COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 47 LOCAL 2187	:	
v.	:	Case No. PERA-C-04-182-E
CITY OF PHILADELPHIA	:	

FINAL ORDER

On June 23, 2005, AFSCME District Council 47, Local 2187 (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued June 6, 2005. In the PDO, the Hearing Examiner dismissed a charge of unfair practices and concluded that the City of Philadelphia (City) did not engage in unfair practices in violation of Section 1201(a)(1), (5) and (9) of the Public Employe Relations Act (PERA), by allegedly failing to implement a settlement agreement resolving a grievance. The City's Brief in Response was filed on July 13, 2005. After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDINGS OF FACT

4. The parties stipulated and agreed that on or about February 7, 2000, the Union filed a grievance against the City's free library concerning the library's failure to properly compensate shift employes for holidays pursuant to the collective bargaining agreement and civil service regulations. The grievance was not resolved at the earlier steps in the process, and a demand for arbitration was filed by the Union with the American Arbitration Association on or about February 26, 2001. A hearing before arbitrator Ralph H. Colflesh Jr., Esq. was scheduled for April 2, 2003. (N.T.8)

5. The parties stipulated and agreed that in lieu of a hearing they entered into a settlement agreement on April 2, 2003. That settlement agreement states:

AMERICAN ARBITRATION ASSOCIATION

DISTRICT COUNCIL 47 and CITY OF PHILADELPHIA
AAA Case No. 14 390 00311 01
Grievance: Class Action: FLOP Shift Employee Holiday Pay (2187-01-06)

SETTLEMENT AGREEMENT

AFSCME District Council 47 Local 2187 and the City of Philadelphia Free Library of Philadelphia agree to settle the above matter upon the following terms and conditions:

1. Shift employees within the Free Library shall be entitled to overtime and holiday compensation time in accordance with the collective bargaining agreement and applicable Civil Service Regulations.

2. Any current employee required to take a day off (free day) or to accept compensatory time or pay at straight time rates in any pay period when a holiday has occurred from January 1, 1999 to the present shall be compensated in the form of back pay calculated consistent with the requirements of paragraph 1above [sic]. An employee who has already used a compensatory day for the holiday shall receive the difference between straight time and the applicable overtime rate.

3. No later than 120 days from the date of this Consent Award, the Free Library shall furnish to the Union in writing a list of all employees whom it believes in good faith are entitled to back pay as set forth in paragraph 2 above, together with the calculations setting forth the amounts owed to each such employee. When the Union and the Library agree on the calculation, such employee shall receive retroactive compensation in the next ensuing pay period. When the Union and the Library disagree, the dispute shall be placed before the Arbitrator for decision.

4. The Arbitrator shall retain jurisdiction of this dispute for a period of not less than 180 days to resolve any disputes regarding implementation of this Agreement, including but not limited to disputes over entitlements to individual compensation.

5. The above constitutes the full terms of settlement between the parties.

(N.T. 8; Joint Exhibit 1)

DISCUSSION

In its exceptions, the Union argues that the Hearing Examiner erred as matter of law by concluding that the City's failure to comply with the settlement agreement at issue falls within the exclusive jurisdiction of the arbitrator and is not an unfair practice as alleged by the Union. In so arguing, the Union asserts that the Hearing Examiner erred in determining that the Board is being asked to resolve a "dispute" arising under the settlement agreement.

The findings of fact as amended herein are as follows. The City and the Union are parties to a collective bargaining agreement that contains a grievance/arbitration procedure. On or about February 7, 2000, the Union filed a grievance involving the City's free library concerning the library's failure to properly compensate shift employes for holidays pursuant to the collective bargaining agreement and civil service regulations. The parties failed to resolve the grievance at the preliminary steps in the process, and the Union demanded arbitration of the dispute. An additional hearing was scheduled for April 2, 2003. In lieu of a hearing, the parties entered into a settlement agreement on April 2, 2003.

