

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 88 :  
 :  
 v. : Case No. PERA-C-04-13-E  
 :  
 NORTHAMPTON COUNTY :

**PROPOSED DECISION AND ORDER**

On January 12, 2004, AFSCME District Council 88 (AFSCME) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Northampton County (County) violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA). On February 2, 2004, the Secretary of the Board issued a complaint and notice of hearing directing a hearing before a Board hearing examiner on March 8, 2004. At the request of the County, the hearing was continued to March 22, 2004. On March 17, 2004, the County filed an answer to the complaint. A hearing was held on March 22, 2004, at which time all parties in interest appeared before the examiner and were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties subsequently requested that the examiner grant an indefinite continuance of the post-hearing briefing schedule so that they could engage in settlement discussions. By letter dated July 20, 2004, the examiner granted the parties' request.

No further communication was received from the parties until AFSCME filed a letter dated May 5, 2006, which alleged that the County had repudiated an agreement to settle the unfair practice charge. AFSCME requested reactivation of the charge and issuance of a briefing schedule. By letter dated June 2, 2006, the examiner directed the parties to file briefs by July 14, 2006. At the request of AFSCME, the time for filing briefs was extended to July 17, 2006. On that date, the parties forwarded briefs to the Board.

On August 28, 2006, the examiner conducted a hearing on AFSCME's charge against the County in Case No. PERA-C-06-196-E. That charge alleged that the County repudiated an agreement to settle several unfair practice charges, including the charge at issue here. The settlement alleged by AFSCME included withdrawal of the charge filed in this case. Because a ruling in favor of AFSCME in PERA-C-06-196-E would result in withdrawal of the charge at issue here, the examiner informed the parties by letter dated October 5, 2006 that he would issue a decision in PERA-C-06-196-E before deciding this case.

On February 12, 2007, the examiner issued a proposed decision in PERA-C-06-196-E, which concluded that AFSCME and the County did not reach a binding agreement to settle the unfair practice charges, including the charge at issue here. Accordingly, this case is now ripe for decision.

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

FINDINGS OF FACT

1. The parties stipulated and agreed that the County is a public employer for purposes of PERA. (N.T. 12)
2. The parties stipulated and agreed that AFSCME is an employe organization for purposes of PERA. (N.T. 12)
3. On July 22, 2003, the Board issued an order certifying AFSCME as the exclusive bargaining representative of a unit of all full-time and regular part-time residual nonprofessional employes of the County, including but not limited to employes in Corrections. (N.T. 6, 15; PERA-R-03-164-E)

4. When the residual unit was certified, it included the kitchen staff at the County prison. (N.T. 15; PERA-R-03-164-E)

5. The parties stipulated and agreed that after AFSCME was certified to represent the residual unit, the County sent out a request for proposals (RFP) from private contractors to operate the prison kitchen (N.T. 6, 11)

6. After AFSCME was certified to represent the residual unit, it orally requested that the County bargain over privatization of the prison kitchen. Thereafter, by letter dated September 5, 2003, AFSCME made a written request that the County bargain the issue. (N.T. 15-16; Union Exhibit 1)

7. By letter dated October 16, 2003, the County's human resources director suggested to AFSCME that the privatization of the prison kitchen may not be bargainable because "it appears that the decision . . . occurred early this year, with the sole remaining determination being the selection of the vendor." The letter also stated that the human resources director had no real involvement in the matter, and suggested that AFSCME contact other representatives of the County, including Director of Corrections James Smith. (N.T. 18-19; Union Exhibit 3)

8. By letter to the director of corrections dated October 23, 2003, AFSCME reiterated its request to bargain over the prison kitchen privatization and requested certain information, including copies of the RFP and the responses to the RFP. (N.T. 16-17; Union Exhibit 2)

9. On October 31, 2003, the County informed AFSCME that it was not obligated to bargain over the privatization of the prison kitchen because the decision was made prior to AFSCME's certification. (N.T. 17-18)

10. The County has adopted home rule and has a county executive. (N.T. 35)

11. By order dated December 2, 2003, the county executive awarded a contract to Aramark Correctional Services, Inc. for provision of prison kitchen services as "the most responsive and responsible bidder meeting specifications." (N.T. 19-20; Union Exhibit 4)

12. The county executive made the decision to subcontract kitchen services at the prison. (N.T. 118)

13. At the beginning of the process of seeking bids to provide kitchen services at the prison, the County did not focus on Aramark as the vendor that would provide the service. (N.T. 100)

