## COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 33 : LOCAL #1637 :

:

v. : Case No. PERA-C-03-292-E

:

CITY OF PHILADELPHIA

## FINAL ORDER

On July 18, 2003, the American Federation of State, County and Municipal Employees, District Council 33, Local No. 1637 (AFSCME) filed a Charge of Unfair Practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Philadelphia Police Department (City) had violated the Public Employe Relations Act (PERA). The Specification of Charges indicated that the City violated PERA on May 13, 2003, by unilaterally implementing a policy regarding leave usage. AFSCME alleged that the unilateral action violated Section 1201(b)(1) and (5), pertaining to unfair practices by a union.

The Secretary of the Board on July 31, 2003, mailed a letter to AFSCME requesting an amendment to the charge within twenty days to specify whether Subsection (a) or (b) was to be charged. Because no response to the July 31, 2003 letter was received within the time specified, on September 10, 2003, the Secretary dismissed the charge as filed.

On September 29, 2003, AFSCME filed timely exceptions to the Secretary's letter of September 10, 2003. AFSCME requested in its exceptions that the charge be amended to designate a violation of Section 1201(a) of PERA. AFSCME further argues that the specification of Section 1201(b) in the original charge was merely a typographical error, that the facts alleged clearly support a violation of Section 1201(a)(1) and (5) of PERA. In the alternative, AFSCME argues that the charge should not be dismissed for failure to respond to the Secretary's amendment letter, since it could not verify that it received the July 31, 2003 amendment letter, and only became aware of the need to amend after the Secretary's administrative dismissal of September 10, 2003.

The Board will first address AFSCME's contention that because it is unable to verify receipt of the Secretary's July 31, 2003 amendment letter, its untimely attempt to amend the charge should nevertheless be accepted by the Board. AFSCME's basis to vacate the Secretary's dismissal is in essence a request that the Board accept its amendment of the charge  $\underline{\text{nunc}}$   $\underline{\text{pro}}$   $\underline{\text{tunc}}$ . Generally, a filing is permitted to be made  $\underline{\text{nunc}}$   $\underline{\text{pro}}$   $\underline{\text{tunc}}$ , where the late filing is occasioned by fraud, duress, coercion, or some extraordinary circumstances beyond the

<sup>&</sup>lt;sup>1</sup> AFSCME also requested an extension of time to file its brief, which was granted, and AFSCME's brief was timely filed on October 19, 2003.

control of the filing party. Sewickley Valley Hospital v. Department of Public Welfare, 550 A.2d 1351 (Pa. Cmwlth. 1988), petition for allowance of appeal denied, 524 Pa. 614, 569 A.2d 1372 (1989); see Bass v. Bureau of Corrections, 485 Pa. 256, 401 A.2d 1133 (1979).

Despite that counsel for AFSCME was unable to verify receipt of the Secretary's July 31, 2003 amendment letter, the letter was sent via certified mail (Item No. 7002 2030 0001 2982 8402) to the address specified by AFSCME on the charge. United States Postal Service records indicate that the July 31, 2003 amendment letter was delivered and received on August 5, 2003 at 7:36 am.  $^3$ 

In rejecting an identical argument to that raised by AFSCME here, the Board in  $\underline{\text{USWA}}$ ,  $\underline{\text{District } \#15}$ ,  $\underline{\text{Local } \#8978 \text{ v. } \text{McKeesport } \text{Municipal}}$  Waste Authority, 16 PPER ¶ 16201 (Final Order, 1985), noted that

[e]ssentially the Board is requested in the matter to authorize an untimely response to the Board's request for additional information where the request was delivered and received in a timely fashion at the address provided by Complainant. That the correspondence was thereafter mishandled by representatives of the Complainant does not provide an adequate explanation for failing to comply with the Board Secretary's ... letter which expressly provided a time within which the Complainant was to reply... It is the Complainant's responsibility to provide an address upon which service may be made, to receive communications from the Board regarding the Charge. The failure of the Complainant to receive the ... letter, and timely respond was not due to any error or omission on the part of the Board.

Moreover, we note that a copy of the July 31, 2003 amendment letter was sent by first-class United States mail to Ann Cohen, an agent of AFSCME. In Millvale Police Wage and Policy Committee v.

Millvale Borough, 29 PPER ¶ 29181 (Final Order, 1998), a case involving counsel's failure to respond to a show cause letter, the Board noted that because the union was directly apprised of the Secretary's action, it is incumbent upon the union to contact its attorney, within the time provided, to ensure that the matter did not go unresolved. Similarly, AFSCME had an obligation here to ensure that it, or its attorney, timely filed a response to the Secretary's July 31, 2003 amendement letter. 4

<sup>3</sup> The signature of B. Gardiner similarly appears for accepting service of the Secretary's September 10, 2003 dismissal letter, and there is no dispute that AFSCME had in fact, received that letter.

 $<sup>^2</sup>$  The Board does not look to testimony or evidence of the parties in deciding issues of timeliness.  $\underline{\text{American Federation of State County and}}$  Municipal Employes, Council 13 v. Commonwealth, Department of  $\underline{\text{Transportation}}, \ 33 \ \text{PPER} \ \P 33027 \ (\text{Final Order, 2001}), \ \underline{\text{reconsideration}}$   $\underline{\text{denied}}, \ \text{Case No. PERA-C-01-386-E (January 16, 2002)}, \ \underline{\underline{\text{affirmed}}}$  unreported, No. 138 C.D. 2002 (Pa. Cmwlth. August 28, 2002).

<sup>&</sup>lt;sup>4</sup> As AFSCME's failure to timely respond to the Secretary's July 31, 2003 amendment letter is dispositive of the outcome here, the Board need not address whether the identification of subsection (b) as opposed to (a)

After a thorough review of the exceptions, and all matters of record, the allegations set forth by AFSCME in the exceptions do not support extraordinary circumstances sufficient to warrant acceptance of the amendment to the charge <u>nunc pro tunc</u>. Accordingly, the Board will dismiss AFSCME's exceptions and sustain the Secretary's letter of September 10, 2003, dismissing the charge.

## 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 September 29, 2003 are dismissed, and the Secretary's letter of September 10, 2003 be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member, and Anne E. Covey, Member, this sixteenth day of December, 2003. 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.

may have been a typographical error, and amended, as alleged. The Board's Rules provide that amendments must be perfected prior to the expiration of the applicable limitations period, 34 Pa. Code § 95.32(a), and here, the amendment in the exceptions was received September 29, 2003, more than four months after the alleged unfair practice on May 13, 2003.