COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS OFFICERS ASSOCIATION	:	
v.	:	Case No. PERA-C-04-560-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF CORRECTIONS FAYETTE SCI	:	

PROPOSED DECISION AND ORDER

On November 8, 2004, the Pennsylvania State Corrections Officers Association (PSCOA) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Commonwealth of Pennsylvania (Commonwealth) had violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to comply with a grievance settlement involving scheduling at the State Correctional Institution at Fayette (SCI-Fayette).[1] On January 18, 2005, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on March 2, 2005. On February 25, 2005, the hearing examiner, upon the request of the Commonwealth and over the objection of PSCOA, continued the hearing indefinitely. On October 17, 2005, PSCOA informed the Secretary that the parties had been unable to resolve the issues underlying the charge and requested that the hearing be rescheduled. On October 21, 2005, the hearing examiner rescheduled the hearing to January 12, 2006. On January 12, 2006, the hearing examiner, upon the request of the Commonwealth and without objection by PSCOA, continued the hearing indefinitely.

On March 12, 2007, the Secretary, noting that the charge had been dormant for some time, informed PSCOA that the charge would be dismissed unless it requested permission to withdraw the charge or showed cause why further proceedings were warranted. On March 22, 2007, PSCOA informed the Secretary that the Commonwealth "remains non-compliant with the settlement agreement" and requested that the hearing be rescheduled. On March 30, 2007, the hearing examiner rescheduled the hearing to June 28, 2007. On June 14, 2007, the hearing examiner, upon the request of the Commonwealth and without objection by PSCOA, continued the hearing. The hearing examiner also rescheduled the hearing to August 22, 2007. On June 27, 2007, the hearing examiner, upon the request of the Commonwealth and without objection by PSCOA, continued the hearing. The hearing examiner also rescheduled the hearing to September 14, 2007. The hearing examiner subsequently continued the hearing for settlement discussions.

On November 19, 2008, the Secretary, noting that the charge had been dormant for some time, informed PSCOA that the charge would be dismissed unless it requested permission to withdraw the charge or showed cause why further proceedings were warranted. On December 8, 2008, PSCOA requested that the hearing be rescheduled. On December 12, 2008, the hearing examiner rescheduled the hearing to March 11, 2009. On December 19, 2008, the hearing examiner, upon the request of the Commonwealth and without objection by PSCOA, continued the hearing. The hearing examiner also rescheduled the hearing to April 9, 2009.

On April 9, 2009, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On June 10, 2009, each party 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:

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[1] PSCOA also filed the charge under section 1201(a)(8). In its brief, however, PSCOA only contends that the Commonwealth violated sections 1201(a)(1) and (5). A charge not presented to a hearing examiner is waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). Accordingly, the charge as filed under section 1201(a)(8) will not be addressed.

FINDINGS OF FACT

1. The Board has certified PSCOA as the exclusive representative of a bargaining unit that includes employes of the Commonwealth working at SCI-Fayette. (Case No. PERA-R-01-153-E)

2. Effective July 1, 2001, the parties entered into a collective bargaining agreement with a multi-step grievance procedure. (N.T. 23-24; Respondent Exhibit 1)

3. On February 13, 2004, PSCOA filed a grievance at SCI-Fayette. (N.T. 12, 52-53; Union Exhibit 1)

4. The Commonwealth denied the grievance at the first step of the grievance procedure. (N.T. 12-13, 55)

5. PSCOA moved the grievance to the second step of the grievance procedure. (N.T. 15)

6. On July 22, 2004, a representative of PSCOA (Business Agent Shawn Hood) and a representative of the Commonwealth (Major Frank Cole) met prior to the second step of the grievance procedure to discuss a settlement of the grievance. They had previously settled 30-50 grievances. They signed a settlement of the grievance as follows: "Mgmt agrees to negotiate any changes of work schedules with the local union." (N.T. 8, 11-12, 16-17, 19, 59-62, 67-68, 82; Union Exhibit 1).

7. Since July 22, 2004, the Commonwealth has not negotiated schedule changes at SCI-Fayette. (N.T. 20)

8. The Commonwealth changes schedules at SCI-Fayette for "all kinds of reasons," including training. (N.T. 63, 65)

DISCUSSION

PSCOA has charged that the Commonwealth committed unfair practices under sections 1201(a)(1) and (5) by refusing to comply with a grievance settlement involving scheduling at SCI-Fayette. As set forth in finding of fact 6, the grievance settlement provides that "Mgmt agrees to negotiate any changes of work schedules with the local union."

The Commonwealth contends that the charge should be dismissed for lack of proof that it has refused to comply with the grievance settlement. The Commonwealth also contends that the charge should be dismissed because the grievance settlement is unenforceable in that the grievance settlement does not represent a meeting of the minds, is ambiguous, is not a waiver of its contractual right to change schedules upon meeting and discussing them, is signed by one of its representatives who had no authority to settle the grievance as he did and is impossible of performance.

