COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 33 AND AFSCME LOCAL 159	:	
	:	Case No. PERA-C-07-489-E
v.	:	
CITY OF PHILADELPHIA	:	

PROPOSED DECISION AND ORDER

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) by the American Federation of State County and Municipal Employes District Council 33 (AFSCME) and AFSCME Local 159 (Local) on November 16, 2007, alleging that the City of Philadelphia (City) violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA). On December 5, 2005, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on January 11, 2008, in Philadelphia, Pennsylvania. The Complaint and Notice of Hearing on the amended charge was issued on December 22, 2004. A series of continuance requests resulted in a hearing being held on April 3, and April 30, 2008. At both days of hearing, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The hearing 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 City is a public employer.

2. AFSCME and the Local are employe organizations.

3. AFSCME is recognized as the exclusive bargaining representative of a non-professional unit of City employes. AFSCME has fifteen local union affiliates, eleven of which provide representation to non-professional and non-uniformed City employes. (N.T. 87, 124).

4. The Local is one of the fifteen affiliates of AFSCME. It is comprised of two chapters. Local 159A unit members have the right to strike under PERA. Some Local 159B unit members do not have the right to strike, and are guards as defined by the Act. Local 159B represents correctional officers, correctional supervisors and prison maintenance personnel. Local 159B also represents counselors and security guards at the youth study center. There are over 1,900 Chapter B unit members, including 1811 guards and 133 youth detention counselors. The City's prison system has issued a Policies and Procedures document which states "[c]orrectional personnel, as security employees, are considered essential for the protection of public safety and by Pennsylvania law are not permitted to strike." (N.T. 24-28, 31, 32-35, 39, 47, 48, 89, 142, 175, 176, 190-193; Union Exhibits 4-9, City Exhibit 7; 43 P.S. §1101.805).

5. The City has gone to interest arbitration with the members of Local 159B on three prior occasions: 1980, 1982 and 1988. Currently, all the Local's members are subject to the current collective bargaining agreement between AFSCME and the City. (N.T. 31, 45-48, 90, 179; Union Exhibit 1, 10-12).

6. On September 11, 2007, AFSCME notified the City's labor relations director that it intended to request collective bargaining, and if necessary, interest arbitration for those Local 159B employes of the Philadelphia Prison System and the Department of Human Services, as part of bargaining a successor collective bargaining agreement. In the letter, AFSCME told the City that it had expressly authorized the Local's officers and bargaining committee to deal directly with the City for those demands subject to collective bargaining and interest arbitration. AFSCME included Local 159B's contract proposals, dated August 13, 2007, in the September 11, 2007, letter to the City. The current contract expires on June 30, 2008. (N.T. 95-97; Union Exhibit 3, 13).

7. By letter dated September 20, 2007, the City refused to engage in separate negotiations or interest arbitration for Local 159B's members. (N.T. 97-99; Union Exhibit 14).

8. On October 9, 2007, AFSCME wrote the City that under Section 801 of PERA, both parties needed to contact the Bureau of Mediation to provide its services, since there was no agreement on a new contract. On that same date, AFSCME also wrote to the Bureau of Mediation, informing it that a bargaining dispute existed between the City and AFSCME's Local 159B employes. AFSCME included the applicable Mediation form with that correspondence. (N.T. 99-101; Union Exhibit 15, 16; 43 P.S. § 1101.801).

9. By letter dated October 31, 2007, AFSCME wrote the City specifically requesting interest arbitration under Sections 805 and 806 of PERA with respect to correctional employes, and designating the Local's arbitrator. (N.T. 101; Union Exhibit 17).

10. On November 5, 2007, the City wrote AFSCME that it was refusing to participate in any separate negotiations to resolve the contractual issues of its correctional members and was rejecting the request for interest arbitration on their behalf. (N.T. 102; Union Exhibit 18).

11. The City does not contest the timeliness of AFSCME's interest arbitration demand. (N.T. 199, 200).

DISCUSSION

In this pas de trois, AFSCME and the Local allege that the City violated Section 1201(a)(1) and (5) of PERA when it refused a timely request to proceed to binding interest arbitration under Section 805 of PERA for those bargaining unit members of AFSCME who are guards as defined by PERA, and who the City says do not have the right to strike. The City defends its actions through a series of arguments concatenated from the premise that a 1961 City ordinance takes away the guards' right to interest arbitration and the Board's jurisdiction.