The Union argues that the Hearing Examiner erred as matter of law by concluding that the City's failure to comply with the settlement agreement at issue falls within the exclusive jurisdiction of the arbitrator and not the Board. In support of this argument, the Union cites to Board and Court precedent that holds that repudiation of arbitration awards and/or grievance settlements constitutes violations of PERA. Moshannon Valley School District v. PLRB, 597 A.2d 229 (Pa. Cmwlth. 1991); Ambridge Area School District v. Ambridge Area Education Association, PSEA/NEA, 670 A.2d 1207 (Pa. Cmwlth. 1996). The Union further argues that the Board is not asked to resolve a "dispute" arising under the settlement agreement, but rather is asked to enforce the agreement. Therefore, the Union argues, the Board has jurisdiction to act and should find the City in violation of PERA.

Issues relating to the enforcement of agreements settling grievances prior to the issuance of an arbitration award present significant questions of labor law policy. The Board has previously held that as a general matter, an employer's refusal to comply with a grievance settlement arrived at a lower stage in the grievance process is an unfair practice. Moshannon Valley School District v. PLRB, *supra*. However, the Board has not previously addressed the narrow issue of whether or not the refusal to implement a grievance settlement agreement reached subsequent to the selection of an arbitrator, but prior to the issuance of a final, binding award, constitutes an unfair practice under Section 1201(a)(5) of PERA.

In reviewing this issue, we find guidance in the Board's and the courts' well established and analogous Section 1201(a)(8) jurisprudence. Generally, Section 1201(a)(8) of PERA imposes an obligation on a public employer to comply with a grievance arbitration award deemed binding under Section 903 of PERA. The Board has held that when the complainant in an unfair labor practice action charges a refusal to comply with the provisions of a binding arbitration award, the Board must determine first if an award exists, second, if the award has been stayed by an appeal, and third, if the respondent has failed to comply with the provisions of the arbitrator's decision. FOP Lodge 5 v. Philadelphia, 32 PPER ¶ 32102 (Order Directing Remand, 2001). Where the Board has determined that an award exists, and an appeal of the award does not stay the enforcement and the charged party has failed to comply with the provisions of the award, then the Board will find that the charged party committed an unfair practice under Section 1201(a)(8).

Further, the Board will not find that a public employer committed an unfair practice if the provisions of the arbitration award are ambiguous and the purported action necessary for compliance cannot be gleaned from the award. Joint Bargaining Committee of the Pennsylvania Employment Security Employees Association v. Commonwealth, Bureau of Labor Relations, 17 PPER ¶ 17177 (Final Order, 1986). In divining the intent of the arbitrator, the inquiry cannot require the Board to add to the award or fill gaps or holes in the award. AFSCME, Local 1971 v City of Philadelphia, Office of Housing and Community Development, 24 PPER ¶ 24052 (Final Order, 1993). Where the provisions of the award are vague, there is no basis for the Board to find that the public employer has refused to comply with it. As the Board explained in Commonwealth, Bureau of Labor Relations, "we fear that such an exercise would in fact undermine the final and binding nature of the arbitration award by placing the Board in the role of a 'super-arbitrator.'" Joint Bargaining Committee of the Pennsylvania Employment Security Employees Association v. Commonwealth, Bureau of Labor Relations, 17 PPER at 472.

Instead, where an ambiguous award exists and the arbitrator retained jurisdiction regarding the implementation of the remedy provided, disputes arising out of the interpretation of the award and the remedy issued, which may hinder the implementation of the award, are properly resubmitted to the arbitrator for clarification. In such a circumstance, the arbitrator is more familiar with the underlying contractual dispute, the award's intent and the remedy ordered than the Board. Simply stated, the arbitrator who authored the award is better situated to interpret his or her award as to legitimate disputes as to its meaning. As the Commonwealth Court stated, "reopening of arbitration under retained jurisdiction, in order to afford remedy under the original award, not only is permissible, but also fulfills the arbitration policy of PERA to provide inexpensive, expeditious contractual remedies." Greater Latrobe Area School District v. Greater Latrobe Education Association, 615 A.2d 999, 1004 (Pa. Cmwlth. 1992). However, where there is no legitimate dispute as to the

intent and meaning of the award, Section 1201(a)(8) of PERA and the caselaw make clear that the failure to comply with a binding grievance award is an unfair practice. The finality of the award is undermined by repeated return to the arbitrator under the guise of "interpretation" of an award when provisions are clear and free from alleged ambiguity.

We find that similar standards presently existing in a Section 1201(a)(8) setting should apply in circumstances, as here, where settlement of grievance(s) occurs at arbitration under the aegis of the arbitrator. Thus, where a settlement agreement is entered into at arbitration and its terms are not ambiguous, requiring interpretation, a party commits an unfair practice under Section 1201(a)(5) of PERA by failing to effectuate the agreement. In such cases, the Board will determine if the charging party proved that 1) a settlement agreement exists, 2) the parties' intent is apparent from settlement agreement, and 3) the party has failed to comply with the agreement's provisions. In determining if the charging party satisfied its burden, the Board will restrict its review to the settlement agreement and appropriate testimonial and documentary evidence. The Board will not interpret the parties' agreement to resolve ambiguities regarding the existence and binding nature of the agreement or to determine the intent of the parties. Where such an inquiry is necessary, the parties should return to the arbitrator for appropriate interpretation.

When settlement agreements are entered into subsequent to the selection of an arbitrator, arbitrators may play a significant role in reaching settlements and crafting agreements. As with arbitration awards, arbitrators that participate in the settlement process are in a far more advantageous position to interpret ambiguities within such agreements than the Board. Accordingly, where the arbitrator was active in reaching the agreement and reducing it to writing, the appropriate venue for parties seeking to enforce an ambiguous settlement agreement is before the arbitrator.

In this case, we find there is no dispute as to the existence and binding nature of the settlement agreement at issue. Additionally, the Union satisfied its burden of proving that the agreement is unambiguous. Further, the Union proved that the City refused to implement the remedy ordered in the agreement. Therefore, the burden shifts to the City to provide an adequate defense to the Union's *prima facie* case.

As a defense to the Union's case, the City argues that there is an ambiguity in the agreement, as there is more than one reasonable interpretation of the remedy. Specifically, the City contends that the Union interprets the agreement as requiring the City to compensate employes provided compensatory time in lieu of pay by either 1) rescinding the employes' additional compensatory time and paying them overtime pay or, 2) if the employe exhausted the compensatory time, pay the employe the difference between overtime pay and base pay. The City interprets the agreement as requiring it to compensate these employes by rescinding the employes' additional compensatory time and paying them only at the base rate, providing no additional compensation to employes who exhausted the compensatory time. In support of this argument, the City cites to the first paragraph of the settlement agreement in which it agrees to compensate the aggrieved employes in accordance with the collective bargaining agreement and applicable Civil Service Regulations. Further, the City argues that the compensation scheme outlined in paragraph 2 of the settlement agreement contradicts the compensation provisions of the collective bargaining agreement and the Civil Service Regulations. Because the agreement expressly retains jurisdiction in the arbitrator regarding disputes over the implementation of the agreement, if the Board agrees with the City and finds that the agreement is ambiguous and requires interpretation from the arbitrator, the Board will decline to find an unfair practice under Section 1201(a)(5) and direct the parties to the arbitrator for further appropriate proceedings.

On this record, we find the City's claim of ambiguity unmeritorious. First, the City's claim of an ambiguity contradicts the express language of the settlement agreement. Paragraph 2 of the settlement agreement plainly provides in relevant part: "An employee who has already used a compensatory day for the holiday shall receive the difference between straight time and the applicable overtime rate." (PDO, Finding of Fact 5). The settlement agreement mandates the City to follow a clear and unambiguous course of action. This unambiguous language requires no analysis of the collective bargaining agreement or reconciliation with other parts of the award allegedly supporting the City's interpretation.

Second, the City provided no evidentiary support for its argument. Rather, the City presented witness testimony regarding the City's compensation practices prior to the settlement agreement and the City managers' interpretation of the compensation scheme provided for in the collective bargaining agreement. The record is devoid of documentary evidence supporting this claim; the City never provided support from the "Civil Service Regulations," which allegedly support its position, or any portion of the collective bargaining agreement that allegedly supports its position and would require further interpretation. Accordingly, the City has failed to meet its burden of presenting adequate evidence to support its argument that the settlement is ambiguous. Consequently, the City's refusal to implement the settlement agreement constitutes an unfair practice under 1201(a)(5) PERA, and the Union's exceptions are sustained.

