

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UTILITY WORKERS UNION OF AMERICA :
LOCAL 433 AFL-CIO¹ :
 :
 v. : Case No. PERA-C-08-426-W
 :
 WHITE OAK BOROUGH :

PROPOSED DECISION AND ORDER

On November 3, 2008, the Utility Workers Union of America, Local 433, AFL-CIO (Union), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that White Oak Borough (Borough) violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to process a grievance and by direct dealing. On November 26, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 19, 2009, if conciliation did not resolve the charge by then. On February 6, 2009, the hearing examiner, upon the request of the Borough and without objection by the Union, continued the hearing to February 24, 2009.

On February 24, 2009, the hearing examiner held the hearing. At the outset of the hearing, the Borough requested another continuance because the chairman of its public works committee was not available (N.T. 6). The Borough represented that it knew the week before that he would not be available but did not ask for a continuance then because it thought that the charge was going to settle and that no hearing would be required under the circumstances (N.T. 6-7). Absent a previously granted continuance request, however, the Board expects the parties to be prepared to present their cases on the day of the hearing. City of Philadelphia, 26 PPER ¶ 26114 (Final Order 1995). Thus, the hearing examiner denied the Borough's request (N.T. 11). The hearing examiner then afforded both parties a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of the hearing, the Borough moved for summary judgment (N.T. 48-53). The hearing examiner took the motion under advisement (N.T. 53). On April 10, 2009, the Association timely filed a brief by deposit in the U.S. Mail.

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. On February 22, 2005, the Board certified the Union as the exclusive representative of a bargaining unit that includes street and sewer department employes of the Borough. (Case No. PERA-R-04-610-W)
2. On January 16, 2007, the parties entered into a collective bargaining agreement that was effective by its own terms from January 1, 2007, through December 31, 2007. (N.T. 20; Complainant Exhibit 1)
3. Article XIII of the collective bargaining agreement sets forth a multi-step grievance procedure ending in arbitration as follows: Grievances are to be presented to the Borough's secretary at step 1. The secretary is to reply at step 2. If the secretary denies the grievance, the Union may present a request for a meeting with the Borough's public works committee at step 3. Upon receiving a request for a meeting, the public works committee is to "arrange a meeting within ten (10) working days" at step 4. The public works committee is to reply at step 5. If the public works committee denies the grievance, the Union may appeal the grievance to arbitration. (Complainant Exhibit 1)

¹ The caption appears as amended by the hearing examiner to reflect the name of the complainant as set forth in the charge.

4. During the parties' negotiations for a successor collective bargaining agreement, the Union designated its attorney (Joseph S. Pass) as its bargaining representative. (N.T. 25)

5. On June 16, 2008, the Union's president (Joseph G. Swenglish) filed a grievance at step 1. (N.T. 21, 26; Complainant Exhibit 2)

6. On June 27, 2008, the secretary denied the grievance at step 2. (N.T. 21; Complainant Exhibit 2)

7. By letter dated July 1, 2008, the Union's stewards (Eric Johnson and Roger Sullivan) filed a request for a meeting with the public works committee at step 3. (N.T. 22; Complainant Exhibit 3)

8. By letter dated July 7, 2008, the Borough's attorney (Terry K. Leckman) wrote to the Union at Mr. Swenglish's home address as follows:

"Gentlemen:

In response to your letter dated July 1, 2008, please note that there is no 'current agreement' and no grievance procedure. The Borough['s] Public Works Committee will not be scheduling a meeting at this time."

(N.T. 22; Complainant Exhibit 4)

9. The employees have not engaged in a work stoppage. (N.T. 41-42)

DISCUSSION

The Union has charged that the Borough violated sections 1201(a)(1) and (5) by refusing to process a grievance and by direct dealing. According to the Union, the refusal to process the grievance and the direct dealing both occurred when the Borough informed the Union's president that its public works committee would not be scheduling a meeting on a grievance at the fourth step of the grievance procedure set forth in the parties' expired collective bargaining agreement. The Union contends that the Borough was under an obligation to process the grievance even though the collective bargaining agreement had expired because the employees never engaged in a work stoppage. The Union contends that the Borough was under an obligation to notify the Union's attorney rather than the Union's president of its refusal to process the grievance because the Union had designated its attorney as its representative during the parties' negotiations for a successor collective bargaining agreement. The Union requests attorney's fees.

The Borough has moved for summary judgment. According to the Borough, the charge should be dismissed for lack of proof. The Borough contends that it was under no obligation to process the grievance because the collective bargaining agreement had expired and was no longer in effect when the stewards requested the meeting with the public works committee. The Borough also contends that the Union waived its right to process the grievance by filing a charge at Case No. PERA-C-08-232-W instead of requesting arbitration of the grievance. See White Oak Borough, 39 PPER 159 (Proposed Decision and Order 2008). The Borough contends that it did not engage in direct dealing when it notified the Union's president rather than the Union's attorney that it was not going to process the grievance because the Union never designated its attorney as its representative for the grievance.

In PLRB v. Williamsport Area School District, 486 Pa. 375, 406 A.2d 329 (1979), our Supreme Court held that an employer violated sections 1201(a)(1) and (5) when it refused to process a grievance under a grievance procedure set forth in an expired collective bargaining agreement where its employees were working and where it had not bargained the grievance procedure to impasse in its negotiations for a successor collective bargaining agreement.

The record shows that the employees were working when the Borough refused to process the grievance (finding of fact 9), so under the analysis set forth in Williamsport Area

School District the fact that the collective bargaining agreement had expired by the time the stewards requested a meeting with the public works committee provides no defense to the charge. Thus, the Borough's motion for summary judgment as to the refusal to process the grievance portion of the charge must be denied. See Slippery Rock Area School District, 14 PPER ¶ 14270 (Final Order 1983)(the hearing examiner properly applied Williamsport Area School District in finding that an employer committed an unfair practice by refusing to process a grievance under a grievance procedure set forth in an expired collective bargaining agreement where the employees had not engaged in a work stoppage).

The fact that the Union filed a charge at Case No. PERA-C-08-232-W instead of requesting arbitration of the grievance does not compel a contrary result. The Borough would have the Board find that the Union is now looking for the proverbial "second bite of the apple," but whether or not the Borough committed unfair practices by refusing to process the grievance was not before the Board in Case No. PERA-C-08-232-W. Moreover, as the hearing examiner wrote in Case No. PERA-C-08-232-W, the charge in that case was not subject to deferral pending the disposition of the grievance at issue in this case because the Borough had not expeditiously processed the grievance to arbitration. White Oak Borough, *supra*, at n. 6. Thus, to the extent that the Union is getting a "second bite of the apple," the Borough only has itself to blame.

In Millcreek School District v. PLRB, 631 A.2d 734 (1993), our Commonwealth Court held that an employer violated sections 1201(a)(1) and (5) when it negotiated directly with individual employees over their terms and conditions of employment. See also Temple University, 38 PPER 156 (Final Order 2007)(employer engaged in direct dealing by negotiating a waiver of liability with an individual employe rather than with his exclusive representative).

The record does not show that the Borough engaged in direct dealing when it notified the Union's president that it was not going to process the grievance. Notably, in so notifying the Union's president, the Borough did not attempt to negotiate a change to employe terms and conditions of employment. Moreover, in so notifying the Union's president, the Borough did not communicate directly with individual employees. Thus, the Borough's motion for summary judgment as to the direct dealing portion of the charge must be granted. See Commonwealth of Pennsylvania, Department of Public Welfare, Selinsgrove Center, 37 PPER 36 (Proposed Decision and Order 2006)(Hearing Examiner Thomas P. Leonard found no direct dealing where the employer communicated not with individual employees but with their local president).

The fact that the Borough's attorney notified the Union's president rather than the Union's attorney that it was not going to process the grievance does not compel a contrary result. The Union would have the Board find that the Borough's attorney was under an obligation to so notify its attorney rather than its president because it had designated its attorney as its representative during the parties' negotiations for a successor collective bargaining agreement. In support of its contention, the Union points out that Pa.R.P.C. 4.2 provides that an attorney is not to communicate directly with a party known to be represented by another attorney. The Board, however, has no jurisdiction to enforce the Rules of Professional Conduct, Chester Township, 21 PPER ¶ 21005 (Final Order 1989), so whether or not the Borough's attorney violated Pa.R.P.C. 4.2 is not for the Board to decide. Moreover, even if the Borough's attorney violated Pa.R.P.C. 4.2, the fact remains that the Borough did not attempt to negotiate a change to employe terms and conditions of employment. The fact also remains that the Borough did not communicate directly with individual employees. No direct dealing is apparent under the circumstances.

The Board has no statutory authority to award attorney's fees. Northampton Township, 35 PPER 138 at n. 4 (Final Order 2004). The Union's request for the same is, therefore, denied.

CONCLUSIONS

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

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

2. The Union is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. The Borough 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 Borough 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) Process the grievance under the grievance procedure set forth in the expired collective bargaining agreement, including arranging a meeting of the public works committee at step 4, replying to the grievance at step 5 and arbitrating the grievance if requested by the Union;
 - (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 twenty-second day of April 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner