COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME COUNCIL 13	:	
	:	
v.	:	Case Nos. PERA-C-97-642-E
	:	PERA-C-97-643-E
COMMONWEALTH OF PENNSYLVANIA	:	
OFFICE OF ATTORNEY GENERAL	:	

FINAL ORDER

On June 11, 1999, the American Federation of State, County and Municipal Employees, Council 13 (AFSCME) filed timely exceptions to the Proposed Decision and Order (PDO) issued on May 26, 1999 in the above-referenced consolidated cases. Pursuant to an extension of time granted by the Secretary of the Labor Relations Board (Board), a brief in support of those exceptions was filed on July 13, 1999 and the Commonwealth of Pennsylvania, Office of Attorney General (OAG) timely filed its brief in opposition on August 2, 1999.

In its exceptions to the PDO, AFSCME initially asserts that 20 additional findings of fact should have been made. It further contends that the hearing examiner failed to credit the testimony of four witnesses, and failed to conclude that the OAG retaliated against two agents for exercising their rights under the collective bargaining agreement (CBA) between AFSCME and the OAG. AFSCME also excepts to the conclusion that the OAG's transfer of two agents was for legitimate business purposes, and to the conclusion that the OAG did not violate the Public Employe Relations Act (PERA) by its actions.

These unfair practice charges arise out of the OAG temporarily transferring Agents Charles Micewski and John McLaughlin in November 1997 from Philadelphia to Wilkes-Barre and Greensburg, respectively. Until May of 1996, the Agents had been assigned to the OAG's bureau of narcotics investigation unit in Philadelphia, and were responsible for investigating and assisting in the prosecution of crimes involving the sale and distribution of narcotics (FF 3, PDO at 1). In May of 1996, both agents were removed from performing active investigations due to allegations of the local prosecuting authorities (Philadelphia District Attorney and the United States Attorney for the Eastern District of Pennsylvania) regarding the credibility of their investigations, testimony, and reporting of plain view searches and warrantless searches (FF 4, PDO at 2). Both the District Attorney and the U.S. Attorney informed the OAG that they would not prosecute any case in which either agent was a witness (FF 4, PDO at 2).

When Pennsylvania Attorney General Fisher took office in January 1997, the OAG began strengthening its CHRIA unit, a unit that enforced the Criminal History Record Information Act and the Child Protective Services Act. It budgeted ten CHRIA enforcement positions throughout the Commonwealth, and intended to place at least one CHRIA agent in each region (FF 7-8, PDO at 2). On October 5, 1997, the OAG met with the two agents and representatives of AFSCME to discuss a transfer (FF 9, PDO at 2). AFSCME asserts that the hearing examiner should have made several findings of fact regarding this meeting: that the OAG notified the agents of its intent to permanently transfer the agents to Norristown, that the OAG stated it was unaware of any wrongdoing by the agents, that the agents were

told they had no choice in the matter, and that an AFSCME representative told the OAG that under the CBA, it could not permanently transfer the agents without consent, but that it could only temporarily transfer the agents.

The Board has thoroughly reviewed the record and concludes that the findings made by the hearing examiner are supported by substantial evidence in the record and accurately reflect the underlying facts necessary to decide this case, as required by the Supreme Court in PLRB v. Kaufmann Dept. Stores, Inc., 345 Pa. 398, 29 A.2d 90 (1942). Furthermore, AFSCME's exceptions do not contest any of these findings, nor do they contest the evidentiary support for the same. The hearing examiner's failure to find the additional facts proffered by AFSCME was not error. In Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 445 (1975), the Supreme Court addressed the claim that a fact finder erred in failing to make findings:

> When the fact finder in an administrative proceeding is required to set forth its findings in an adjudication, that adjudication must include all findings necessary to resolve the issues raised by the evidence which are relevant to a decision.

464 Pa. At 287, 346 A.2d at 461. See also Birriel v. Workmen's Compensation Appeal Board, 435 A.2d 292 (Pa. Cmwlth. 1981). These, as well as the numerous other proffered findings of fact that AFSCME alleges to be erroneously omitted from the hearing examiner's decision are not relevant to the ultimate determination of whether the OAG committed an unfair practice under PERA. For example, it is not relevant that AFSCME made a counterproposal that was denied by the OAG, nor is it relevant that Agent McLaughlin was the only bilingual employe in the Philadelphia office. It is not relevant to these charges of unfair practices that the Commonwealth was obligated to pay out of town per diem and mileage because of the transfer, nor is it relevant that the agents' 1998 performance evaluation reports were lower than prior years.

The hearing examiner is not required to make findings summarizing all of the evidence presented in the record. Rather, he need only make those findings that are necessary to resolve the issues presented and are relevant to the decision. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1997); Commonwealth, Dept. of Public Welfare, Allegheny County Assistance Office, 27 PPER ¶ 27188 (Final Order, 1996). Our review indicates that the hearing examiner made the findings necessary to resolve the issues presented. The additional findings proposed by AFSCME are not necessary to the ultimate decision in this case, and thus will not be made by the Board.

AFSCME also excepts to the failure of the hearing examiner to credit the testimony of the two agents and two representatives of AFSCME. It is well-settled that the Board will not reverse credibility determinations of its hearing examiners who were able to observe the manner and demeanor of the witnesses at the hearing, absent compelling reasons. Purchase Line School District, 26 PPER ¶ 26184 (Final Order, 1995); Transport Workers Union v. SEPTA, 17 PPER ¶ 17038 (Final Order, 1986); Bereczky, et al. v. McKeesport Area School District, 17 PPER ¶ 17155 (Final Order, 1986). The mere fact that the hearing examiner chose to discredit AFSCME's witnesses

and credit the OAG's witnesses is not error. Commonwealth of Pennsylvania (State Police), 27 PPER ¶ 27159 (Final Order, 1996). The Board will defer to the hearing examiner's credibility determinations in this matter.

AFSCME further excepts to the conclusion that the agents were transferred to Wilkes-Barre and Greensburg solely because they declined to agree to a voluntary transfer to Norristown. The record does not support this assertion, rather it supports the hearing examiner's findings of fact. The OAG was willing to permanently transfer the agents to Norristown to have the objections of the prosecuting authorities permanently resolved, even though there were already CHRIA agents working there. The agents' refusal eliminated the option of having a permanent solution. Therefore, consistent with the CBA and the OAG's plan to have a CHRIA agent in each district, the OAG temporarily transferred the agents to locations where CHRIA agents were needed (FF 15, PDO at 3). The record supports this finding. William Ryan Jr., Director of the Criminal Law Division of the OAG testified that the OAG made the offer to transfer the agents to Norristown, even though it was not the most efficient use of the CHRIA resources (N.T. 167). Failing in that, he testified that the OAG had an obligation to use the ten CHRIA unit slots as effectively and efficiently as it could, and therefore transferred the agents to the Wilkes-Barre and Greensburg locations (N.T. 182). Thus, the hearing examiner's findings and conclusions are clearly supported by the record.

AFSCME also excepts to the conclusion that this transfer was for legitimate business purposes, and asserts that the transfer was to punish the agents for exercising their rights under the CBA. For support, it proffers the agents' testimony that there was no work for them to do in Wilkes-Barre and Greensburg. The Board gives deference to the hearing examiner's decision to credit all, some, or none of the testimony by a particular witness. Kaolin Mushroom Farms, Inc., id. There is sufficient testimony in the record to support the hearing examiner's conclusion. Mr. Ryan acknowledged in his testimony that things may have been slow for the agents, but that was because the OAG was in the process of trying to assemble the CHRIA unit (N.T. 196). Ronald C. Stanko, Chief Deputy Attorney General of the Regulatory Compliance and Intelligence Section testified that the process was moving slowly due to bidding, interviewing, and deciding who would fill the CHRIA positions (N.T. 207). Once the positions were filled, the assignment of 3000 cases and bringing the newly assigned agents up to speed took time, because the agents had to familiarize themselves with the information and the laws that they would be enforcing (N.T. 208). The hearing examiner's determination that the transfer was for legitimate business purposes is supported by the record. The OAG's business purpose was to have a CHRIA agent in every district to enforce the Criminal History Record Information Act and the Child Protective Services Act. Transferring agents Micewski and McLaughlin to CHRIA positions in Wilkes-Barre and Greensburg helped to achieve this purpose.

AFSCME excepts to the conclusion that the employer did not violate PERA. In the PDO, the hearing examiner properly concluded that the agents were not transferred in retaliation for having exercised their rights in refusing the permanent transfers first offered by the OAG. In order to prove an unfair labor practice charge alleging discrimination based upon union activity, the complainant must prove three elements: (1) that the complainant engaged in protected activity; (2) that the employer knew of the complainant's protected activity; and (3) that the employer was

motivated by anti-union animus in taking the adverse action. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). A thorough review of the record supports the hearing examiner's conclusion that the third element of this test was not met. There is no dispute that the agents engaged in protected activity (invoking a contractual right) and that the OAG had knowledge of the action. However, the record is void of any direct evidence of an anti-union motive or other evidence which could support an inference of anti-union animus (PDO at 6). As discussed above, the agents were transferred to locations where a need for CHRIA agents was perceived. The record supports the conclusion that a legitimate business reason, rather than retaliation or anti-union animus was the motivation for the transfers.

In its exceptions, AFSCME contends that a finding of fact should have been made that the OAG's denial of sick leave to Agent McLaughlin was in retaliation for exercising his rights under the contract. Again, the record supports the hearing examiner's determination that the third element of the test outlined in St. Joseph's was not met. Id. There is insufficient evidence to support an inference of anti-union animus. The only leave denial established by the record was on the day the agent was to report to his new assignment in Greensburg. The denial of this leave is legitimate since the request could as reasonably be viewed as an attempt to circumvent the OAG transfer. Moreover, the record reflects that the agent used sick leave in late 1997, after his refusal of the permanent transfer to Norristown, and continuously from April 1998 to the date of the hearing (PDO at 7). There is insufficient evidence to support a finding of fact that an anti-union animus motivated the denial of sick leave on the date Agent McLaughlin was to report to Greensburg.

After a thorough review of the exceptions 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 nineteenth day of October, 1999. 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.