14. The County received multiple responses by vendors to the RFP for prison kitchen services. (N.T. 101)

15. The County did not negotiate with AFSCME over the subcontracting of kitchen services at the prison. Rather, the County took the position that it had no obligation to bargain over this issue. (N.T. 44-45, 64, 123, 132, 147-148)

16. On January 7, 2004, the County and AFSCME met concerning various issues. They discussed the subcontracting of kitchen services at the prison, but did not engage in negotiations over the matter. Instead, their discussion was limited to AFSCME's request for information regarding the contract with Aramark. (N.T. 44-45, 60-61, 64, 148-149; Union Exhibit 7)

17. As a result of the subcontracting of the prison kitchen, the County laid off six members of the residual bargaining unit in or about February 2004. (N.T. 70-71)

#### DISCUSSION

AFSCME alleges that the County violated Section 1201(a)(1) and (5) of PERA by refusing to bargain over subcontracting of kitchen work at the County prison that had

previously been performed by members of the residual bargaining unit. The County contends that the unfair practice charge should be dismissed because: (1) the County decided to subcontract the kitchen work before AFSCME was certified as the exclusive representative of the residual unit; (2) AFSCME failed to request bargaining until after the decision was made; and (3) the County bargained with AFSCME over the effects of subcontracting the kitchen operation.

It is well settled that a public employer must bargain to impasse with the exclusive representative of the bargaining unit before subcontracting bargaining unit work. Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006); Upper Moreland Township School District v. PLRB, 695 A.2d 904 (Pa. Cmwlth. 1997), appeal denied, 552 Pa. 698, 716 A.2d 1250 (1998); Morrisville School District v. PLRB, 687 A.2d 5 (Pa. Cmwlth. 1996), appeal denied, 549 Pa. 708, 700 A.2d 445 (1997); Midland Borough School District v. PLRB, 560 A.2d 303 (Pa. Cmwlth. 1989), appeal denied, 525 Pa. 651, 581 A.2d 576 (1990). Here it is undisputed that the kitchen work at the County prison was performed exclusively by members of the residual bargaining unit before the work was subcontracted to Aramark (N.T. 15, 70-77).

It is also clear that the County did not bargain to impasse with AFSCME before it subcontracted the kitchen work. To the contrary, no bargaining occurred because the County took the position that it had no duty to bargain. Witnesses for both parties agreed that the discussion that occurred in January 2004 (after the subcontract had already been awarded to Aramark) only concerned AFSCME's request for information regarding the contract with Aramark (N.T. 44-45, 64, 148-149). Clearly, there was no negotiation over the decision to subcontract.

Indeed, the County only claims in its brief to have bargained over the effects of the decision to subcontract. However, a public employer's duty to bargain over subcontracting involves the decision itself and not merely its effects. Also, the record evidence on which the County relies does not even evidence bargaining over the effects of the decision to subcontract. Instead, as already discussed, this evidence merely indicates that the parties discussed AFSCME's request for information regarding the County's contract with Aramark.

The County's other arguments are equally meritless. The County claims that AFSCME knew that it was pursuing subcontracting before AFSCME was certified to represent the residual unit and should have demanded bargaining at that time. However, in the testimony cited by the County, AFSCME Assistant Director Lawrence Murin simply indicated that he believed "there were rumors to that effect" (N.T. 16). Also, until AFSCME was certified to represent the residual bargaining unit, it had no right to demand bargaining over the unit members' terms and conditions of employment, and the County had no duty to engage in such bargaining. West Hanover Township, 24 PPER ¶ 24016 (Proposed Decision and Order, 1993), 24 PPER ¶ 24041 (Final Order, 1993) (employer's duty to bargain under PERA arises when union obtains certification as exclusive representative of bargaining unit). Moreover, even after AFSCME was certified, it was not obligated to raise the issue of subcontracting with the County. Rather, as the party seeking to change the existing terms and conditions of employment, the County had the affirmative duty to seek out AFSCME and raise this issue in negotiations. Peters Creek Sanitary Authority, 33 PPER ¶ 33200 (Proposed Decision and Order, 2002), 34 PPER 27 (Final Order, 2003); Philadelphia School District, 29 PPER ¶ 29085 (Final Order, 1998). AFSCME did in fact request bargaining over the issue of subcontracting, both orally and in writing, but these requests do not obviate the fact that the County had the affirmative duty to raise the issue in negotiations.

Although the County offered testimony that it had already decided to subcontract the kitchen work before AFSCME was certified to represent the residual bargaining unit, I do not find this testimony to be credible. The County did not even issue the RFP seeking bids by outside contractors to perform the work until after AFSCME was certified. It strains credulity for the County to claim that it had decided to subcontract even before it had the opportunity to review the terms of any bids made in response to the RFP. Indeed, at the point in time where the County claims to have made the decision to subcontract, it had no way of knowing whether it would even receive any acceptable bids.