The City argues that the Board does not have jurisdiction to order interest arbitration for the guards because the Board lacks the ability to put guards in their own unit by removing them from the ordinance's purview. Since they cannot become a separate unit, argues the City, the guards have no right to interest arbitration because they are not a "unit of guards" as PERA mandates. The City also argues that the Board has already ruled that guards covered by the ordinance do not have the right to interest arbitration. In two tangential arguments, the City argues that guards covered by the ordinance are "not without a remedy for [their] issues;" and that this charge is premature. A review of these arguments shows why they fail. But, the best place to start the analysis is with those applicable sections of PERA.

PERA recognizes the unique position guards hold in the statutory scheme of bargaining. While guards clearly have the right to organize, their organizational right is limited to bargaining units that exclude other public employes. 43 P.S. § 1101.604(3). Additionally, because they perform such essential work, guards are prohibited from striking "at any time." 43 P.S. § 1101.1001.

In return for not allowing guards their strongest weapon in the bargaining process - the right to strike - and to help maintain some balance of power between the employer and the guard units, PERA creates and empowers a binding, tripartite, interest arbitration panel[1] to decide the appropriate terms and conditions of employment for "units of guards" when the parties themselves are unable to agree. 43 P.S. § 1101.805.

This trade-off of allowing binding interest arbitration in return for no right to strike goes to the very heart of the bargaining relationship and its underlying public policy. Courts have steadfastly, directly connected the inability to strike and the right to interest arbitration as the conjoined twins of labor law. By way of example, under a

[1] One arbitrator is selected by the employer, another by the union, and those two select a third. 43 P.S. § 1101.806.

similar statute for police, generically referred to as Act 111[2], police are also prohibited from striking but have the right to binding interest arbitration. Describing the possibility of a situation where police had no right to strike yet were not granted interest arbitration, our Supreme Court said, "This absurd result is obviously contrary to the intent of the legislature...." Borough of Lewistown v. PLRB, 558 Pa. 141, 151 n.8, 735 A.2d 1240, 1245 n.8. *See also*, Office of Administration v. PLRB, 528 Pa. 472, 481, 598 A.2d 1274, 1278 (1991)(Section 805 of the PERA mandates binding interest arbitration where employer and "*representatives* of prison guards" reach an impasse, because prison guards are prohibited from striking. Binding interest arbitration is the *quid pro quo* for the denial of the right to strike) (emphasis added); Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006) (same); Clinton County, 24 PPER ¶ 24144 (Final Order, 1993)(same). PERA follows this *quid pro quo* philosophy of replacing the right to strike with interest arbitration for guards.

PERA, then, sets up unique rules for guards: they must have their own exclusive units; they cannot strike; and, in direct return for no strike capability, guards are guaranteed binding interest arbitration. Significantly, in Section 2003, PERA also recognizes the ordinance that supposedly keeps the guards in question from going to interest arbitration.

Section 2003 of PERA, in referring to the ordinance, says that the ordinance's provisions "which are inconsistent with the provisions of this act [PERA] shall remain in full force and effect so long as the present provisions of that ordinance are valid and operative." Consequently, where the ordinance and PERA are at odds, the ordinance trumps PERA. 43 P.S. § 1101.2003.

Having laid out the law under PERA, we now turn to the ordinance that the City attempts to use in denying the City's guards interest arbitration, even though the City still denies them the right to strike.

Formally titled, "An Ordinance to authorize the Mayor to enter into an Agreement with District Council 33, American Federation of State, County and Municipal Employes, A.F.L.-C.I.O., Philadelphia and Vicinity regarding its representation of certain City employes,"[3] this City ordinance was passed on April 4, 1961. It essentially created one huge bargaining unit which contains groups of employes that PERA would later prohibit, for now obvious reasons, from being in the same unit. The unit created by the ordinance now includes guards, other rank and file employes, guard sergeants and lieutenants, other supervisors, and both professional and nonprofessional employes.[4]

The City's assertion that the Board has no jurisdiction to order interest arbitration stems from the holding in two early Board cases. In the first case, a group of deputy sheriffs petitioned the Board in 1971 to represent the City's deputy sheriffs, who were then covered by the ordinance. And, indeed, in that case, the Board found that it had no jurisdiction over the representation petition because Section 2003 PERA "prevents the Board from entertaining a petition for representation which challenges the propriety of a group's inclusion in the overall unit established by the Ordinance." City of Philadelphia (Deputy Sheriffs), 2 PPER 138 at 139 (Decision of PLRB, 1972).[5]

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[2] 43 P.S. § 217.1-217.12. Under this statutory scheme, police are prohibited from striking and in return are granted interest arbitration, a virtually identical situation to guards under the PERA.

