

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME COUNCIL 13 :  
 :  
 v. : Case No. PERA-C-08-200-E  
 :  
 COMMONWEALTH OF PENNSYLVANIA :  
 PENNSYLVANIA GAME COMMISSION :

**PROPOSED DECISION AND ORDER**

On May 27, 2008, the American Federation of State County and Municipal Employees (AFSCME) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Commonwealth of Pennsylvania (Commonwealth), Pennsylvania Game Commission (PGC), had violated sections 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by refusing to comply with the terms of a grievance settlement involving the use of lunch and break room facilities at the PGC's training center. On June 12, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on July 29, 2008. On June 24, 2008, the hearing examiner, upon the request of the Commonwealth and without objection by AFSCME, continued the hearing. On August 28, 2008, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of AFSCME's case-in-chief, the Commonwealth moved to dismiss the charge for lack of proof that it violated the settlement agreement (N.T. 30-31). The hearing examiner took the motion under advisement (N.T. 32). On December 4, 2008, AFSCME filed a brief. On December 5, 2008, the Commonwealth filed a brief.

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. The Board has certified AFSCME as the exclusive representative of a bargaining unit that includes employees of the Commonwealth working at the PGC. (Case No. PERA-R-1413-C)

2. By letter dated December 18, 2003, the chief of personnel services for the PGC (Harry G. Benion) proposed a settlement of grievance 90-2518-0245 as follows:

"As a response to the First Step meeting held on July 15, 2003 concerning the above referenced grievance, the Pennsylvania Game Commission (PGC) proposes the following settlement.

- PGC will proceed with renovation of the current 2<sup>nd</sup> floor lunchroom using the proposed floor plan dated February 27, 2003 (attached).

- PGC will permit access to the cafeteria in the Ross Leffler School of Conservation with the following conditions:

- The cafeteria will be available for breaks and lunch Monday through Friday from 9:00 a.m. until 3:00 p.m. EXCEPT:

- When a WCO Training Class is in residence.
- When the cafeteria is being used for meetings (meetings causing such a conflict will be posted conspicuously outside the cafeteria).

The lounge in the Ross Leffler School of Conservation will be made an alternative site when the cafeteria is being used for meetings and off limits for breaks/lunch. People should use the second floor refrigerator and microwave on these days so as not to interrupt meetings in the cafeteria. (This does not include those times when a WCO class is in residence).

o The cafeteria frequently will be shared over the lunch period with people enrolled in a training event where lunch is provided. Sufficient space to accommodate the group in training will be reserved and marked as such on the appropriate number of tables. Employees using the cafeteria for lunch will be expected to honor these reservation arrangements.

o PGC will place a refrigerator (full-size) and microwave in the seating area close to where the coat rack is currently situated.

o Use of the kitchen adjoining the dining area will not be permitted; however, employees can wash dishes, when necessary, in the second floor lunch room. PGC will install movable room divider in the cafeteria to separate the seating area from the kitchen if adequate funding is available.

o Use of the cafeteria will be expected to conform to reasonable standards of cleanliness and order. Employees will be expected to dispose of trash, clean the table when appropriate, and replace chairs in their original position when leaving the room.

o PGC will post an announcement that the cafeteria is now available for use by employees (pending settlement).

This agreement resolves all issues encompassed in the above referenced grievance.

If you are in concurrence with this proposal, please sign in the space indicated and return an executed copy to my office.

It is understood that acceptance of this agreement does not establish a precedent or in any way prejudice the contractual rights of the Commonwealth or the Union."

(N.T. 7, 12-13, 41; Union Exhibit 1)

3. On January 6, 2004, a staff representative for AFSCME (Mary Schwanger) agreed to the grievance settlement. (N.T. 7-8; Union Exhibit 1)

4. In February 2007, the Commonwealth sent an email as follows:

"With the 27<sup>th</sup> Class of Wildlife Conservation Officers taking up residence April 1<sup>st</sup> it is timely to review changes you can anticipate with respect to the training wing of the building.

Lunches and breaks may not be taken in the training wing while the 27<sup>th</sup> class is in residence, nor may employees use the gymnasium or weight room regardless of time of day. Nor will employees be permitted to use the cafeteria's refrigerator for storing items or the microwave for heating. We'll move the cafeteria refrigerator to another location in the building if the refrigerator in the second-floor lunch room is insufficient to fill the need.

Also, the training wing parking lots will be needed for training division staff, guest lecturers and cadets. For those who typically use the training wing lots, please park elsewhere. Also, those who come and go through the Cadet entrance adjacent to the cafeteria should use the front entrance to the building.

There are weeks during the year-long training curriculum when the WCO class will be away from Harrisburg. During these weeks use of the training wing will return to normal with the exception the second floor will remain off limits. The cafeteria and lounge will be available for breaks and lunches, and the gymnasium will be available for breaks and after-hours activity with the understanding users will not be permitted to use the second floor. Use of the training wing parking lots and entrance will also go back to normal use.

Training division staff will announce in advance the weeks Cadets will be away from Harrisburg.

These expectations will take affect (sic) on Monday, March 26<sup>th</sup>.

Thank you"

(N.T. 10-11; Union Exhibit 2)

5. On May 4, 2007, the president of AFSCME Local 2518 (Betty Joyner) filed grievance 90-2518-0247 alleging that "Management Fails to comply with terms of the grievant (sic) settlement 90-2518-0245[.]" The relief or remedy sought by Ms. Joyner was, "Permit All Employees Access to utilize the Ross Leffler School of Conservation Wing on a shared agreed basis, including the Gym, Lounge, parking, cafeteria & outside picnic table[.]" (N.T. 10, 12, 14-15; Commonwealth Exhibit 1)

6. On January 10, 2008, the parties resolved grievance 90-2518-0247 as follows: "The parties shall meet locally to discuss the break/meal facilities specifically focusing on the facilities available to employees when a WCO training class is in session." (N.T. 14; Union Exhibit 3)

7. In early February 2008, the parties met pursuant to their resolution of grievance 90-2518-0247. They did not reach an agreement. (N.T. 14, 26-27, 44-45)

8. By letter dated February 12, 2008, Mr. Benion wrote to Ms. Schwanger as follows:

"I am writing you regarding lunch and break room facilities at the Pennsylvania Game Commission's Elmerton Avenue headquarters.

The January 6, 2004, agreement, which had been put in place to settle Grievance 90-2518-0245, concerning the reduction of space in the second floor lunch break room for the purpose of expanding Game Commission offices, served the parties for more than three years. Although the issue of lunch and break room facilities while a Wildlife Conservation Officer Training Class is in residence had been addressed in the 2004 agreement, we recognized that the enrollment of the 27<sup>th</sup> class, the first class to take up residence at the Ross Leffler School of Conservation following establishment of the settlement agreement, would limit employees to the second floor lunch and break room. For this reason, even though it was not required under the terms of the 2004 settlement, in March 2007, prior to the April 1 reporting day for WCO Trainees, the Game Commission moved proactively to open a second lunch and break room on the first floor of our Elmerton Avenue headquarters building in order to better accommodate the needs of employees, including those represented by AFSCME Council 90.

Unfortunately a protracted disagreement over the continued implementation of the January 6, 2004, settlement agreement following the enrollment of the 27<sup>th</sup> class has developed. The grievance 90-2518-0247, filed by Betty Joiner, Steward, in May 2007, was heard by the Eastern Joint Area Committee on January 10, 2008. The Committee's decision was that the parties shall meet locally to discuss the break/meal facilities specifically focusing on the facilities available to employees when a WCO Training class is in session.

On Thursday, January 31, the Game Commission met with Ms. Joyner and George Estright of AFSCME Council 90 to discuss issues surrounding facilities available to employees when a WCO training class is in session. While this meeting gave the parties the opportunity to focus on major issues of concern, in the end we were unable to come to a resolution mutually acceptable to AFSCME and the Pennsylvania Game Commission. Since the parties cannot agree on continued implementation of the 2004 settlement of Grievance 90-2518-0245, especially during those times a WCO Training Class is in session, at this time the Game Commission considers the aforementioned settlement agreement to be suspended.

Effective March 10, 2008, the following policy for lunch and break room facilities at Pennsylvania Game Commission headquarters at 2001 Elmerton Avenue will apply.

- 1) Game Commission employees will be permitted and encouraged to make full use of the two lunch and break rooms established for this purpose on the first and second floors of the headquarters building at 2001 Elmerton Avenue. We believe that these two lunch and break rooms essentially are comparable, with respect to space and facilities, to the single lunch and break room that had existed on the second floor prior to the office expansion project for which the 2004 settlement agreement had been put in place.
- 2) The cafeteria, lounge and TV room situated in the Training wing, which houses the Ross Leffler School of Conservation, will no longer be available for employees to use as lunch and break rooms during the workday.
- 3) Employee access to the Training wing, including use of the restrooms, copier machine, gymnasium, and exercise room, will continue to be permitted, as in the past, during those times when a Wildlife Conservation Officer Trainee class is *not* in residence at the Ross Leffler School of Conservation.
- 4) We are prepared to meet and discuss periodically regarding improvements to the lunch and break rooms on the first and second floors of our headquarters building. Items brought to our attention at the January 31 meeting, including securing a larger trash can and a second microwave oven for the first floor break room, are being reviewed.

In closing, please do not hesitate to contact me if you have any questions or concerns."

