

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SERVICE EMPLOYEES INTERNATIONAL :
UNION LOCAL 668, PSSU :
:
v. : Case No. PERA-C-07-517-W
:
WESTMORELAND COUNTY :

FINAL ORDER

The Service Employees International Union Local 668, PSSU (SEIU) filed timely¹ exceptions, a brief in support of the exceptions and a supplemental specification of charges with the Pennsylvania Labor Relations Board (Board). SEIU's exceptions challenge a December 21, 2007 decision of the Secretary of the Board declining to issue a complaint and dismissing SEIU's Charge of Unfair Practices filed against Westmoreland County (County).

In its Charge of Unfair Practices filed on December 7, 2007, as amended on December 18, 2007, SEIU alleged that the County committed violations of Section 1201(a)(3), (5) and (8) of the Public Employee Relations Act (PERA) by failing to implement the provisions of an interest arbitration award concerning both the court-appointed and court-related bargaining units represented by SEIU.² In the December 21, 2007 dismissal letter, the Board Secretary explained that an employer commits an unfair practice "if it recognizes or bargains with one of two rival unions where there exists a question of representation." PLRB v. Commonwealth of Pennsylvania (Pennsylvania Liquor Control Board), 10 PPER ¶ 10031 at 47 (Nisi Decision and Order, 1979)(adopting the federal policy under Midwest Piping and Supply Co., 63 NLRB 1060 (1945)). A question of representation exists under the Board's Midwest Piping policy when an order and notice of hearing is issued on a timely-filed rival representation petition. The Secretary reasoned that because the Board issued hearing notices on November 2, 2007 concerning rival representation petitions filed by the Westmoreland County Court-Related Employees Association (Association) on October 25, 2007,³ a question of representation arose in each of SEIU's bargaining units. Therefore, as of November 2, 2007, the County was obligated to cease bargaining with SEIU, including further participation in the interest arbitration proceedings under Section 805 of PERA. AFSCME, District Council 83 v. Huntingdon County, 16 PPER ¶ 16057 (Final Order, 1985)(reaffirming the Board's Midwest Piping doctrine), aff'd sub nom. AFSCME, District Council 83, AFL-CIO v. PLRB, 553 A.2d 1030 (Pa. Cmwlth. 1989) (Huntingdon County). Accordingly, the Board Secretary concluded that SEIU failed to state a cause of action under Section 1201(a)(5) of PERA. The Secretary further declined to issue a complaint on SEIU's charge of a violation of Section 1201(a)(3) of PERA because the Charge contained no allegation that the County took adverse action against employes for engaging in protected activity.⁴

¹ Although SEIU's exceptions were received by the Board on January 11, 2008, they are deemed filed on January 10, 2008 because transmittal documents indicate that they were deposited on that date with a private courier for next day delivery. Teamsters Local Union No. 32 v. Washington Township Municipal Authority, 20 PPER ¶ 20068 (Final Order, 1989), affirmed, 20 PPER ¶ 20146 (Court of Common Pleas of Franklin County, 1989).

² On November 7, 2007, the neutral arbitrator of the interest arbitration panel signed a proposed interest arbitration award. On November 9, 2007, the partial arbitrators representing the County and SEIU signed the proposed interest arbitration award.

³ Case No. PERA-R-07-455-W was filed on behalf of the court-related employes and Case No. PERA-R-07-456-W was filed on behalf of the court-appointed employes.

⁴ The Secretary also declined to issue a complaint on SEIU's charge of a violation of Section 1201(a)(8) because this case does not involve failure to comply with a grievance arbitration award as set forth in Section 1201(a)(8). SEIU did not file exceptions to the Secretary's decision regarding the violation of Section 1201(a)(8). Therefore, we need not address that portion of the charge.

In its exceptions to the Secretary's decision not to issue a complaint, SEIU argues that this case is distinguishable from prior cases where the question of representation arose before the invocation of the interest arbitration procedures. Because the interest arbitration proceedings commenced here before the question of representation arose, SEIU argues that the County was no longer "bargaining". SEIU further argues that the County did not have any further participation in the arbitration proceedings after the question of representation arose. Therefore, SEIU argues that the Midwest Piping doctrine does not apply and that it is an unfair practice for the County to fail to implement the award. SEIU further argues that interest arbitration awards under Section 805 must be treated differently than negotiations between the parties because of the proviso in Section 805 that the award "shall be final and binding upon both parties." As to its charge of a violation of Section 1201(a)(3), SEIU argues that the County's refusal to implement the arbitration award discouraged members of the bargaining unit from supporting SEIU and further encouraged support for membership in the Association.

In determining whether to issue a complaint, the Board assumes that all facts alleged are true. Issuance of a complaint on a charge of unfair practices is not a matter of right, but is within the sound discretion of the Board. PSSU, Local 668 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978). Generally, a complaint will be issued unless the facts alleged in the charge do not support a cause of action for an unfair practice as defined by PERA. Homer Center Education Association v. Homer Center School District, 30 PPER ¶ 30024 (Final Order, 1998).

After review of SEIU's exceptions, we must dismiss the exceptions and affirm the decision of the Secretary not to issue a complaint. First, the distinction that SEIU attempts to draw between the mandatory nature of the interest arbitration process under Section 805 of PERA and negotiations between the parties is meritless and has previously been rejected by the Board. In PLRB v. City of Philadelphia (Deputy Sheriffs), 15 PPER ¶ 15068 (Final Order, 1984), the union alleged, as SEIU does here, that the City committed an unfair labor practice after it refused to implement an interest arbitration award. The hearing examiner dismissed the charge, concluding that the City had no obligation to implement an interest arbitration award that was issued after a question of representation arose. On exceptions, the union urged the Board to reverse its policy set forth in Chartiers-Houston School District (Chartiers-Houston), 14 PPER ¶ 14056 (1983). In that case, the Board declined to follow the decision of the National Labor Relations Board (NLRB) in RCA Del Caribe, Inc., 262 NLRB No. 116, 110 LRRM 1369 (1982), in which the NLRB changed course and held that it would no longer apply its Midwest Piping doctrine, which required an employer to cease bargaining with an incumbent union when a question of representation arose (i.e., upon the NLRB's issuance of an order directing a hearing on a rival union's representation petition). In City of Philadelphia, the Board affirmed the decision of the hearing examiner and stated that:

The exceptions also suggest that the mandatory nature of an arbitration procedure is somehow distinguishable from the collective bargaining process. Section 805 of PERA does contain mandatory language. We see no distinction between the "shall" contained in Section 805 and those contained in Sections 801-803 which also mandate that the employer enter into collective bargaining with the certified bargaining representative and reduce that agreement to writing under pain of unfair labor practice. The same underlying policy, i.e., protection of the employees' right to choose a bargaining representative as mandated in Article IV, applies to the interest arbitration process under Section 805. **Just as the Board had provided an exception to the mandate for collective bargaining in the case that a question of representation exists, so the Board will apply this exception to interest arbitration under PERA as well. The Board is fully aware of the underlying policy tensions at issue, but resolves these tensions in favor of free choice of bargaining representative.**

City of Philadelphia, 15 PPER at 157 (footnote omitted; emphasis added). City of Philadelphia is a case directly on point and is dispositive of SEIU's argument that Midwest Piping should not apply to bargaining units required to submit to interest arbitration.

Further, the Commonwealth Court's Huntingdon County decision affirmed the Board's application of Midwest Piping to interest arbitration units. In Huntingdon County, the county and the union representing its prison guards reached an impasse in collective bargaining for a successor agreement in December of 1983. Accordingly, the parties proceeded to binding interest arbitration under Section 805. In January 1984, a rival union filed a petition for representation seeking to represent the prison guards. On February 6, 1984, the Board issued an Order and Notice of Hearing on the representation petition. On February 27, 1984, the incumbent union requested that the county select an arbitrator. After the county refused, the incumbent union filed a charge of unfair labor practices. The Board declined to issue a complaint, reasoning that a question of representation had arisen and that the county was obligated to cease bargaining with the incumbent union. The Board concluded, consistent with the Commonwealth Court decision in Dunmore Police Association v. Dunmore Borough, 528 A.2d 299 (Pa. Cmwlth. 1987), that interest arbitration is an extension of the collective bargaining process and must cease when a question of representation arises. The Court rejected the incumbent union's argument, similar to SEIU's argument here, that Midwest Piping should not apply to interest arbitration units and stated as follows:

Review of the Board's decision discloses that the Board did not ignore the distinction between the two processes [negotiation and interest arbitration], but specifically chose to extend the Midwest Piping rule to bargaining units subject to section 805 binding interest arbitration. The Board concluded that "the same concessions and promises of benefit can occur both during the arbitration process, when the employer could concede an issue by the way it presents its case to the panel of arbitrators, and after the arbitration award is issued. . . ." Board's Final Order at 3. This court has held that the Board "'possesses administrative expertise in the area of public employee labor relations and that great deference ought to be given to the PLRB's assessment of the often competing concerns relevant to the issue of whether the conduct of an employer or a union constitutes a refusal to meet the mutual obligation to bargain in good faith.'" Mars Area Association of School Service Personnel v. Pennsylvania Labor Relations Board, 114 Pa. Commonwealth Ct. 152, 156, 538 A.2d 585, 587 (1987) (quoting Richland School District v. Pennsylvania Labor Relations Board, 71 Pa. Commonwealth Ct. 45, 53-54, 454 A.2d 649, 652 (1983)).

AFSCME argues that, by refusing to issue a complaint on the unfair labor practice charges, the Board has permitted Employer to avoid its obligations under PERA to proceed to arbitration and has placed AFSCME at a disadvantage because it could not negotiate or strike. We recognize that section 805 of PERA mandates interest arbitration once a public employer and the bargaining representative of prison guards reach an impasse in negotiations. In fact, the Board acknowledges that arbitration under section 805 is a substitute for a union's right to strike.

However, as the Board correctly notes in its brief, bargaining units are also given the right to select a different bargaining representative as provided by section 605 of PERA. The Board's decision does not permit Employer to avoid bargaining entirely, but properly balances the competing rights and interests of the parties under PERA. **The employer's obligation to bargain or proceed to arbitration is merely suspended until the representation claims are resolved.**

Huntingdon County, 553 A.2d at 1032-1033 (emphasis added).

Huntingdon County required the County to cease participating in interest arbitration with SEIU until the question of representation was resolved. Only in this manner is a rival union's right to petition to represent employees in the statutorily prescribed period protected. Section 605(7)(ii) of PERA provides that:

(ii) Petitions for elections may be filed with the board not sooner than ninety days nor later than sixty days before the expiration date of any

collective bargaining agreement **or after the expiration date until such time as a new written agreement has been entered into ...**

43 P.S. § 1101.605(7)(ii) (emphasis added).

In this case, it is undisputed that the collective bargaining agreements had expired and no new agreements had been entered into at the time the petitions for representation were filed. As such, the Association was statutorily entitled to file the petitions for representation. Thus, a question of representation existed when the hearing notices were issued on November 2, 2007, and the County would have committed an unfair practice by implementing the interest arbitration award. Under Midwest Piping, as adopted by the Board, the County was required to cease participating in bargaining or interest arbitration with SEIU until the representation procedures set forth in Sections 601-607 of PERA were completed, either through certification of the rival union as employe bargaining representative or issuance of orders dismissing the rival's petitions for representation.

In its brief in support of its exceptions, SEIU erroneously contends that the interest arbitration award was issued on November 7, 2007 and that the County and SEIU had concluded the interest arbitration process. SEIU's contention ignores the fact that both partial arbitrators representing SEIU and the County signed the proposed interest arbitration award on November 9, 2007, after the parties were obligated to cease the process under Huntingdon County. Therefore, contrary to SEIU's assertion, which is the lynchpin of its entire argument in this case, the interest arbitration process was not concluded when the question of representation arose on November 2, 2007 and the County was under no obligation to thereafter implement the award that was finalized after a question of representation existed. City of Philadelphia, supra. Thus, we agree with the Secretary that the unfair practice charge does not state a violation of the County's duty to bargain under Section 1201(a)(5) of PERA.

Because the County had no obligation, and indeed was precluded, from implementing the arbitration award while the question of representation was pending, the charge also fails to state a violation of Section 1201(a)(3) of PERA. Indeed, the charge does not allege that the County treated employes that support SEIU differently than employes that do not support SEIU. To the contrary, the charge indicates that the County did not implement the award for the bargaining unit as a whole. Accordingly, the Secretary correctly determined that the charge fails to state a cause of action under Section 1201(a)(3).

After a thorough review of the exceptions and all matters of record, there are no facts alleged warranting issuance of a complaint. Accordingly, the Board shall dismiss the exceptions and sustain the Secretary's decision declining to issue a complaint.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions are dismissed and the Secretary's decision not to issue a complaint be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, and James M. Darby, Member, this eighteenth day of March, 2008. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.