[3] PERA incorrectly transposes some capital and lower case letters in the name of this ordinance. 43 P.S. § 1101.2003; City Exhibit 4.

[4] The ordinance gives bargaining rights to guard sergeants and lieutenants. (N.T. 121). The record is unclear whether these positions would be first level supervisors and supervisors under PERA. However, since the ordinance takes precedence over PERA, guard sergeants and lieutenants would be included among those guards who get interest arbitration. All bargaining unit employes that the City considers guards who do not have the right to strike regardless of their possible status under PERA, would have the right to interest arbitration under the ordinance.

[5] Exceptions were filed to this order and after a hearing was held, the Board issued a Final Order on November 6, 1972, dismissing those exceptions and confirming the above-referenced order. City of Philadelphia (Deputy sheriffs), 3 PPER 355 at 357 (Nisi Order of Dismissal, 1973). That November 6, 1972, final order, alas, is unreported.

In the second case, City of Philadelphia (Deputy Sheriffs), 3 PPER 355 (Nisi Order of Dismissal, 1973), a petition was filed by the Fraternal Order of Police asking to represent a unit of deputy sheriffs who were then covered by the ordinance. Dismissing the petition, the Board reiterated its position that the "existence of the Ordinance precludes the Board from taking jurisdiction of a Petition for Election which challenges the inclusion of a group of employes in the overall bargaining unit created by the Ordinance." Id. at 357.[6] These two cases, however, decided the issue of whether there can be a second bargaining agent for some employes under the ordinance's purview, not whether the guards covered by the ordinance can get interest arbitration.

Since Section 805 of PERA allows only "units of guards" the right to interest arbitration, argues the City, and the Board cannot carve out a unit of guards[7], then the guards currently under the auspices of the ordinance simply can't get the benefit of interest arbitration, even though the City considers them guards under Section 1001 of PERA and they cannot strike. The City's logic here shows just how it cherry-picks those sections of PERA it wants the ordinance to override so that it has the maximum advantage over the guards' working conditions, while not allowing them the one economic weapon that comes close to leveling the playing field: interest arbitration. When the subject matter of the ordinance overrides PERA, it does so across the whole of PERA, not just in those sections that benefit the City.

There is no dispute that where it is in conflict with PERA, the ordinance controls. The ordinance, in fact, did away with PERA's requirement that guards be in their own exclusive unit. Guards in the City are not in their own unit, and indeed, are precluded by the ordinance from forming their own unit with another bargaining representative. The language in Section 604(3) that does not permit guards in a unit with other non-guard employes is superceded by the ordinance.

Likewise, the language in Section 805 that limits "units of guards" to interest arbitration is also superceded by the ordinance, because the ordinance does away with the requirement that guards be in their own unit. When the ordinance did away with the requirement of a separate unit for guards, it did so both in Section 604(3) and in Section 805. Any requirement in PERA that references guards in their own unit is simply rendered nugatory by the ordinance.

The City spends much time and effort in its brief reciting a litany of cases for various propositions concerning rules of statutory construction, highlighting what it asserts is the interpretive difference between Section 1001's prohibition against "guards" striking, and Section 805's use of the term "units of guards" having a right to interest arbitration. (City's brief at 10-12).

The rules of statutory construction to which the City refers include: courts will not disturb the plain meaning of the statute[8]; the mention of one thing in a statute implies the exclusion of others not expressed[9]; and the legislature is assumed to avoid mere surplusage and therefore effect must be given to every word in the statute[10].

Regardless of those rules of statutory construction, the simple fact remains that when the legislature adopted PERA, it was mindful of the ordinance, since, in Section 2003, it specifically gave the ordinance the dominant position when it conflicts with PERA. The legislature knew, when it adopted PERA, that Section 604(3)'s prohibition of guards in mixed units was precluded by the ordinance. Likewise, the legislature also knew that Section 805's "units of guards" requirement was inapplicable under the ordinance, because there are no units of guards.[11]

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[6] It is the Commonwealth Court opinion in this case, Employes of the City of Philadelphia, Deputy Sheriffs I & II v. PLRB, 350 A.2d 923 (Pa. Cmwlth. 1976) that the City cites in its brief.

[7] It is clear that another bargaining representative cannot, by petition, have the Board remove employes from the purview of the ordinance.

[8] Philadelphia Housing Authority v. Commonwealth of Pennsylvania, 499 A.2d 294, 508 Pa. 576 (1985).

[9] Commonwealth v. Spotz, 716 A.2d 580, 552 Pa. 499 (1998).

[10] Commonwealth v. Scott, 546 A.2d 96, 376 Pa. Super. 416 (Pa. Super. Ct. 1988).

[11] In point of fact, Section 604(2), which disallows professional and nonprofessional employes in the same unit without the professionals' consent, and Section 604(5), which prohibits supervisory and public employes in the same unit, directly conflict with the ordinance, and are therefore superceded by it. These sections, too, are simply not applicable to City employes because of the ordinance.

Giving the ordinance preference over all the conflicting sections of PERA meets the requirements of 1 Pa. C.S. § 1921(a), which states that, "[t]he object of all interpretation and construction of statutes is to ascertain and effectuate the intention of the General Assembly. Every statute shall be construed, if possible, to give effect to *all* its provisions."[12] The City wants to give full measure to the overriding nature of the ordinance when it benefits the City, but not when it benefits the guards.

The City also argues that the Board has already ruled that its guards are not entitled to interest arbitration. In support of that position, the City refers to the rationale in the proposed decision and order of City of Philadelphia, 25 PPER ¶ 25081 (Proposed Decision and Order, 1994), a case involving two of the three parties here. The Local charged an unfair practice when the City refused the Local's demand for interest arbitration. In that case, the examiner decided that after ARSCME bargained a contract with the City that explicitly included representation of the Local, the Local couldn't request interest arbitration. The reason the Local was precluded from requesting interest arbitration was because AFSCME, and not the Local, was the exclusive bargaining agent for the guards in question. The examiner then dismissed the charge. The Board's final order upheld that dismissal. 26 PPER ¶ 26045 (Final Order, 1995).

But, the Board's final order was based upon very different grounds. The final order concluded that the Local's demand for interest arbitration was untimely under PERA's mandatory timetables, and that was the sole reason for the Board's dismissal. In point of fact, the Board concluded that, "the remaining issues regarding the relationship between [AFSCME] District Council 33 and Local 159 discussed at length in the [proposed decision and order] need not be addressed in this order." 26 PPER at 108. Hardly a ringing affirmation of the City's argument that guards are not entitled to interest arbitration under the Board's prior rulings.[13]

The City refers to both Board cases and cases from the National Labor Relations Board (NLRB) for the proposition that AFSCME cannot delegate its bargaining authority to the Local for issues subject to interest arbitration. All of those cases, however, are distinguishable on their facts from the instant case. One case involved a battle between two locals, when the international union tried to "transfer" recognition from one local to another. Lawrence County Housing Authority, 13 PPER ¶ 13040 (Proposed decision and Order, 1982). Another case cited by the City, UE v. NLRB, 986 F.2d 70 (4th Cir. 1993) involved negotiating an initial contract. In the midst of initial contract negotiations, the independent local became affiliated with an international union and then a dispute arose over the exact identity of the bargaining representative. In another case cited by the City, an employer had a dispute with the local and the international union over which entity the employer had to bargain with at different plants, when the local was the recognized bargaining representative at only one location. UAW v. NLRB, 394 F.2d 757 (D.C. Cir. 1968). The City presents a plethora of cases, but a paucity of persuasive authority.

The City argues next that its guards are "not without a remedy for [their] issues." (City's brief at 16). The City asserts that because other employes in the unit are able to strike, the guards receive the benefits obtained through their striking. Indeed, according to the City, the guards are better off because they can continue to work and get paid while other, less-fortunate unit members are striking without benefit of pay! A quick look at the last set of contract negotiations shows just how purely academic this argument is.

In August of 2004, during the last set of contract negotiations, AFSCME requested that issues in dispute for the Local be submitted to interest arbitration under Section 805 of PERA. The City not only refused that request, but also told AFSCME that it would

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[12] Emphasis added.

