

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PSSU LOCAL #668 SEIU :
 :
 v. : Case No. PERA-C-03-158-E
 :
 FRANKLIN COUNTY :

FINAL ORDER

Pennsylvania Social Service Union, SEIU, Local 668 (Union) filed timely exceptions on October 10, 2003, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued September 23, 2003. After the grant of an extension by the Board Secretary, the Union filed a brief in support of its exceptions on November 3, 2003. In the PDO, the Hearing Examiner concluded that Franklin County (County) had committed unfair labor practices within the meaning of Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by failing to meet its obligation to bargain with the Union prior to unilaterally changing the family and medical leave policy, the pay grade change policy, the rates of pay and the rate of contribution for medical insurance. The County's Brief in Response was filed on November 13, 2003.

The Hearing Examiner based his findings of fact on the County's stipulations to the allegations presented in the Union's Specification of Charges in the Complaint. The County did not contest the unfair practice charge and offered no defense for its actions. (PDO p.1). These facts are as follows. On January 6, 2000, the Board certified the Union as the exclusive representative of the employees at issue, and the parties initiated bargaining.

After three years of negotiation, and in the absence of an agreement, the County changed its family and medical leave policy and its pay grade change policy on January 2, 2003. Under the changes, the County permitted its employees to take leave under the Family and Medical Leave Act and provided a policy that determined the rate of pay for transferred or promoted employees. By memorandum dated January 6, 2003, the County informed the members of the bargaining unit that their rate of pay would increase to reflect the County's last offer to the Union, and that their contribution for medical insurance would decrease to match other County employees' rates.

The Hearing Examiner found that the County committed unfair practices within the meaning of Section 1201(a)(1) and (5) of PERA. The Hearing Examiner ordered the County, *inter alia*, to take the following actions: rescind the changes to the discretionary aspects of the family and medical leave policy and to the pay grade change policy; rescind the change to the rate of contribution for medical insurance to the extent that members of the bargaining unit were not benefited; and furnish satisfactory evidence of compliance to the Board. The County did not except to the PDO, but rather filed an Affidavit of Compliance on October 9, 2003.

After a thorough review of the Union's exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDING OF FACT

6. In its letter informing its employees about the compensation adjustment, the County stated:

Since the beginning of 2002, our proposal, which was never accepted, has included raises for the 2002 and 2003 years. However, we do not at this point see an end to our impasse, and we recognize that these employees should not go any longer without a compensation adjustment. For that reason, we are implementing the increases for the 2002 and 2003 years and adjusting the compensation to reflect the step increases employees would have received under the County's proposals.

(Specification of Charges, paragraph 6, attachment A).

DISCUSSION

The Union sets forth six exceptions to the PDO. The exceptions may be summarized as follows. The Hearing Examiner erred in (1) determining that once the County has complied with the relief ordered to remedy its unfair practices, the reason for blocking the processing of the decertification petition will no longer exist, (2) determining that the employees can be made whole with the monetary and procedural relief in the PDO, (3) determining that the taint of the employer's action was not present when signatures were collected for the decertification petition, (4) failing to acknowledge the current harm done to the negotiation position of the Union by the County's unilateral wage increase, (5) failing to acknowledge the County's admitted action in disregard of the Board's order certifying the Union as the exclusive bargaining representative, and (6) failing to find that the County's admitted action constituted direct dealing with the employees and continues to taint the atmosphere for an election, making it impossible to conduct a decertification election free of coercion at this time.

The County does not dispute the finding of an unfair practice, and it has submitted an Affidavit of Compliance to the PDO on October 9, 2003. The Union's exceptions largely concern the impact the County's admitted unfair practice has on the pending decertification petition at Case No. PERA-D-03-181-E. The Union asserts that the remedies ordered in the PDO are insufficient, and that they fail to address the deleterious effect the unfair practices exacted on the Union's ability to negotiate with the County in a stable bargaining environment and on the conditions necessary to hold a free and fair election. The Board has held that an election must be held in laboratory conditions in which, "the circumstances of an election have allowed the employees to exercise free choice in deciding whether to be represented by a union." In the Matter of the Employees of Montgomery County, 30 PPER ¶ 30074 (Amended Order Dismissing the Employer's Objections to the Conduct of an Election, 1999). The Board will resolve these exceptions collectively.

