

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICES :
UNION, LOCAL 668, SEIU, AFL-CIO :
 :
 :
 V. :
 : Case No. PERA-C-99-359-E
 :
 COMMONWEALTH OF PENNSYLVANIA, :
 DEPARTMENT OF PUBLIC WELFARE, :
 DARRELL DAY, et al. :

FINAL ORDER

On September 7, 1999, the Pennsylvania Social Services Union, Local 668, SEIU, AFL-CIO (Union), filed unfair labor practice charges against the Commonwealth of Pennsylvania, Department of Public Welfare (DPW), on behalf of Walter Peshko, alleging a violation of Section 1201(a)(3), (5) and (9) of the Public Employe Relations Act (PERA). The Union and the Commonwealth are parties to a statewide collective bargaining agreement. The Union alleged that the Fayette County Assistance Office (FCAO), which is under the direction and control of DPW, failed to meet its obligation to "meet and discuss", pursuant to PERA and a Local Agreement (Agreement). The Union specifically alleged that the FCAO unilaterally implemented a previously unknown managerial policy, which was inconsistent with past practice, affecting the assignments of income maintenance caseworkers (IMCWs) to certain special units.¹

The material allegations set forth in the Specification of Charges are as follows. In the beginning of December 1998, Walter Peshko was an IMCW at the FCAO. At that time, he was then assigned to the Employment and Training Program (ETP) special unit. On December 2, 1998, the FCAO posted the availability of a position in the Nursing Home Unit (NHU).² Mr. Peshko bid on the vacant position. On December 4, 1998, Mr. Peshko was informed that he was awarded the NHU position because he was the most senior employe and he was otherwise qualified for the position. According to the Union's allegations and the documents that the Union attached to the charges, on December 4, 1998, Mr. Peshko was advised that the FCAO had an unwritten policy which required staff to remain in their new assignments for a period of 12 months from the effective date of their reassignment. On December 9, 1998, within one week of Mr. Peshko's bid for the position and after the December 8, 1998, effective date of his reassignment, Mr. Peshko requested

¹ For purposes of issuing a complaint, the factual allegations in the charge of unfair practices are accepted as accurate. PSSU Local 668 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978).

² The Union alleged that the vacancy was in the Disability Advocacy Program (DAP). The DAP is expressly identified as one of the special units in the Agreement. The terms of the Agreement apply only to expressly identified special units. However, the FCAO posting attached to the Union's Specification of Charges indicates that the vacancy was in the NHU, which is not expressly covered by the Agreement. Although the Union did not allege that the NHU is substantially the same as the DAP, this discrepancy did not affect the Board's conclusion on the merits of the issues presented by the Union's exceptions.

to return to his former position in the ETP unit due to undisclosed health problems. The FCAO denied Mr. Peshko's request based on its unwritten policy. On December 14, 1998, management met with Union officials in response to the Union's request to meet and discuss the denial of Mr. Peshko's December 9, 1998, request to be returned to the ETP unit. During this meeting, management informed Union officials about its unwritten management policy.

On March 12, 1999, the FCAO circulated an announcement informing staff members that it filled the vacancy left by Mr. Peshko in the ETP position. Consequently, on March 19, 1999, the Union filed a grievance, on behalf of Mr. Peshko, claiming that Mr. Peshko was denied a transfer to his former ETP position based on the unilateral implementation of the unwritten, inconsistent policy. By letter dated April 26, 1999, management denied the Union's grievance asserting that Mr. Peshko was told of the policy prohibiting reassignments within 12 months of beginning a new position before the effective date of his reassignment to NHU and before he vacated his position in the ETP unit. The FCAO also asserted that the 12-month restriction at issue is a managerial policy and it complied with its obligation to meet with union officials and discuss the existence and effect of the policy.

The Union then alleged that, sometime after it received the April 26, 1999, letter, it "became aware of the negotiated local agreement of September 30, 1993, regarding criteria for selection and reassignment of IMCWs to special units." (Union's Specification of Charges at ¶ 14). The Union asked the FCAO to reconsider the initial grievance, claiming that the policy and the denial of Mr. Peshko's return-transfer request were inconsistent with the Agreement. On May 7, 1999, the FCAO again denied the Union's grievance and its request for reconsideration. On September 7, 1999, four months to the day after the second denial, the Union filed unfair labor practice charges.

By letter dated October 1, 1999, the Secretary of the Pennsylvania Labor Relations Board (Board) dismissed the charges as untimely. On October 19, 1999, the Union timely filed exceptions to the Secretary's letter declining to issue a complaint. The Union requested an extension of time to file a brief in support of its exceptions, and the Union's brief was timely filed on December 20, 1999.

Section 1505 of PERA states that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge." This Board has previously determined that the mandatory language of Section 1505 raises the question of whether a charge was properly filed within the four-month limitation period to one of jurisdiction. PLRB v. New Castle Area School District, 7 PPER 16 (Nisi Order, 1976), *affirmed*, 7 PPER 99 (Final Order, 1976). Therefore, this Board does not have jurisdiction to entertain any unfair labor practice charge that is filed beyond the four-month limitation period as provided by Section 1505. However, the limitation period does not begin to run until the complainant has either actual or constructive knowledge of events alleged to constitute the unfair practice. Id. at 16.

The unfair labor practice charges alleged are based on the Union's claims that the FCAO unilaterally implemented an unwritten managerial policy, which was inconsistent with past practice and the local Agreement,

and refused to meet with Union officials and discuss the propriety of that action. These alleged actions also served as the basis for the grievance submitted on March 19, 1999.

In its exceptions and brief in support, the Union argues that Union officials did not discover the existence of the Agreement until after the FCAO's April 26, 1999, denial. The Union claims that it believed the provisions of the newly discovered Agreement were inconsistent with the FCAO's policy and that, once confronted with the terms of the Agreement, the FCAO would change its position and grant the Union the requested remedy pursuant to its grievance, i.e., transfer Mr. Peshko to his former ETP position. Therefore, argues the Union, it was not until the FCAO issued its May 7, 1999, letter confirming its previous denial that it had actual or constructive knowledge of its right to file unfair labor practice charges, and the September 7, 1999, filing is within the four-month limitations period. However, the Board does not agree.

The Board has exclusive jurisdiction to determine whether an unfair labor practice has occurred. Mazzie v. Commonwealth, 495 Pa. 128, 432 A.2d 985, 991 (1981). The Board does not have jurisdiction to entertain a grievance or remedy conduct that solely involves interpretation of the parties' collective bargaining agreement and does not violate statutory rights. York County Hospital and Home v. District Council 89, AFSCME, AFL-CIO Local 1485, 426 A.2d 1224, 1225 (Pa. Cmwlth. Ct. 1981). Pursuant to Section 903 of PERA, the parties must resolve disputes arising under their collective bargaining agreement through a grievance procedure that must culminate in binding arbitration. Often, however, conduct that gives rise to a grievance under the parties' agreement may also constitute an unfair labor practice. The unfair labor practice charge aspect of the conduct can be entertained by the Board. Id. Accordingly, a "[u]nion could pursue a grievance to compel performance of the collective bargaining agreement in addition to its unfair labor practice charge," Id., and the availability of a grievance procedure to seek redress under a collective bargaining agreement does not oust the Board of subject matter jurisdiction to determine if the same conduct constitutes an unfair labor practice. Commonwealth v. PLRB, 459 A.2d 452, 456 (Pa. Cmwlth. Ct. 1983). Moreover, the Board is not ousted of jurisdiction to determine whether conduct constitutes an unfair labor practice when that determination depends on the interpretation of a collective bargaining agreement. Millcreek Township School District v. PLRB, 631 A.2d 734, 737 (Pa. Cmwlth. Ct. 1993).

Although a grievance may arise from the same conduct as an unfair labor practice charge, the two procedures are separate and distinct and the Board lacks jurisdiction over the former. Gardonis v. Penn Hills School District, 15 PPER ¶ 15120 (Final Order, 1984). This distinction is exemplified by the Board's deferral policy, which was articulated in PLRB v. Pine Grove Area School District, 10 PPER ¶ 10167 (Deferral Order, 1979), and approved by the Commonwealth Court in York Paid Firefighters Ass'n Local 627, IAFF, AFL-CIO v. PLRB, 630 A.2d 527, 528-29 (Pa. Cmwlth. Ct. 1993). As explained in Pine Grove, when the parties to a collective bargaining agreement have submitted a matter to grievance arbitration and the complaining party has filed an unfair labor practice charge with the Board arising out of the same conduct, the Board will hold its own proceedings on the unfair labor practice charge in abeyance and permit the parties to proceed to arbitration. Pine Grove, *supra*. The Board, however, will not dismiss the unfair labor practice charge until the matter is arbitrated to an award and the arbitration process meets certain standards

established by the Board in Pine Grove. Id. If the Board is satisfied with the arbitration, the unfair labor practice charges and the complaint will be dismissed. Id. Therefore, the Board's jurisdiction to entertain an unfair labor practice charge is severable from a grievance procedure, which was invoked as a result of the same conduct, because the Board has no jurisdiction over the grievance procedure. Penn Hills, *supra*. Accordingly, the Board must limit its analysis, in the instant matter, to the timeliness of the unfair labor practice charges alone, and the circumstances pertaining thereto, exclusive of the grievance procedure.

The Union, however, has commingled these two distinct procedures. The thrust of the Union's argument in support of its exceptions is that the Union was entitled to rely on representations made by FCAO officials that they would reconsider their April 26, 1999, decision to deny the March 19, 1999, grievance, which was rooted in the Agreement. Specifically, the Union alleges that "[m]anagement advised the Union they would reconsider their decision based on this negotiated/signed agreement." (Exceptions at ¶ 3). Even if the Board accepted this allegation as true,³ such a representation does not toll the statute of limitations governing the timeliness of, and the Board's jurisdiction over, the filing of unfair labor practice charges. Management's representations during the grievance procedure, pertaining to its position on a grievance, do not have any bearing on the triggering event for filing an unfair labor practice charge, a collateral procedure in a different forum. The Union's confusion regarding the distinct separation between these two procedures would have the Board erroneously determine that management's representations that it would reconsider its position on a grievance, given new information, caused the Union to be unaware that an unfair labor practice had already been committed.

The four-month limitation period for filing an unfair labor practice charge under PERA begins to run when the allegedly prohibited conduct is committed and the union has actual or constructive notice of said conduct, notwithstanding the union's filing of or intent to file a grievance based on the same conduct. In AFSCME Council 83, AFL-CIO v. State College Borough, 18 PPER ¶ 18119 (Final Order, 1987), this Board concluded that, where the initial denial of a grievance arbitration request was beyond the limitation period, subsequent requests and refusals within the limitations period will not revive a defunct cause of action. Id. In the State College decision, the Board determined that the limitation period began to run when the union first became aware of the employer's unwillingness to arbitrate and the union's right to file an unfair labor practice first ripened. This rationale applies to the circumstances in the instant case. A union cannot manipulate the limitation period or revive a defunct unfair labor practice charge by filing a grievance for the same conduct. Once a union has notice that an employer has affirmatively engaged in conduct that may constitute an unfair labor practice, the union may not toll the running of the limitation period for filing charges by requesting the employer to address a grievance on the same subject. Regardless of the forum chosen by the complaining party to seek redress for certain conduct, i.e., a grievance procedure or an unfair labor practice charge or both, the statutory period for filing an unfair labor practice charge begins to run

³ The extensive documentation supplied by the Union indicates that management did not make any such representations. However, the Board, at this level, is constrained to accept as true the Union's allegations for determining whether to issue a complaint.

when the conduct occurred and the complainant has notice. Requesting or expecting an employer to reverse or remedy the effect of its conduct, in response to a grievance, does not toll the limitation period regarding the filing of the unfair labor practice charge.

The Union here alleges that the basis for its unfair labor practice charge is that the FCAO failed to meet and discuss with Union officials before unilaterally implementing an unwritten policy. This policy allegedly prevented Mr. Peshko from returning to his former ETP position, and it is inconsistent with past practice and the local Agreement. The unilateral implementation occurred on December 4, 1998, when Mr. Peshko was advised, prior to accepting his new position in the NHU, about the "unwritten" 12-month transfer restriction. This conduct occurred again on December 9, 1998, when Mr. Peshko requested to be transferred back to his former ETP position due to the sudden onset of health problems. At this time, Mr. Peshko was again advised of the policy. On December 14, 1998, Union officials had a meeting with officials from the FCAO, during which the Union was advised of the policy. Therefore, the conduct that serves as the basis for the unfair labor practice charge occurred on December 14, 1998, when the Union was given actual notice that the FCAO refused to transfer Mr. Peshko to his previous position in the ETP based on its unwritten policy prohibiting position changes within 12 months of starting a new position.

In March 1999, the FCAO actually filled the vacant ETP position with a less senior employe and refused Mr. Peshko's second request for the ETP position based on the "unwritten" 12-month restriction. At this time, the Union filed a grievance, dated March 19, 1999, which was denied on April 26, 1999, for reasons already known to the Union. The Union argues that, until that denial, it was unaware of the terms of the local Agreement, which justified requesting the FCAO to reconsider its initial grievance denial.⁴ Therefore, the Union reasons that the second denial on May 7, 1999, is the date upon which the Union's right to file a charge with the Board ripened.

Alleged ignorance of its own local Agreement may have fueled their request to reconsider a grievance. This, however, does not change the date on which the unfair labor practice was committed. Requesting the FCAO to remedy conduct, which already affirmatively occurred, through the grievance procedure does not delay the running of the limitation period. The Union's cause of action ripened, as did the Board's jurisdiction, when the Union allegedly became aware of the unwritten policy in December 1998. The Union's right to bring an unfair labor practice charge did not recur when the Union decided to utilize the separate and distinct grievance procedure for redress; it did not recur when the FCAO denied the initial grievance; and it did not recur when the FCAO denied the Union's second grievance request. The grievance procedure operates independently from the Board's jurisdiction over unfair labor practices. The Board's jurisdiction to

⁴ In AFSCME, Council 13, AFL-CIO v. Commonwealth, Department of Military Affairs, 22 PPER ¶ 22205 (Final Order, 1991), this Board held that notice of events or circumstances to a union representative constitutes notice to the union. In the instant case, the 1993 Agreement submitted by the Union was indeed executed by one of the Union's own representatives. Therefore, the Union is charged with having knowledge of the terms of the Agreement at the time of the alleged unfair labor practice, which occurred in December 1998.

entertain an unfair labor practice charge is dictated by the 4-month limitation period in PERA, while the limitation on filing a grievance derives from the collective bargaining agreement itself. Therefore, the September 7, 1999, filing date is more than four months from the event alleged to constitute the unfair labor practice, and the Board is without jurisdiction to entertain the Union's charges.

A review of the charge of unfair practices reveals that the only event occurring within the limitation period is the May 7, 1999, denial of the grievance. (Specification of Charges, ¶15). However, the denial of a grievance is not an unfair practice. The real issue to the Union was the reason for the denial, which was the alleged unilateral, unwritten 12-month policy and which the Union had also allegedly discovered to be inconsistent with the local Agreement. However, each of these latter events occurred or were known to the Union prior to May 7, 1999, rendering the unfair practice charge untimely.

After a thorough review of the exceptions and supporting brief to the decision of the Secretary declining to issue a complaint, the Board shall dismiss the exceptions and affirm the Secretary's determination.

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 be and the same are dismissed and the Secretary's decision not to issue a complaint be and the same is 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 fifteenth day of February, 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.