[13] Quite the opposite, in City of Philadelphia, 26 PPER ¶ 26045 (Final Order, 1995) the Board opined, albeit in *dictum* that, "Local 159 represents correctional officers, who, under Section 1001 of PERA, have no right to strike. Consequently, correctional officers are granted the right to interest arbitration under Section 805 of PERA as their final impasse resolution procedure." 26 PPER at 108. Further, in AFSCME District Council 33 and AFSME Local 159 v. City of Philadelphia, 36 PPER 158 (Final Order, 2005), the Board again, in *dictum*, reiterated AFSCME's right to demand interest arbitration for its guards under the ordinance. 36 PPER at 468. While *dictum is* certainly not binding precedent, it often portends future rulings.

refuse to sign the negotiated master agreement unless AFSCME withdrew its interest arbitration request. Because, at that time, AFSCME's health and welfare fund had insufficient moneys to timely pay for increased premiums absent a cash infusion from the new master agreement, in a "heated and difficult vote," AFSCME withdrew the interest arbitration demand for the Local and signed the master agreement. AFSCME District Council 33 and AFSCME Local 159 v. City of Philadelphia, 36 PPER 95 (Proposed Decision and Order, 2005), 36 PPER 158 (Final Order, 2005).

That set of negotiations provides a pragmatic example of how the City's logic does not reflect the reality of the situation. The City's argument presupposes that the Local has the clout to make AFSCME strike over the Local's issues. The last set of negotiations shows that not to be the case.

The AFSCME unit has over 10,000 members. The Local has about 2,000 members. (N.T. 176). In the vulgate, the Local is the tail, not the dog. That other members of the ordinance's bargaining unit may strike to further their own ends does not insure that the issues unique to the guards will be addressed at all, other than through the City's beneficence.

The City also mentions that the Local's "issues" can be pursued through grievance arbitration. How a grievance enables the guards to bargain terms and conditions of employment with the City is left unexplained in the City's brief. Perhaps that's because grievance arbitration only gives the parties a forum to resolve disputes over the interpretation of an *existing* contract, while interest arbitration is the process by which that contract is created. To the extent the City argues that the former may substitute for the latter, the City shows that it does not appreciate, or chooses to ignore, that basic difference.

The City's last argument is that even if the guards have the right to interest arbitration (which they do) this charge was filed prematurely, "because the parties are not at impasse." According to the City, negotiations are not at impasse because "negotiations for a new collective bargaining agreement have just begun and are ongoing." Therefore, argues the City, interest arbitration "would be premature at this time." (City's brief at 16, 17).

The charge is not premature because the City refused to participate in the interest arbitration procedure according to the mandatory procedures in Article VIII of PERA. The demand for interest arbitration is not premature for the same reason. The City needs to read Lebanon County, 29 PPER ¶ 29108 (Final Order, 1998).

Lebanon County makes it clear that when PERA mentions "impasse," in relation to a demand for interest arbitration under Article VIII, it is not referring to that stage in the parties' negotiations where the parties are unwilling or unable to make further proposals that narrow the differences between them, but rather is referring to the statutory dispute resolution procedures in PERA. To the extent that the City is arguing that AFSCME and the City are not at a bargaining impasse, it simply doesn't matter. AFSCME here has timely requested interest arbitration under the mandatory timelines set forth in Article VIII of PERA. Philadelphia housing Authority v. PLRB, 620 A.2d 594 (Pa. Cmwlth. 1993), allocatur denied, 536 A.2d 634, 637 A.2d 294 (1993). Following those mandatory timelines, AFSCME's interest arbitration demand is not premature. (N.T. 117, 118). Moreover, the City waived any argument as to the timeliness of AFSCME's request for interest arbitration. (N.T. 198).

The City violated Section 1201(a)(1) and (5) of PERA, when it refused to participate in the interest arbitration process. The City must immediately name its arbitrator to the panel and proceed to place all issues in dispute for correctional officers before the panel.

CONCLUSIONS

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

1. The City is a public employer under section 301(1) of PERA.

2. AFSCME and the Local are employe organizations under section 301(3) of PERA.

3. The Board has jurisdiction over the parties.

4. The City has committed unfair practices under Section 1201(a)(1) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the City shall:

1. Cease and desist from interfering with, restraining or coercing employes 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 limited to the discussing of grievances with the exclusive representative.

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

(a) Immediately name its arbitrator to the interest arbitration panel and proceed to place all issues in dispute before the interest arbitration panel in a timely manner;

(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 security guards 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-third day of June 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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Timothy Tietze, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 33 AND AFSCME LOCAL 159	: :	
v.	:	Case No. PERA-C-07-489-E
CITY OF PHILADELPHIA	:	

AFFADIVIT OF COMPLIANCE

The City hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of PERA; that it has named its arbitrator to the interest arbitration panel and placed all issues in dispute before the interest arbitration panel; that it has posted the proposed decision and order as directed 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