Moreover, as the County's own witness conceded, it had no contractually binding offers from outside contractors at the time of the alleged decision to subcontract (N.T. 116).

The County has adopted home rule and has a county executive (N.T. 35). The county executive was responsible for the decision to subcontract (N.T. 118), and he did not award the contract to Aramark until December 2003 (Union Exhibit 4), which was more than four months after AFSCME was certified to represent the residual bargaining unit. Notably, the county executive was not present at the hearing and did not testify that he decided to subcontract the kitchen work before AFSCME was certified. Other employees of the County may have been in favor of subcontracting and may have included projected cost savings from such action in their budget proposals, but until the bidding process was completed and a bid was accepted by the county executive, there was no certainty that the work of the kitchen employees would be transferred to an outside contractor.

The Board has held that where a charge alleges a unilateral transfer of bargaining unit work to non-unit personnel, the charge is premature and will be dismissed if it is filed before the work is actually transferred outside the unit. APSCUF v. PLRB, 661 A.2d 898 (Pa. Cmwlth. 1995). The Board's rationale in such cases is that no change occurs in employee working conditions until the work is actually removed from the unit. Here the change in working conditions did not occur until after the county executive awarded the contract for kitchen services to Aramark. That action occurred months after AFSCME was certified as the exclusive representative of the residual bargaining unit, which included the workers in the prison kitchen.

Upon AFSCME's certification, the County was duty bound to maintain the status quo and to bargain any proposed changes in terms and conditions of employment with AFSCME. Peters Creek, *supra*. The status quo upon AFSCME's certification was that the kitchen work was performed by unit members. Because the County altered the status quo and subcontracted the unit's work without prior bargaining with AFSCME, it violated its duty to bargain under PERA. Thus, the County will be directed to restore the status quo ante by rescinding the subcontract with Aramark, restoring the work to the bargaining unit, and making the employees whole for any losses caused by the unfair practice.

#### CONCLUSIONS

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

1. The County is a public employer for purposes of Section 301(1) of PERA.
2. AFSCME is an employee organization for purposes of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The County 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 PERA, the examiner

#### HEREBY ORDERS AND DIRECTS

that the County shall:

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in 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, including but not limited to the discussing of grievances with the exclusive representative.

3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of PERA:

(a) Rescind the subcontracting of kitchen work at the County prison;

(b) Restore the kitchen work to the bargaining unit;

(c) Offer the affected employes unconditional reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them;

(d) Make the affected employes whole all wages and benefits which they would have earned from the date of discharge to the effective date of an unconditional offer of reinstatement;

(e) The backpay due the employes shall be computed on the basis of each separate calendar quarter or portion thereof during the period stated above. The quarterly period shall begin with the first day of January, April, July and October. The pay shall be determined by deducting from a sum equal to that which the employes normally would have earned for each quarter or portion thereof earnings which they actually earned or with the exercise of due diligence would have earned in other employment during that period; earnings which they would have lost through sickness; and any unemployment compensation received by them. Earnings in one particular quarter shall have no effect on the liability for any other quarter. Where an employer claims lack of due diligence, it shall be the employer's obligation to establish that there was substantially equivalent employment reasonably available and that due diligence was not exercised to find interim employment;

(f) Post a copy of this decision and order within five (5) days from the date hereof in a conspicuous place readily accessible to their employes and have the same remain so posted for a period of ten (10) consecutive days; and

(g) 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 pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED AND MAILED this tenth day of April, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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PETER LASSI, Hearing Examiner

April 10, 2007

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NORTHAMPTON COUNTY  
Case No. PERA-C-04-13-E

Enclosed please find a copy of the proposed decision and order issued in the above-captioned matter.

Sincerely,

PETER LASSI  
Hearing Examiner

Enclosure

cc: Northampton County Commissioners  
R. Michael Kirkpatrick, Esquire  
Northampton County Prison Advisory Board

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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**AFFIDAVIT OF COMPLIANCE**

Northampton County hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of PERA; that it has rescinded the subcontracting of kitchen work at the County prison; that it has restored the kitchen work to the bargaining unit; that it has offered the affected employes unconditional reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them; that it has made the affected employes whole for all wages and benefits which they would have earned from the date of discharge to the effective date of an unconditional offer of reinstatement; that it has posted the proposed decision and order as directed therein; and that it has served a copy of this affidavit on AFSCME at its principal place of business.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

\_\_\_\_\_  
Signature of Notary Public