The employees have designated the Union as their exclusive representative and retained it in two separate elections. The Union was certified as the employees' exclusive representative on January 6, 2000, and has prevailed in subsequent decertification elections on March 9, 2001, and May 13, 2002. A third decertification petition was filed on May 15, 2003, and is pending at Case No. PERA-D-03-181-E. That petition is presently blocked by this unfair practice proceeding pursuant to the Board's rules. 34 Pa. Code § 95.58(b).

The County clearly violated PERA in its implementation of changed employment terms and conditions prior to reaching a negotiated settlement with the Union. The law is well established that a public employer violates its good faith bargaining obligation by declaring an impasse in negotiations and implementing new wages, hours and terms and conditions of employment proposed in prior negotiations. Philadelphia Housing Authority v. PLRB, 620 A.2d 594 (Pa. Cmwlth. 1992). As the Court has stated:

It would not serve the legislature's declared goal of promoting orderly and constructive relationships between public employers and their employees through good faith collective bargaining to allow a public employer to implement its final offer when the employees in the unit have not disrupted the continuation of public services by striking. Unilateral action by an employer during a period of no contract while employees continue to work serves to polarize the process and would encourage strikes by employees who otherwise may wish to continue working under the terms of the expired agreement while negotiations continue.

Philadelphia Housing Authority v. PLRB, 620 A.2d at 600, citing, St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

The findings of fact demonstrate that the Union was certified in January 2000, and had been negotiating with the County for three years without reaching an agreement. Twice during this period, the Union's majority support was challenged in decertification elections, which were defeated, the most recent by the largest margin. This most recent decertification election was conducted on May 13, 2002 and the order of certification was issued January 7, 2003. Coincident with the certification of the results of the second decertification election, the County implemented significant changes in wages and benefits by increasing the pay of bargaining unit members, altering employee contributions to medical insurance, altering the family and medical leave policy and changing its pay grade change policy. These changes strike at the heart of the Union's role as the elected representative of the employees to negotiate such matters, and effectively sent a message to employees in the bargaining unit that wages and benefits increases can and should be effected without the Union. This conduct, taken well into these protracted negotiations, is antithetical to the fundamental policy of PERA. The County's stated reason for the change is that the employees "should not go any longer without a compensation adjustment." (Finding of Fact 6, supra). The underlying facts and law, however, contradict the employer's acts. The employees have twice rejected attempts to decertify the Union (March 21, 2001, and January 7, 2003) since its initial certification in January 2000, despite

knowledge that pay and benefit increases would be deferred as long as negotiations continued. The employer cannot usurp the employees' right to elect to forgo increases during this impasse, and decide for them wage and benefit matters PERA reserves to the employees and their elected representative to negotiate.

The County's implementation of changed employment terms, and the subsequent unfair labor charge filed by the Union, prevented the existence of a stable bargaining relationship under which to negotiate a collective bargaining agreement. The County effectively placed the Union in the difficult position of choosing between two undesirable alternatives. First, the Union could have simply absorbed the unfair practice, because it improved employee compensation. However, that unchallenged, unlawful conduct would have shown bargaining unit employees that the quicker route to improved working conditions was without the Union, when the Union's continued majority was under annual challenge. Second, the Union could have filed a charge of unfair practices challenging the unlawful pay increase and effectively resisted the employer's attempt to improve employee pay.¹ Either choice would negatively impact the employees' right to an election free of coercion.

