

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 86 :
 :
 v. :
 : Case No. PERA-C-04-76-E
 COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF PUBLIC WELFARE :
 SELINGSGROVE CENTER :

PROPOSED DECISION AND ORDER

On February 17, 2004, AFSCME, District Council 86 (Union or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Commonwealth of Pennsylvania, Department of Public Welfare, Selingsgrove Center (Center or Respondent) violated Sections 1201(a)(1),(2),(5) and (9) of the Public Employee Relations Act (Act) by engaging in direct dealing with the local union president and by refusing to adhere to the meet and discuss and bargaining provisions of the Act.

On April 12, 2004, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of seeking resolution of the matters in dispute through mutual agreement of the parties and June 14, 2004, in Harrisburg was assigned as the time and place of hearing, if necessary.

The hearing was necessary and the Board assigned Thomas P. Leonard, Esquire, a hearing examiner of the Board, to hear the case. The parties requested several continuances and the hearing was eventually held on May 23, 2005, at which time all parties of interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The Examiner, on the basis of the testimony presented at the hearing, and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That the Commonwealth of Pennsylvania, Department of Public Welfare, Selingsgrove Center, is a public employer within the meaning of Section 301(1) of the Act.

2. That AFSCME, District Council 86, is an employe organization within the meaning of Section 301(3) of the Act.

3. That the Union is the exclusive bargaining representative of the employes at the Selingsgrove Center, which is operated by the Commonwealth's Department of Public Welfare. (N.T. 8)

4. The center employs individuals responsible for the direct care of approximately 375 mentally handicapped residents. The job classifications include licensed practical nurses (LPN's) and residential service aides (RSA's). There are approximately 800 employes represented by AFSCME at the center (N.T. 28, 30, 58)

5. That Nilus L. "Larry" Mattive is the facility director at the center, a position he has held since 2000. He is responsible for all of the administrative, programmatic and support services for the center. Mattive came to Selingsgrove Center at a time when the institution had numerous problems, including being decertified by the Pennsylvania Department of Health. Staffing and scheduling were top concerns of Mattive. (N.T. 58-59)

6. That Karen Black is the assistant to the executive director of AFSCME Council 13. She is responsible for dealing with situations that arise in the various bargaining units in Commonwealth agencies that may have a statewide impact or that cannot be

resolved at the local level. She has held that position for eight years. One of the agencies she deals with is the Department of Public Welfare. (N.T. 6)

7. That Sharon Sober is employed by AFSCME District Council 86 as a staff representative. She has held that position for the past 14 years. One of the areas of her responsibilities is the bargaining unit employes at Selinsgrove Center, which has approximately 800 employes in the unit. (N.T. 28)

8. That Sober was assigned to Selinsgrove by Norma Braidigan, Director of Council 86, employed by Council 13. Braidigan is responsible for assuring that union staff, such as Sober, assist the employes with their problems and that the master collective bargaining agreement is followed. (N.T. 16)

9. That for the past 10 years, the center's management and AFSCME participated in monthly labor-management meetings. Prior to the meetings, AFSCME proposes an agenda of items it wishes to discuss with the management. Mattive does not participate in the meetings. (N.T. 20, 28-29, Complainant's Exhibit 3)

10. That an issue that the parties have frequently discussed at the labor management committee meetings is the trading of "break days" (scheduled leave). The break days are scheduled at the beginning of the year and are obtained by seniority. In the past, more senior employes who had obtained break days that fell on holidays would trade, or even sell for cash, these holiday break days with less senior employes. (The center must schedule LPN's and RSA's on holidays because of the necessity for full time direct care of the residents.) The Union viewed the practice of switching break days as an abuse of the seniority benefit set forth in the collective bargaining agreement, whereby less senior employes are, in effect, prohibited from selecting a break day that the more senior employe never used. (N.T. 29-30, 32-33)

11. That in fall 2002, Braidigan reached an agreement with Mattive that the local management would continue to deal with Black and Sober over matters at the center because of the relatively inexperienced local union executive board at the center, including Union President Rick Humes, who was the new president. Additionally, Braidigan and Mattive reached an agreement that the work schedules for days off would remain the same. Present at this meeting was the executive board of the local union and Mattive's management team. (N.T. 18, 21-22, 31, 60-62)

12. That on September 9, 2003, Sober wrote to Black summarizing issues that remained unresolved issues at the center. One issue was the practice of the management in approving leave and how it interfered with the members' contractual rights. Sober suggested that the Union involve Ed Sadosky, the Department's Director of the Bureau of Direct Program Operations. (N.T. Complainant's Exhibit 1)

13. That on October 1, 2003, Black wrote to Sadosky seeking his assistance to resolve several matters at Selinsgrove Center that could not be resolved with Mattive. One of the items complained of was the alleged practice of Mattive failing to meet with Sober prior to meeting with employes over matters that affect wages, hours and working conditions. (N.T. 11, Complainant's Exhibit 2)

14. That on November 7, 2003, a meeting was held in Harrisburg at Council 13 of AFSCME. Present for the Commonwealth were Sadosky and Mattive. Present for the Union were Black and Sober. Humes was there, but AFSCME had not invited him. At this meeting, the parties agreed that Mattive and Sober would have more effective communication and that any local agreements had to be dealt with through Sober. (N.T. 24-25, 54-55, 60-62)

15. That at the December 11, 2003 labor-management meeting, the parties discussed, among other issues, the issue of trading "break days" (leave days) when such days fell on a holiday. (N.T. 29)

16. That at the December 11, 2003, labor-management committee meeting held at the center, present were Sober and Humes for the Union and Richelle Finerghy, Labor Relations Coordinator for the center. Mattive was not there. The agenda for the December

11 meeting included a discussion of trading break days when break days fell on a holiday. (N.T. 37, Complainant Exhibit 3)

17. That the Union was concerned over the issue of switching days because it would be directly related in some cases to break days that had been obtained by seniority bidding. In addition to the concerns addressed earlier, the switching concerned the Union because it was being implemented without notice to all of the employees, meaning it would be available to some employees and not to other employees. (N.T. 36-39)

18. That at the January labor management committee meeting Sober learned, for the first time, from Cindy Hoffman, Director of the Scheduling Office, that employees had gone ahead and switched holidays for Christmas and New Year that had just passed. This was also a surprise to the Center's labor management coordinator, Richelle Finerghy, who also learned about it at the same time. (N.T. 37, 75-77)

19. That Nancy Owens is the Director of Residential Unit Management at the center. She directs the community services managers in the Therapeutic Activity Services (TAS) department. She came to the center in November 2003 after long assignments at two other DPW facilities. (N.T. 80)

20. That in December 2003, an aide approached Owens about switching holidays with another aide; the aide who was working Christmas Day wanted to switch her "break day" with another aide who was working New Year's Day. Before Owens "had a chance to look into it," Humes approached Owens in the hallway in front of scheduling and asked if she would approve the switch. Owens was not aware of any agreements that had been made with the Union over this issue because she had not attended local labor management committee meetings. She had never met Humes before and had not talked with Mattive about the issue. (N.T. 81-85)

21. That Mattive had been aware of the possibility of a request for switching break days and had advised Humes that such an idea had problems with it and that it could only be done if worked out in the labor-management committee setting. Mattive later gave Hoffman the approval to enter into an agreement with the local union president over the issue of switching the holidays, the change that prompted this charge. (N.T. 63-67)

DISCUSSION

The Union's charge of unfair practices alleges that officials at the Department of Public Welfare's Selinsgrove Center violated the Act by engaging in direct dealing with employees, by refusing to bargain with the Union and by refusing to fulfill its meet and discuss obligations with the Union.

The Board will find an employer in violation of Sections 1201(a)(1) and (5) of the Act if the employer bypasses the exclusive representative of an employee and negotiates directly with the employee. Delaware Valley School District, 17 PPER ¶ 17104 (Proposed Decision and Order, 1986), 17 PPER ¶ 17156 (Final Order, 1986), Lehigh County, 11 PPER ¶ 11115 (Nisi Decision and Order, 1980).

The facts of this case do not support a direct dealing charge. There is no evidence that the management dealt directly with employees. The switch in the schedule was accomplished after the facility director instructed his managers to make the switch only after the local president and the labor management committee approved it. There is no evidence that Director Mattive or his managers dealt directly with the employees.

However, the facts do support a finding that the actions of the management of the center constituted a violation of the duty to bargain. Mattive did not follow through on the agreement to work Sober. The facts show that the switch of break days in December, 2003, was done without the involvement of Sober, the person designated in the November, 2002, meeting, at which Mattive and Sadosky were present, as the Union representative who the parties had agreed to communicate any changes in the schedules.

In its defense, the Commonwealth argues that the action of the center's management was not an intentional violation of the act but was simply an effort to respond to a request of two employes who had mutually agreed to switch holidays. The Commonwealth also argues that the idea of switching was an idea that was supported by Sober. Finally, the Commonwealth argues that the switch was done only after Owens obtained the approval of Humes, the local union president.

As for the first defense, long established labor law holds that even an unintentional unilateral grant of benefits in violation of an employer's bargaining duty constitutes an unfair practice. Millcreek Township School District v. PLRB, 631 A. 2d 734, 738 (Pa. Cmwlth. 1993). See also Warminster Township 31 PPER ¶ 31156 (Final Order, 2000). Consequently, the good intentions of the center's management will not relieve the employer from bargaining with the Union over a change in the scheduling of break days.

The second defense is that Sober's expression of interest in allowing switching to occur meant she had given her approval to the change that did in fact later occur. This argument begs the question of whether the center's administration followed through with its obligations to actually meet with Sober over scheduling changes as it had promised to do a year earlier. What prompted Sober's objection, and the present unfair practice charge, was that the switch was done without her knowledge, after she had let the management know the importance of informing her so that she could properly apprise the members of the unit of a change in the scheduling that would affect all employes. Sober is responsible for seeing that the contractual rights of approximately 800 employes are respected. Of these employes, nearly 300 were hired in the last few years. It does not help her do her job or help labor-management relations in general for her to be blindsided by an agreement reached without her involvement.

The third defense is that local union president Humes approved of the change in scheduling, thus satisfying the duty to bargain. The problem with this defense is the record is clear that the center's management, after being apprised by AFSCME Council 13's representatives of the inexperience of the local union leadership, agreed to work with AFSCME staff representative Sober on this issue before any changes were made and failed to do so.

Accordingly, even though the actions of the center's management may have been motivated by a desire to help employes and even though the local union president approved of the action, the action itself was directly contrary to agreement that had been reached that Sober would be part of any resolution of such issues.

The Union has also alleged that the Commonwealth has violated Section 1201(a)(2) of the Act, which prohibits public employers from "dominating or interfering with the formation, existence or administration of any employe organization." 43 P.S. 1101.1201(a)(2). This section of the Act is designed to prohibit the practice of employers operating "company unions" that are indistinguishable from the employer in terms of control of the day-to-day affairs of the organization. Gerald Boling v. Commonwealth of Pennsylvania, Department of Public Welfare, Mayview State Hospital, 16 PPER ¶ 16167 (Final Order, 1985). The facts do not show such a situation at the center. There may have been inexperienced local union leadership, but the union did not show that the local leadership was controlled by management. Accordingly, there will be no finding of a violation of Section 1201(a)(2) of the Act.

Finally, the Union has also alleged a violation of Section 1201(a)(9) of the Act, which makes it an unfair practice for public employers to refuse to comply with the provisions of "meet and discuss." There will be no finding of a violation of this section. The parties have fulfilled the meet and discuss provisions of the Act both through the monthly labor-management committee meetings at the center and through higher-level meetings in Harrisburg.

CONCLUSIONS

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

1. That the Commonwealth of Pennsylvania, Department of Public Welfare, Selinsgrove Center, is a public employer within the meaning of Section 301(1) of the Act.

2. That AFSCME District Council 86 is an employe organization within the meaning of Section 301(3) of the Act.

3. That the Board has jurisdiction over the parties hereto.

4. That the Commonwealth has committed unfair practices within the meaning of Section 1201 (a)(1) and (5) of the Act.

5. That the Commonwealth has not committed unfair practices within the meaning of Section 1201(a)(2) and (9) of the Act.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Commonwealth shall:

1. Cease and desist from interfering, 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 the exclusive representative of the employes at the Selinsgrove Center, including but not limited to the discussing of grievances with the exclusive representative.

3. Take the following affirmative action that the hearing examiner finds necessary to effectuate the policies of the Act:

(a) 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

(b) Furnish to the Board within twenty (20) days of the date hereof-satisfactory evidence of compliance with this decision and 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 (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this third day of March, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

THOMAS P. LEONARD, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 86

v.

COMMONWEALTH OF PENNSYLVANIA
DEPARTMENT OF PUBLIC WELFARE
SELINGROVE CENTER

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Case No. PERA-C-04-76-E

AFFIDAVIT OF COMPLIANCE

The Commonwealth of Pennsylvania, Department of Public Welfare, Selingsgrove Center hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (5) of the Public Employe Relations Act; that it has posted the proposed decision and order and that it has served a copy of this affidavit on AFSCME District Council 86.

Signature/Date

Title

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

Signature of Notary Public