

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 538 :
 :
 v. : Case No. PERA-C-05-316-W
 :
 ARMSTRONG COUNTY :

PROPOSED DECISION AND ORDER

On July 20, 2005, Chauffeurs, Warehousemen & Helpers, Local Union No. 538 (Union), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the County of Armstrong (County) had violated sections 1201(a)(1) and 1201(a)(5) of the Public Employe Relations Act (Act) by refusing to arbitrate a grievance involving the discharge of an employe. On August 17, 2005, the Secretary of the Board informed the Union that the Board was unable to process the charge as filed and that "[i]t will be necessary for you to amend your charge to identify specifically the employe allegedly involved." On August 26, 2005, the Union filed an amended charge identifying the employe allegedly involved as Jason Nimal. On September 13, 2005, the Secretary dismissed the charge as amended. According to the Secretary, "[a] review of the Specification of Charges indicates that the alleged unfair practice occurred on or about March 2004. Accordingly, your charge is dismissed as untimely."

On September 22, 2005, the Union filed exceptions averring that the County did not commit the unfair practices charged until June 30, 2005, and that the charge therefore was timely filed. On October 18, 2005, the Board issued an order remanding the charge to the Secretary with direction to issue a complaint.

On October 25, 2005, the Secretary issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on December 14, 2005, if conciliation did not resolve the charge by then. After a series of unopposed continuances, a first day of hearing was held on June 8, 2006. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On June 9, 2006, the County filed an answer averring that the charge should be dismissed as untimely filed and because the grievance is not arbitrable. A second day of hearing was held on July 17, 2006. Again, both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On September 22, 2006, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On June 3, 1977, the Board certified the Union as the exclusive representative of a bargaining unit that includes "[a]ll full time and regular part time jail guards, the jail matron and jail cook" employed by the County and the Armstrong County Sheriff. (Case No. PERA-R-8190-W)
2. Effective January 1, 2004, the County and the Union entered into a three-year collective bargaining agreement. (County Exhibit C)
3. On February 25, 2004, the Union filed a grievance (no. 3981) alleging that the County violated the collective bargaining agreement by discharging Mr. Nimal. (Union Exhibit 4)
4. On May 10, 2005, the Union's attorney (Stephen H. Jordan, Esquire) sent to the County's attorney (Gregory Gleason, Esquire) an email as follows:

"Greg:

I wrote to you a week ago proposing that the grievances pending between the County and Local 538 be submitted to a single Mediator for resolution. Please advise me whether your client will agree to this proposal. If not, we will need to proceed to arbitration."

(Union Exhibit 9)

5. On June 30, 2005, Attorney Gleason sent to Attorney Jordan an email as follows:

"Steve - The County will not arbitrate the Nimal matter because he was in the probationary period at the time of termination and did not have a right to file a grievance over discharge and because the union did not advance the matter to arbitration in a timely matter. I will be on vacation from July 5 through July 12."

(Union Exhibit 15)

DISCUSSION

The Union has charged that the County committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act by refusing to arbitrate a grievance involving the discharge of an employe (Mr. Nimal). The Union contends that it timely filed the charge within four months of when the County refused to arbitrate the grievance on June 30, 2005. Citing PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982), the Union also contends that whether or not the grievance is arbitrable is for an arbitrator, not the Board, to decide.

The County has answered that the charge should be dismissed as untimely filed and because the grievance is not arbitrable. The County contends that it refused to arbitrate the grievance as early as March 8, 2004, which is more than four months before the filing of the charge. Citing Upper Makefield Township v. PLRB, 562 Pa. 113, 753 A.2d 803 (2000), the County also contends that the grievance involves a probationary employe and therefore is not arbitrable. The County further contends that the grievance is not arbitrable because the Union did not process it to arbitration in a timely fashion.

In order to be timely, a charge must be filed within four months of when the charging party knew or should have known of the unfair practices charged. Thomas v. Commonwealth of Pennsylvania, PLRB, 483 A.2d 1016 (Pa. Cmwlth. 1994). The record shows that the County refused to arbitrate the grievance on June 30, 2005 (finding of fact 5). The charge was filed within four months thereafter on July 20, 2005. Thus, the charge is timely filed.

In support of its contention that the charge is not timely filed, the County cites Delaware County Intermediate Unit, 25 PPER ¶ 25119 (Final Order 1994), for the proposition that the four month limitation period for the filing of a charge begins to run when the employer gives "clear and unequivocal notice - either actual or constructive - of the acts that constitute the alleged unfair labor practice." 25 PPER at 303, citing Truck Drivers and Helpers Union, Local No. 170 v. NLRB, 993 F.2d 990 at 998 n. 7 (1st Cir. 1993). The County also points out that by letter dated March 1, 2004, the Union's secretary/treasurer, principal officer (Betty Gross Fischer) wrote to the County's deputy warden (David Hogue) as follows:

"[B]y way of this letter, I'm requesting a meeting to discuss grievance number 3981 filed by Jason Nim[al]. Please advise me as to the earliest dates and times that you are available to meet on this grievance."

(N.T. 30). The County further points out that by letter dated March 8, 2004, its attorney (Mr. Gleason) informed Ms. Fischer as follows:

"Your correspondence of March 1, 2004, to deputy warden Hogue has been referred to me for response. Please be advised that the County will not schedule a

meeting regarding alleged Grievance 3981 because Mr. Nimal was a probationary employee at the time of his termination, and his complaint is not a grievance.

Mr. Nimal's date of hire is October 2, 2003, and he has therefore not completed his probationary period at the time of his termination."

(Union Exhibit 5). Based on that exchange of correspondence, the County would have the Board find that as early as March 8, 2004, the Union had clear and unequivocal notice that the County was refusing to arbitrate the grievance.¹

A close review of the exchange of correspondence reveals at best, however, that the Union requested a meeting to discuss the grievance and that the County denied the request. Noticeably absent from the exchange of correspondence is any indication that the Union requested to arbitrate the grievance or that the County refused any such request. Accordingly, the County's contention is without merit.

In Bald Eagle Area School District, *supra*, the court held that an employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act if it refuses to arbitrate a grievance alleging a violation of a collective bargaining agreement. In so holding, the court explained that the arbitrability of a grievance is to be decided by an arbitrator in the first instance and by the courts thereafter. The court condemned any attempt to circumvent the arbitration process by having the Board perform that task. As the court wrote:

"Furthermore, today's decision only returns the issue to the forum where it should have been decided at the outset; it obviously leaves open the possibility of additional review. However, were we to decide otherwise we would only encourage potential parties to such disputes to continue to follow the practice of preliminary litigating through one forum the power of another to decide the substantive issue. We condemn that practice and hold that hereafter issues involving conflicts between a public sector collective bargaining agreement and fundamental statutory policies of this Commonwealth must be presented first to arbitration for determination, subject to appropriate court review of any award in conflict with such policies."

451 A.2d at 764. See also Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), aff'd without opinion, 544 Pa. 199, 675 A.2d 1211 (1996)(same).

The record shows that the Union filed a grievance alleging a violation of a collective bargaining agreement between the parties (findings of fact 2-3), that the Union requested arbitration of the grievance (finding of fact 4) and that the District refused to arbitrate the grievance on the ground that it was not arbitrable (finding of fact 5).

Under the law as set forth in Bald Eagle Area School District and Chester Upland School District, the County was obligated to arbitrate the grievance upon request, with any question as to the arbitrability of the grievance to be decided first by the arbitrator and then by the courts. Thus, by refusing to arbitrate the grievance on the ground that it was not arbitrable, the County committed unfair practices as charged.

In support of its contention that it was under no obligation to arbitrate the grievance, the County cites Upper Makefield Township, *supra*, for the proposition that grievances involving probationary employees are not arbitrable unless the parties' collective bargaining agreement provides otherwise. According to the County, the parties' collective bargaining agreement does not provide otherwise here, so the grievance is not arbitrable. Whether or not the grievance is arbitrable is not, however, for the Board to decide. In Township of Sugarloaf v. Bowling, 563 Pa. 237, 759 A.2d 913 (2000), the court held that any dispute over the arbitrability of a grievance involving a probationary employe must be

¹In addition, the County would have the Board discredit the testimony of Ms. Fischer that the County's commissioners agreed to arbitrate the grievance (N.T. 26-27, 44). As the County points out, its director of human resources (Mary Anne Koleny) and commissioners (James Scahill, Richard Fink and Patricia Kirkpatrick) testified that the commissioners never agreed to arbitrate the grievance (N.T. 57-58, 71, 74, 78-79, 82-83). In finding the charge to be timely filed, however, no reliance has been placed on Ms. Fischer's testimony. Accordingly, no attempt has been made to resolve the conflict in the testimony as to whether or not the County agreed to arbitrate the grievance.

presented first to arbitration for decision. In so holding, the court cited Bald Eagle Area School District, supra. Accordingly, while Upper Makefield Township may well provide a defense for the County in arbitration, it provides no defense to the charge here.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The County is a public employer under section 301(1) of the Act.
2. The Union is an employe organization under section 301(3) of the Act.
3. The Board has jurisdiction over the parties.
4. The charge is timely filed.
5. The County has committed unfair practices under sections 1201(a)(1) and 1201(a)(5) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the County shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
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, including but limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the Act:
 - (a) Submit to the Union in writing an offer to arbitrate the grievance;
 - (b) Post a copy of this decision and 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; and
 - (c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-seventh day of September 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner

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September 27, 2006

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ARMSTRONG COUNTY
Case No. PERA-C-05-316-W

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Armstrong County Commissioners
Pittsburgh Regional Office

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The County hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and 1201(a)(5) of the Act, that it has submitted to the Association in writing an offer to arbitrate the grievance, that it has posted a copy of the proposed decision and order as directed and that it has served a copy of this affidavit on the Union.

Signature/Date

Title

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

Signature of Notary Public