceptions, the response and brief in support of the response, and all matters of record, the Board shall dismiss the exceptions and make the proposed decision and order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the proposed decision and order in the above-captioned matter be and the same are hereby dismissed and the proposed decision and order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-first day of November, 2000. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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v.	:	Case No. PERA-C-00-11-E
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AFFIDAVIT OF COMPLIANCE

The County hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Act, that it has complied with the responses of the panel at the third step of the grievance procedure, that it has paid interest at the simple rate of six (6) per cent annum on any back pay accrued by Ms. Tippett and Ms. Clark following the responses of the panel at step three of the grievance procedure, that it has posted the proposed decision and order as directed therein along with the final order, and that it has served AFSCME with a copy of this affidavit.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____
Signature of Notary Public