In dismissing the charge, the Hearing Examiner relied on Allegheny County, 28 PPER ¶ 28118 (Final Order, 1997), which we find does not support the City's action here. First, in Allegheny County, the Board reversed a hearing examiner decision and found an unfair practice for the employer's refusal to implement a settlement agreement reached prior to arbitration. The Board relied on its consistent body of law, (*e.g.* Moshannon Valley School District, *supra*), holding that an

employer's failure to comply with a pre-arbitration settlement agreement is an unfair practice. Second, the Board stated in *dicta* that once the parties reach arbitration, the Board's role under Section 1201(a)(5) enforcing the duty to bargain, including the discussion and arbitration of grievances, is "generally concluded." Absent an agreement settling the grievance at arbitration, once the matter is submitted to the arbitrator and results in an award, the Board's jurisdiction can be thereafter invoked under Section 1201(a)(8) for failure to comply with the award. Thus as a "general" matter, once arbitration is invoked, the nature of the Board's role generally changes. However, Allegheny County did not address the facts here (where at arbitration, a settlement is reached) and is accordingly distinguishable and an exception to the general rule.

PLRB v. AFSCME, District Council 47, 13 PPER ¶ 13248 (Final Order, 1982), relied on by the City is similarly unavailing. AFSCME was decided by the Board without the benefit of a hearing and record (the Board affirmed the Secretary's decision not to issue a complaint on the employer's charge that the union violated its bargaining duty by seeking arbitration), and the factual background of that matter is quite limited. However, the allegation of unfair practice was that despite an alleged settlement of the grievance, the union claimed the matter was not resolved and was resuming submission of the matter to an arbitrator. Our review of the limited analysis in AFSCME leads us to conclude that the matter was proceeding to arbitration and little if any value would be served by the employer's attempt to insert the Board in the position blocking the process. There was no factual record developed in the Board's order issued in 1982, because the matter was decided pre-complaint and the recitation of the claim in the Board's decision indicates that the parties disputed whether the agreement, in fact, resolved the issue. Accordingly, AFSCME, *supra*, would likely not meet the above-stated requirement that the agreement unambiguously resolved the dispute.

After a thorough review of the exceptions**,** the PDO and all matters of record, the Board shall sustain the exceptions and reverse the PDO consistent with this Order.

CONCLUSIONS

Conclusions 1 through 3 as set forth in the Proposed Decision and Order are hereby affirmed and incorporated herein by reference and made a part hereof. Conclusion number 4 of the Proposed Decision and Order is hereby vacated and set aside.

5. The City has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

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 and the Order on page 4 of the Proposed Decision and Order is hereby vacated and set aside; and

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the City shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed by Article IV of PERA.

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit.

3. Take the following affirmative action that the Board finds necessary to effectuate the policies of PERA:

(a) Compensate employes provided compensatory time for holidays in lieu of pay by either 1) rescinding the employes' additional compensatory time and paying them overtime pay or, 2) if the employe exhausted the compensatory time, pay the employe the difference between overtime pay and base pay; and

(b) Post a copy of this Final Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Final Order by completion and filing of the attached affidavit of compliance.

(d) Serve to the Union within twenty (20) days of the date hereof satisfactory evidence of compliance with this Final Order by completion and service of a copy of the attached affidavit of compliance.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member and James M. Darby, Member, this twentieth day of September, 2005. 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

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CITY OF PHILADELPHIA	:	

AFFIDAVIT OF COMPLIANCE

The City of Philadelphia hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Act, that it has compensated employes provided compensatory time for holidays in lieu of pay by either 1) rescinding the employes' additional compensatory time and paying them overtime pay or, 2) if the employe exhausted the compensatory time, paying the employe the difference between overtime pay and base pay, that it has posted a copy of the Final Order as directed and that it has served a copy of this affidavit on AFSCME District Council 47, Local 2187.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public