The Board has held that it,

cannot and will not reward the commission of an unfair labor practice by permitting the victim of that unfair labor practice to have its majority support challenged where the unfair labor practice itself tends to undermine the effectiveness of the employee representative and its relative support among the employees.

In the Matter of the Employees of Chester Township, 21 PPER ¶ 21090 (Final Order, 1990). It is noteworthy that several of the deleterious effects of the unfair practice remained in effect, including the family and medical leave changes, the pay grade change policy and the medical insurance contribution changes, from January, 2003, until October, 2003, and were only remedied after issuance of the PDO in September. This case is analogous to those in which the Board has blocked elections pursuant to Cf. Charley. Cf. Charley v. PLRB, 583 A.2d 65. In that case, the Court held that "[t]he Board has the discretion to decide when the effects of an unfair labor practice require a refusal to conduct a representation election." Cf. Charley v. PLRB, 583 A.2d at 67, citing, Commonwealth v. PLRB, 441 A.2d 470 (Pa. Cmwlth. 1982, affirmed in part, reversed in part on other grounds, 502 Pa. 7, 463 A.2d 409 (1983)(holding that the postponement of a representation election until outstanding unfair labor practice charges are resolved is discretionary with the Board).

¹ Generally, while usual remedy is restoration of the *status quo ante*, the Board does not rescind the benefits the employees receive by the unfair practice. It would serve no legitimate remedial or preventative purpose to punish a party that is a victim of an unfair practice, by allowing its action vindicating bargaining rights to become the basis to remove employee pay and benefits. AFSCME District Council 88 v. Warminster Township, 31 PPER ¶ 31156 (Final Order, 2000).

We now turn to the question of when an election pursuant to the decertification petition would be appropriate. For the above stated reasons, the Board disagrees with the Hearing Examiner that an election is timely at present. In determining the appropriate time of an election, the Board will examine and reconcile several competing factors, including the unfair labor practice, the remedial actions ordered, the policies of PERA and the employees' right to a fair and impartial resolution of the decertification petition.

It is significant that even in the absence of an unfair practice, a union is guaranteed at least one year from certification free of challenge to its majority support. In the Matter of the Employees of Twin Valley School District, 7 PPER 86 (Order and Notice of Decertification Election, 1976); In the Matter of the Employees of Belle Vernon Area School Dist., 20 PPER ¶ 20076 (Final Order, 1989); See also 43 P.S. § 1101.605(7)(i). The effect of this guarantee is to create, for one year, a duty upon the employer to bargain in good faith with the certified representative of its employees. In the Matter of the Employees of Twin Valley School District. Additionally, the Board has stated that a decertification petition is only proper after a one-year period and in the absence of a collective bargaining agreement, if the non-existence of the agreement is not attributable to any alleged unfair practice. Id.

In this case the County's unfair practices created instability in the bargaining relationship from the most recent election and certification in January 2003. Coincident with that certification, the County committed the unfair practice that went unremedied for most of calendar year 2003. Consequently, the Union never enjoyed a stable bargaining relationship free from challenge to its majority support for the minimum period required by law.

In light of the deleterious effects of the County's unfair labor practice, the County's denial of a stable bargaining relationship to the Union, and the failure to reach a collective bargaining agreement, the Board will hold in abeyance the decertification petition until the Union has enjoyed its right to a stable negotiating relationship with the County as guaranteed by law. During this time, the County and Union are still under the obligation to bargain in good faith for a new collective bargaining agreement. Therefore, in the absence of a prospectively filed unfair labor practice charge, the nature of which would taint the atmosphere and disallow a free and fair election, any election on the petition filed at No. PERA-D-03-181-E will not occur until the policies of PERA as above stated are fulfilled.

After a thorough review of the exceptions and all matters of record, the Board shall sustain the exceptions and direct that further proceedings on the decertification petition at Case No. PERA-D-03-181-E be continued until further order.

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 in the above-captioned matter be and the same are hereby sustained consistent with this order and the Proposed Decision and Order as amended herein is hereby 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.