(N.T. 27; Union Exhibit 4)

#### DISCUSSION

AFSCME has charged that the Commonwealth committed unfair practices under sections 1201(a)(1) and (5) by refusing to comply with the terms of a grievance settlement involving the use of lunch and break room facilities at the PGC's training center. As AFSCME points out, the grievance settlement provides that the cafeteria at the PGC's training center "will be available for breaks and lunch Monday through Friday from 9:00 a.m. until 3:00 p.m." except (1) when a WCO training class is in residence and (2) when the cafeteria is being used for meetings (finding of fact 3). As AFSCME also points out, the Commonwealth now "considers the aforementioned settlement agreement to be suspended" and has imposed a policy under which the cafeteria "will no longer be available for employees to use as lunch and break rooms during the workday" (finding of fact 8).

The Commonwealth has moved to dismiss the charge for lack of proof that it violated the settlement agreement. According to the Commonwealth, during its case-in-chief, AFSCME proved nothing more than that the Commonwealth acted consistent with a proviso in the settlement agreement "that the cafeteria won't be available to non-WCO employees when a training class is in residence" (N.T. 31).

In its brief, the Commonwealth also contends that the charge should be dismissed because AFSCME filed a grievance seeking relief in violation of the grievance settlement and thus waived its right to enforce the grievance settlement. As the Commonwealth points out, after it sent an email that the cafeteria would not be available while a WCO class was in residence (finding of fact 3), AFSCME filed grievance 90-2518-0247 to gain access to the cafeteria on a shared basis (finding of fact 5), even though the grievance settlement provides that the cafeteria would not be available when a WCO training class was in residence. The Commonwealth further contends that the charge should be dismissed

because it has a sound basis for interpreting the parties' resolution of grievance 90-2518-0247 to mean that the grievance settlement was no longer in effect. As the Commonwealth points out, the parties resolved grievance 90-2518-0247 by agreeing to "meet locally to discuss the break/meal facilities specifically focusing on the facilities available to employees when a WCO training class is in session" (finding of fact 6) and met pursuant to their resolution of the grievance, albeit without reaching an agreement (finding of fact 7).

An employer commits unfair practices under sections 1201(a)(1) and (5) if it violates the terms of a grievance settlement. Moshannon Valley School District v. PLRB, 597 A.2d 229 (Pa. Cmwlth. 1991).

During its case-in-chief, AFSCME established, as noted above, that the grievance settlement provides that the cafeteria at the PGC's training center "will be available for breaks and lunch Monday through Friday from 9:00 a.m. until 3:00 p.m." except (1) when a WCO training class is in residence and (2) when the cafeteria is being used for meetings. AFSCME also established, as noted above, that the Commonwealth now "considers the aforementioned settlement agreement to be suspended" and has imposed a policy under which the cafeteria "will no longer be available for employees to use as lunch and break rooms during the workday." Thus, it is apparent that AFSCME proved that the Commonwealth violated the terms of the settlement agreement by prohibiting use of the cafeteria even when a WCO class is not in residence and even when meetings are not being held. The Commonwealth's motion to dismiss is, therefore, denied.

Given that the Commonwealth violated the terms of the settlement agreement, it also follows that the Commonwealth must be found in violation of the PERA as charged.

The Commonwealth's contention that AFSCME waived its right to enforce the settlement agreement because it filed grievance 90-2518-0247 seeking relief in violation of the settlement agreement is without merit. A waiver must be "clear and unmistakable." Delaware County, 25 PPER ¶ 25030 at 97 (Final Order 1994). AFSCME's filing of the grievance hardly fits that description. To the contrary, although AFSCME may well have been seeking relief in violation of the settlement agreement, it is apparent that AFSCME's filing of the grievance was an attempt to enforce the settlement agreement. No clear and unmistakable waiver of its right to enforce the settlement agreement is apparent under the circumstances.

The Commonwealth's contention that it has a sound basis for interpreting the parties' resolution of grievance 90-2518-0247 to mean that the grievance settlement was no longer in effect also is without merit. Although no violation of an employer's statutory obligation to bargain in good faith may be found where the employer has a sound basis for interpreting an agreement of the parties to mean that it could act in a particular fashion and where it acts in conformity with its interpretation of the agreement, Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000), such is not the case here. The parties' resolution of grievance 90-2518-0247 relates not to the settlement agreement but to grievance 90-2518-0247. Thus, the Commonwealth does not have a sound basis for interpreting the parties' resolution of grievance 90-2518-0247 to mean that the settlement agreement was no longer in effect.

#### CONCLUSIONS

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

1. The Commonwealth is a public employer under 301(1) of the PERA.
2. AFSCME is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has committed unfair practices under sections 1201(a)(1) and (5) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing 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 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 hearing examiner finds necessary to effectuate the policies of the PERA:

(a) Comply with the terms of the grievance settlement;

(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 completing and filing 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 seventeenth day of December 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner