COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 88	:	
	:	
v.	:	Case No. PERA-C-06-196-E
	:	
NORTHAMPTON COUNTY	:	

PROPOSED DECISION AND ORDER

On May 9, 2006, 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 Employe Relations Act (PERA). On June 7, 2006, the Secretary of the Board issued a complaint and notice of hearing directing a hearing before a Board hearing examiner on August 17, 2006. At the request of the County, and over the objection of AFSCME, the hearing was continued to August 28, 2006. On that date, all parties in interest appeared before the examiner and were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs on or before November 9, 2006.

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 County is a public employer for purposes of PERA.

2. AFSCME is an employe organization for purposes of PERA.

3. On July 22, 2003, the Board issued an order certifying AFSCME as the exclusive representative of a unit of all full-time and regular part-time residual nonprofessional employes of the County. (N.T. 13-14; Union Exhibit 1)

4. The County and AFSCME commenced negotiations for an initial collective bargaining agreement for the residual unit around August 2003. (N.T. 14, 17-18)

5. Lawrence Murin is AFSCME’s assistant director. Murin is responsible for negotiating labor agreements for various units of County employes, including the units at issue here. (N.T. 11-14)

6. From 2003 until late 2005, Drew Lewis was both the County’s director of community and economic development and its chief negotiator in contract negotiations with AFSCME. (N.T. 15, 82-83)

7. On January 12, 2004, AFSCME filed a charge of unfair practices with the Board, which alleged that the County violated Section 1201(a)(1) and (5) of PERA by refusing to bargain over subcontracting of kitchen work performed at the County prison by members of the residual bargaining unit. The charge was docketed at Case No. PERA-C-04-13-E. (N.T. 20-21; Union Exhibit 2; PERA-C-04-13-E)

8. On January 15, 2004, AFSCME filed a charge of unfair practices with the Board, which alleged that the County violated Section 1201(a)(1) and (5) of PERA by declining to provide step increases to the members of the residual bargaining unit during negotiations for an initial collective bargaining agreement. The charge was docketed at Case No. PERA-C-04-18-E. (N.T. 21-22; Union Exhibit 4; PERA-C-04-18-E)

9. On January 26, 2004, AFSCME filed a charge of unfair practices with the Board, which alleged that the County violated Section 1201(a)(1) and (5) of PERA by repudiating an agreement to negotiate with AFSCME over means by which to avoid furloughs in three bargaining units, including the residual unit. The charge was docketed at Case No. PERA-C-04-32-E. (N.T. 21; Union Exhibit 3; PERA-C-04-32-E)

10. The unfair practice charges filed at Case Nos. PERA-C-04-13-E and PERA-C-04-32-E were consolidated for hearing and were heard by a Board hearing examiner on March 22, 2004. (N.T. 21, 23; Union Exhibits 2, 3; Case Nos. PERA-C-04-13-E, PERA-C-04-32-E)

11. After the March 22, 2004 hearing, the County contacted AFSCME to initiate settlement negotiations concerning the charge filed in Case No. PERA-C-04-13-E. (N.T. 23-24; Union Exhibit 5)

12. On June 25, 2004, the Board issued an order certifying AFSCME as the exclusive representative of a unit of all full-time and regular part-time court-appointed nonprofessional employes of the County. (N.T. 13-14; Union Exhibit 1)

13. By letter dated July 12, 2004, AFSCME informed the Board's hearing examiner that the County and AFSCME were requesting an extension of the post-hearing briefing schedule in Case Nos. PERA-C-04-13-E and PERA-C-04-32-E "in order to allow them time to explore settlement of this matter." The letter stated that the parties were "requesting an indefinite postponement, with the intention of advising the Board at such time as either a final settlement is reached, or the parties determine that no settlement can be reached and briefs need to be filed." (N.T. 25; Union Exhibit 6)

14. On August 30, 2004, the Board issued an order certifying AFSCME as the exclusive representative of a unit of all full-time and regular part-time court-appointed professional employes of the County. (N.T. 13-14; Union Exhibit 1)

15. On September 10, 2004, the County faxed information to AFSCME concerning the members of the residual bargaining unit who were affected by the subcontracting of the work in the prison kitchen, including the rate of pay when the employes were laid off, whether they filed for retirement and any recall offers that they received for County employment. (N.T. 31; Union Exhibit 8)

16. On September 15, 2004, the County faxed information to AFSCME regarding any unemployment compensation benefits received by the former employes of the prison kitchen. (N.T. 32-33; Union Exhibit 8)

17. By memorandum dated September 23, 2004, AFSCME informed the County that it had calculated the amount owed to each of the employes who were affected by the subcontracting of the work in the prison kitchen. AFSCME stated that "[t]he amounts are approximations and cover the time period from mid-February to mid-September. These amounts would increase with the passing of time." (N.T. 33; Union Exhibit 8)

18. By letter dated December 6, 2004, AFSCME informed the Board that the County and AFSCME were jointly requesting a continuance of the hearing scheduled for December 16, 2004 in Case No. PERA-C-04-18-E "as the parties are currently involved in settlement discussions." (N.T. 25-26; Union Exhibit 7)

19. On December 22, 2004, the Board issued an order certifying AFSCME as the exclusive representative of a prison guard unit that includes juvenile detention care workers at the County's juvenile justice center. (N.T. 13-14; Union Exhibit 1)

20. By memorandum dated January 14, 2005, the County informed AFSCME of "the County position as it relates to our requirements to voluntarily enter the residual unit into interest arbitration." The County's memo stated:

> "At this juncture we are willing to enter into this position with the following items: Base pay rate, life insurance, and bereavement. Please realize that this is a point-in-time decision. As we proceed and continue to negotiate, I believe that other possibilities may exist depending on where other items fall. Additionally, we must keep in mind that the County's willingness to enter into this voluntary interest arbitration position is specifically contingent upon the union's withdraw (sic) of specific unfair labor practice charges; the most significant being the prison kitchen charge.

> Also, we need to continue the balance of the discussions as it relates to the possible remuneration for the affected workers in the prison kitchen. We have not had a discussion on the kitchen worker issue since Linda Markwith sent you the memo dated 9/15/2004 concerning the specifics of each worker. I fully believe that all of these items are interrelated and it is difficult to submit a cemented list of 'in or out' issues for interest arbitration without fully understanding the entire package. Let's talk early next week in order to begin to quickly move this item forward. Thank you."

(N.T. 42; Union Exhibit 11)

21. On March 18, 2005, the Board issued an order certifying AFSCME as the exclusive representative of a unit of all full-time and regular part-time court-related employes of the County. (N.T. 13-14; Union Exhibit 1)

22. By letters dated April 18, 2005 and April 29, 2005, AFSCME sent the County certain information regarding backpay for the employes affected by the subcontracting of the kitchen work in the prison. The April 18 letter requested that the County contact AFSCME "with available dates to meet." The County did not respond to AFSCME's letter and never took a position on the amount of compensation that may be due the affected employes. (N.T. 34-35; Union Exhibit 8)

23. In a letter to the County dated July 1, 2005, AFSCME stated as follows:

> "As you know, Northampton County and AFSCME District Council 88 are presently involved in negotiations for an initial collective bargaining agreement for the four above-referenced bargaining units, as well as for the residual nonprofessional unit. The County and AFSCME agreed last fall that, in the event they are unable to resolve all issues for these units at the bargaining table, in the interest of efficiency, they will conduct a consolidated arbitration proceeding, along with the residual unit. . ."

(N.T. 56; Union Exhibit 21)

24. By letter dated July 15, 2005, the County's legal counsel responded to AFSCME's July 1, 2005 letter as follows:

> "[C]ontrary to other comments in your letter, the County has never agreed to a consolidated arbitration, or even to go to interest arbitration at this time. Instead, the County would prefer to see draft CBA's from the bargaining units, or at least written lists of demands. It does not make sense to go to arbitration until the parties have exhausted negotiations. At this point, my understanding is that the bargaining units have not even put forth proposed CBA's or written lists of demands. The County would welcome this information from you. Lastly, even if there is an impasse, the County will have to evaluate whether a consolidated arbitration is appropriate. The issues for the different units may be different, and not all groups may be eligible to require a binding arbitration . . . ."

(N.T. 57-58; Union Exhibit 22)

25. In a letter to AFSCME dated October 18, 2005, the County referenced a meeting in which the parties discussed the "three unfair labor practices that have been filed against the County by your bargaining units, Contract negotiations with the bargaining units, and potential arbitrations." With regard to these matters, the County stated:

> "First, the County is not willing to consider a consolidated arbitration of the court-related/appointed units (with or without the residual unit) until such time as good faith negotiations have been exhausted, and we can see what issues exist. There may be different issues for different units.

> Second, while the County is willing to consider an arbitration with the residual unit, as part of the resolution of the ULP's, the County would, at this time, not be agreeable to submitting the issue of benefits to arbitration (and some other items). Drew Lewis' January 2005 correspondence to Mr. Murin identifies the issues that we would be willing to submit to arbitration (and those we would not be willing to submit), pending an agreement on other matters . . . .
>
> Third, Mr. Murin indicated that the numbers contained in his April 2005 proposal for resolution of the alleged prison kitchen ULP are now stale. Even if, however, the Union would prevail in a ULP and some other relief be awarded, we do not agree with the concept that damages would run ad infinitim (sic). In fact, my understanding is that at least one of the employees was rehired by Aramark, and two other employees retired. Nevertheless, we are asking that you please provide us with your updated compensation figures . . . ."

(N.T. 59; Union Exhibit 23)

26. By letter dated November 8, 2005, AFSCME responded to the County's letter of October 18, 2005. AFSCME stated that its "agreement to resolve the three outstanding unfair labor practices was based upon the County's prior agreement to allow unresolved issues in the residual unit relating to wages, broadly defined, and benefits to go to interest arbitration along with outstanding issues in the court-related and court-appointed units. If in fact the County reneges on that agreement, we will have to revisit whether or not the unfair labor practices can be resolved." (N.T. 61-62; Union Exhibit 24)

27. By letter to AFSCME's legal counsel dated February 23, 2006, the County's legal counsel referenced a telephone conversation on December 19, 2005, and stated that "[i]t is my understanding of that conversation that we agreed that the outstanding unfair labor practices (PERA-C-04-13-E, PERA-C-04-18-E, and PERA-C-04-32-E) could all be resolved during the course of collective bargaining negotiations, provided that Union concerns over backpay and recall rights for former prison kitchen employees are addressed . . . ." (N.T. 63; Union Exhibit 27)

28. By letter dated February 24, 2006, AFSCME's legal counsel responded to the February 23 letter from the County's legal counsel as follows:

> "With regard to the pending unfair labor practices involving the County's unilateral cessation of step increases (PERA-C-04-18-E), and repudiation of its agreement with AFSCME relating to the 2004 furloughs (PERA-C-04-32-E), as we discussed in December, AFSCME and the County agreed last year to pursue global resolution of these unfair practice charges, as well as the charge concerning the County's unilateral subcontracting of bargaining unit work in the prison kitchen (PERA-C-04-13-E).
>
> As part of that global agreement, however, the County consented to proceed to one, consolidated interest arbitration for all five new units, to resolve any matters remaining in dispute for the court-appointed and court-related units, as well as unresolved matters relating to wages, broadly defined, and benefits, in the residual unit (unless the parties could reach agreement on all issues through negotiations).
>
> Therefore, the understanding articulated in your February 23 letter, does not, in the Union's view, completely reflect the parties' agreement regarding how to handle these unfair labor practice charges."

(N.T. 64; Union Exhibit 28)

29. By letter to AFSCME Assistant Director Murin dated March 1, 2006, the County's legal counsel stated as follows:

"Following our negotiations today, I felt it was important to clarify a couple of key points that were discussed.

- It is the County's position that while at one time the possibility of agreeing to arbitration with the residual unit was discussed, it was always discussed in conjunction with the withdrawal of unfair labor practices, specifically one regarding the prison kitchen. In the more than twelve (12) months since theses (sic) discussions were initiated, no unfair labor practice charges have been withdrawn by the Union. Accordingly, any previous offers made by the County to agree to binding arbitration for the residual unit are now revoked . . . ."

(N.T. 67; Union Exhibit 29)

30. By letter dated March 8, 2006, the County informed AFSCME that it was willing to conduct a consolidated interest arbitration for the court-related nonprofessional, court-appointed nonprofessional, court-appointed professional, and juvenile detention caseworker bargaining units. The County further stated that it "is not willing to grant arbitration to the Residual Unit. We will continue to evaluate this issue and should the County's position ever change, we will advise you accordingly." (N.T. 72; Union Exhibit 31)

31. By letter dated March 24, 2006, AFSCME requested that the County state its position regarding interest arbitration for the residual unit no later than April 7. (N.T. 72; Union Exhibit 32)

32. By letter to the County dated March 30, 2006, AFSCME Assistant Director Murin referenced the kitchen privatization, stated that he was enclosing 2005 earnings documentation for two individuals, and also stated that "I believe the County now has the information necessary to prepare a response to our settlement offer." (N.T. 31-36; Union Exhibit 8)

33. By letters dated April 6 and April 21, 2006, the County advised AFSCME that it had finalized its decision not to grant arbitration to the residual unit. (N.T. 73, 75; Union Exhibits 33, 34)

34. The County and AFSCME never reduced the alleged agreement to settle the unfair practice charges to writing. (N.T. 30, 95-96, 103-104)

35. The County and AFSCME never agreed on an amount of back wages for the employes that were affected by the subcontracting of the kitchen work at the prison. (N.T. 95, 100)

36. AFSCME did not withdraw the unfair practice charges in Case Nos. PERA-C-04-13-E, PERA-C-04-18-E, or PERA-C-04-32-E, and "reactivated" those charges by either requesting the establishment of a briefing schedule or scheduling of a hearing. (N.T. 101-102, 107-108, 115)

DISCUSSION

AFSCME alleges that the County violated Section 1201(a)(1) and (5) of PERA by repudiating an alleged oral agreement to settle three unfair practice charges. AFSCME contends that in return for withdrawal of the unfair practice charges in Case Nos. PERA-C-04-13-E, PERA-C-04-18-E and PERA-C-04-32-E, the County: (1) agreed to pay backpay to the employes who were affected by the subcontracting of the kitchen work at the County prison (the action by the County that was the basis for the charge in PERA-C-04-13-E); and (2) agreed to proceed to binding interest arbitration for the residual bargaining unit over wages and benefits, including health insurance, even though the County otherwise had no legal obligation to participate in interest arbitration for the residual unit. AFSCME also contends that the parties agreed that the interest arbitration for the residual unit would be held in conjunction with the interest arbitration proceedings for other bargaining units of County employes that actually have the statutory right to demand interest

arbitration. The County acknowledges that the parties had discussions concerning potential settlement of the unfair practice charges, but argues that the charge should be dismissed because AFSCME did not act consistent with the terms of the alleged agreement, and the parties never reached complete agreement on the terms under discussion.

To establish that a binding agreement exists, the complainant must prove that the parties reached a meeting of the minds concerning the subject matter at issue. Bethel Park School District, 27 PPER ¶ 27033 (Proposed Decision and Order, 1995). The Board will examine all relevant circumstances to determine whether the parties reached an agreement. Id. It is the external conduct of the parties and not subjective beliefs that establishes the presence or absence of a meeting of the minds. Bethel Park, citing Mack Trucks, Inc. v. International Union, 856 F.2d 579 (3d Cir. 1988), cert. denied, 489 U.S. 1054, 109 S.Ct. 1316 (1989). No binding settlement exists where the parties reach agreement on some terms, but are unable to come to a complete resolution of their dispute via a settlement agreement. Folcroft Borough, 28 PPER ¶ 28097 (Final Order, 1997). See also Milk and Ice Cream Salesmen, Drivers and Dairy Employes, Local Union No. 205, 4 PPER 52 (Nisi Decision and Order, 1974)(no meeting of the minds exists where there are important matters that are still not completely settled).

After review of the entire record and the briefs of the parties, I find that AFSCME has failed to prove by substantial and legally credible evidence that the parties reached complete agreement on the terms under discussion to settle the three unfair practice charges. Indeed, while AFSCME offered testimony as to its subjective belief that the parties reached a meeting of the minds, its objective conduct undermines that claim.

For example, AFSCME's assistant director/chief negotiator (Lawrence Murin) testified that the parties reached the alleged oral agreement to settle the unfair practice charges in September 2004 (N.T. 30). However, AFSCME did not advise the Board of this alleged settlement, even though it had pledged to do so in a July 2004 letter that requested indefinite postponement of the post hearing briefing schedule in Case Nos. PERA-C-04-13-E and PERA-C-04-32-E to allow time for settlement discussions (FF 13). Moreover, in December 2004, some three months after reaching the alleged agreement to settle the charges, AFSCME informed the Board that the parties were jointly requesting a continuance of the hearing scheduled in Case No. PERA-C-04-18-E "as the parties are currently involved in settlement discussions" (FF 18). If the parties had already settled the charges, as claimed by AFSCME's primary witness, then why did AFSCME indicate that settlement negotiations were ongoing? Indeed, as late as March 30, 2006, when AFSCME Chief Negotiator Murin sent the County certain information related to AFSCME's claim for backpay for the employes who were affected by the subcontracting of the kitchen work at the County prison, Murin stated that "I believe that the County now has the information necessary to prepare a response to our settlement offer" (FF 32). Thus, AFSCME itself indicated that the parties were still engaged in settlement discussions long after its chief negotiator claimed the parties had reached a settlement agreement.

Also worthy of note is AFSCME's failure to withdraw any of the unfair practice charges (FF 36), even though this was allegedly part of the settlement agreement. AFSCME declined to take such action even though its assistant director/chief negotiator acknowledged in his testimony that the charges concerning the step increases and furloughs (Case Nos. PERA-C-04-18-E and PERA-C-04-32-E) did not require any further agreement, and only needed to be withdrawn by AFSCME (N.T. 101-102). When Murin was asked on cross-examination why AFSCME did not withdraw the charges, he testified as follows:

> "A. Well, we would be fools to withdraw the only leverage that we had in order to get the county to agree to something without an agreement from them to actually do it.
>
> Q. Oh, so there wasn't an agreement to do it?
>
> A. There was an agreement to do it. But why should we withdraw the unfair labor practice charges in advance of even knowing what the payout was going to be to the kitchen workers."

(N.T. 102).

This testimony only underscores the parties' failure to reach agreement regarding any backpay due the former employes of the prison kitchen, which was supposedly part of the quid pro quo for withdrawing the subcontracting unfair practice charge and other charges. As AFSCME Chief Negotiator Murin conceded earlier in his testimony, "[a]n amount was never agreed upon" (N.T. 100). While Murin subsequently testified that the parties had agreed on a "formula" for computing the back pay and that its computation was simply "a matter of arithmetic" (N.T. 104-105), he acknowledged that the parties did not agree on the period of time for which the employes should receive backpay:

> "Q. Well, isn't it a little bit more than arithmetic? Isn't it also how long that period runs for?
>
> A. Yeah.
>
> Q. You heard Mr. Lewis's testimony that he disagreed with your calculation that it continued to run, correct?
>
> A. I believe at some point they raised concerns about the continuing liability. And our response was, Well look, we're the ones ready to settle this thing. You haven't responded to us."

(N.T. 105).

This testimony by AFSCME's chief negotiator indicates that the parties never fully resolved the issue of compensation for the employes who were affected by the subcontracting of the work in the prison kitchen, and thus never reached a comprehensive settlement on the terms under discussion. Further support for this conclusion is found in Murin's March 2006 letter to the County, in which he expressed his belief that "the County now has the information necessary to prepare a response to our settlement offer" (FF 32). If by March 2006 the parties were still exchanging offers on one of the components of the proposed settlement, then clearly they did not reach an agreement in September 2004 as testified to by AFSCME's primary witness. In sum, I find that AFSCME failed to prove that the parties ever resolved the issue of backpay for the kitchen workers. Without such proof, I cannot find that the parties reached a meeting of the minds on the terms of the proposed settlement. Moreover, AFSCME's objective conduct indicates that the parties never reached a comprehensive settlement. Accordingly, the County did not fail to comply with a binding settlement agreement, and the charge of unfair practices must be dismissed.

One other matter requires comment. AFSCME argues that the examiner erred by not allowing testimony regarding alleged statements by a state mediator during negotiations. However, not only are state mediators prohibited from testifying regarding any mediation they conduct, 43 P.S. § 211.34, but "mediation communications" are privileged and are not admissible as evidence in any action or proceeding, including administrative proceedings such as the one at issue here. 42 Pa.C.S.A. § 5949(a). "Mediation communications" include verbal communications by a mediator during or outside a mediation session. 42 Pa.C.S.A. § 5949(c). Therefore, the alleged statements by the mediator are not admissible in this proceeding.

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 employe organization for purposes of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County has not committed unfair practices in violation of Section 1201(a)(1) or (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 charge of unfair practices is dismissed and the complaint issued thereon is rescinded.

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 twelfth day of February, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

PETER LASSI, Hearing Examiner

February 12, 2007

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NORTHAMPTON COUNTY
Case No. PERA-C-06-196-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
AFSCME District Council 88
R. Michael Kirkpatrick, Esquire
George C. Hlavac, Esquire
David R. Keene, Esquire