An employer commits unfair practices under sections 1201(a)(1) and (5) if it refuses to comply with a grievance settlement. Moshannon Valley School District v. PLRB, 597 A.2d 229 (Pa. Cmwlth. 1991); City of Philadelphia, 30 PPER ¶ 30003 (Final Order 1998). As set forth in finding of fact 6, the parties entered into a grievance settlement providing that "Mgmt agrees to negotiate any changes of work schedules with the local union" at SCI-Fayette. As set forth in finding of fact 7, the Commonwealth has not negotiated schedule changes at SCI-Fayette since the parties entered into the grievance settlement. Thus, it is apparent that the Commonwealth has refused to comply with a grievance settlement. Accordingly, the Commonwealth must be found in violation of sections 1201(a)(1) and (5) as charged.

None of the Commonwealth's defenses to the charge has merit.

The Commonwealth first contends that the charge should be dismissed because PSCOA did not prove by substantial evidence that the Commonwealth has refused to comply with the grievance settlement. In support of its contention, the Commonwealth points out that a charge is to be dismissed if the charging party does not present substantial evidence

that the employer has refused to comply with a grievance settlement. Commonwealth of Pennsylvania, Department of Corrections, Dallas SCI, 38 PPER 84 (Proposed Decision and Order 2007). The Commonwealth also points out that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion," PLRB v. Kaufman Department Stores, Inc., 345 Pa. 398, 400, 29 A.2d 90, 92 (1942), and that "if a reasonable man could not have reached the decision from the evidence and its inferences, then the decision is not supported by substantial evidence and it should be set aside." Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311, 313 (Pa. Cmwlth. 1974). The Commonwealth further points out that the evidence PSCOA presented to prove that the Commonwealth has refused to comply with the grievance settlement was testimony by Business Agent Hood that "[t]here [has] been no negotiations with regard to schedule changes at the Local level" (N.T. 20).

In the Commonwealth's view, Business Agent Hood's testimony is supposition as to whether or not it ever changed a schedule at the local level and therefore is not substantial evidence that it has refused to comply with the grievance settlement. The logical inference to be drawn from his testimony, however, is that the Commonwealth has changed schedules at SCI-Fayette without negotiating them. Thus, PSCOA proved by substantial evidence that the Commonwealth has refused to comply with the grievance settlement.

The Commonwealth next contends that the charge should be dismissed because the grievance settlement does not represent a meeting of the minds and therefore is unenforceable. In support of its contention, the Commonwealth points out that any agreement requires a meeting of the minds in order to be enforceable. Port Allegany Borough, 34 PPER 149 (Final Order 2003). The Commonwealth also points out that its representative who signed the grievance settlement (Major Cole) testified that his intent was to agree to something other than what is in the grievance settlement (N.T. 59), while its former labor relations coordinator at SCI-Fayette (Barbara Bair) testified that a representative of PSCOA (Grievance Coordinator Bill Hart) told her not to worry about the grievance settlement because he was aware that Major Cole did not realize what he was signing (N.T. 78). The Commonwealth submits that further support for its contention may be found in the fact that in subsequent negotiations for successor collective bargaining agreements PSCOA proposed changes to a contractual provision obligating the Commonwealth to meet and discuss schedule changes (Respondent Exhibits 1, 4-5). According to the Commonwealth, PSCOA would not have done so if the grievance settlement already obligated the Commonwealth to negotiate schedule changes. In addition, the Commonwealth would have the Board find that PSCOA is attempting to gain here what it could not gain at the bargaining table.

Both parties signed the grievance settlement agreement, however, so it is self-evident that the grievance settlement represents a meeting of their minds. Moreover, as more fully discussed below, the grievance settlement is clear and unambiguous. If a grievance settlement is "clear and unambiguous, the intent of the parties is to be determined only from the express language of the agreement." Avery v. PLRB, 509 A.2d 888, 891 (Pa. Cmwlth 1986). Furthermore, parole evidence as to what the parties intended to agree to in a written agreement is inadmissible where the agreement is clear and unambiguous. New Britain Borough, 39 PPER 102 (Final Order 2008). Thus, neither the testimony of Major Cole and Ms. Bair nor the changes proposed by PSCOA in the subsequent negotiations for successor collective bargaining agreements supports a finding that the grievance settlement does not represent a meeting of the minds.

The Commonwealth next contends that the charge should be dismissed because the grievance settlement is ambiguous and therefore unenforceable. In support of its contention, the Commonwealth points out that an ambiguous agreement may not be enforced because there is no way of knowing what the parties agreed to under the circumstances. Avery, supra; Commonwealth of Pennsylvania, Bureau of Labor Relations, 17 PPER ¶ 17177 (Final Order 1986). The Commonwealth also submits that the word "negotiate" in the grievance settlement is ambiguous because it is not defined in the settlement or the law. According to the Commonwealth, the word "negotiate" may really mean "meet and discuss" because Black's Law Dictionary, Sixth Edition 1990, defines "negotiate" as meaning "[t]o meet with another so as to arrive through discussion at some kind of agreement or compromise about something." The Commonwealth points out that in Greater Nanticoke Area School District v. Greater Nanticoke Area Education Association, 760 A.2d 1214 (Pa.

Cmwlth. 2000), the Court found the word "furlough" in a collective bargaining agreement to be subject to interpretation because it was not defined in the agreement or the law.

There is, however, no ambiguity about the meaning of the word "negotiate" under public sector labor law in Pennsylvania. See Commonwealth of Pennsylvania, PLRB v. APSCUF, 355 A.2d 853 (Pa. Cmwlth. 1976), where the Court explained the difference between the obligation to bargain or "negotiate" under the PERA and the obligation to meet and discuss under the PERA. Moreover, the record shows that as soon as Major Cole informed Ms. Bair of the grievance settlement she told him that he "couldn't sign an agreement to negotiate" (N.T. 77). The immediacy of her reaction indicates that she knew full well the meaning of the word "negotiate." Thus, it is apparent that the Commonwealth should have known or knows full well what the word "negotiate" means.

The Commonwealth next contends that the charge should be dismissed because the grievance settlement is not a "clear, express and unequivocal" waiver of its contractual right to change schedules upon meeting and discussing them and therefore is unenforceable. In support of its contention, the Commonwealth points out that under the parties' collective bargaining in effect at the time of the grievance settlement it had the right to change schedules upon meeting and discussing them (Respondent Exhibit 1) and that a waiver of contractual rights must be "intentional, clear, express and unequivocal." Penn Hills Municipality, 34 PPER 135 at 416 (Final Order 2003), aff'd sub nom. Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills, 876 A.2d 494 (Pa. Cmwlth. 2005), citing Commonwealth of Pennsylvania v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983).

As noted above, however, there is no ambiguity about the meaning of the word "negotiate." Thus, it is apparent that by entering into the grievance settlement the Commonwealth intentionally, clearly, expressly and unequivocally waived whatever contractual right it had to change schedules upon meeting and discussing them.

The Commonwealth next contends that the charge should be dismissed because Major Cole had no authority to sign the grievance settlement as he did, making it unenforceable. In support of its contention, the Commonwealth points out that the grievance settlement altered the contractual provision giving it the right to change schedules upon meeting and discussing them (Respondent Exhibit 1). The Commonwealth also points out that the collective bargaining agreement provides that its terms may not be altered in the grievance procedure. Id.

The record does not show, however, that the Commonwealth ever advised PSCOA of a limitation on Major Cole's authority to settle the grievance. Moreover, the record shows that Major Cole had negotiated numerous other grievance settlements with Business Agent Hood. See finding of fact 6. On a substantially similar record in City of Philadelphia, 27 PPER ¶ 27185 (Final Order 1996), the Board, citing Moshannon Valley School District, supra, found that an employer was bound by a grievance settlement that one of its representatives entered into even though the grievance settlement was inconsistent with the employer's policy. Noting that the representative had entered into prior grievance settlements, the Board reasoned that he had the apparent authority to bind the employer. Given that Major Cole had negotiated numerous other grievance settlements with Business Agent Hood, he likewise had the apparent authority to bind the Commonwealth.

The Commonwealth finally contends that the charge should be dismissed because the grievance settlement is impossible of performance and therefore unenforceable. In support of its contention, the Commonwealth points out that impossibility of performance excuses an employer from its obligations under an agreement. City of McKeesport, 17 PPER ¶ 17041 (Final Order 1986), citing IBFO, Local 1201 v. Board of Education of the School District of Philadelphia, 500 Pa. 474, 457 A.2d 1269 (1983); PSTA v. Commonwealth of Pennsylvania, 37 PPER 57 (Proposed Decision and Order 2003). So will exigent circumstances. As the Board recently explained in Nazareth Borough, Case No. PF-C-08-42-E (Final Order, June 16, 2009):

> "An exigent circumstance may serve as a defense to a failure to bargain charge, but only where the employer establishes that it has made reasonable efforts to avert the situation, and where it is proven that compliance with the collective bargaining agreement, interest arbitration award, or collective bargaining

obligations, would be impossible and cause the employer to be unable to timely perform an essential public function. Mifflin County Educational Support Personnel Association ESPA/PSEA/NEA v. Mifflin County School District, 38 PPER 37 (Final Order, 2007) (school district established exigent circumstances where the district was required by law to have a sign language interpreter by the start of the school year, but after failed attempts to fill the position through the contractual bidding process, and reasonable efforts to hire an interpreter at the contractual rate of pay, the district was constrained to accept the wage demands of a qualified interpreter in time for the start of school year); City of Jeannette, supra (the employer was not excused from removal of bargaining unit work under the claim of exigent circumstances where the city did not first offer bargaining unit employes the ability to work a vacant shift consistent with past practice)."

Slip opinion at 3.

According to the Commonwealth, "[m]anagement cannot be expected to bargain over all schedule changes that may occur at SCI Fayette, including those changes necessitated by emergencies, including riots, shakedowns, escapes, etc." Brief at 13. The record shows, however, that the Commonwealth also changes schedules for training. See finding of fact 8. Training hardly qualifies as an emergency situation. Thus, it is not impossible for the Commonwealth to comply with the grievance settlement.

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. PSCOA 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 grievance settlement;

(b) Make its employes whole for any losses sustained by them as the result of its refusal to comply with the grievance settlement;

(c) 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

(d) 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 eighth day of July 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner