

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 47, Local 2187 :
 :
 v. : Case No. PERA-C-08-136-E
 :
 CITY OF PHILADELPHIA, DEPARTMENT :
 OF PUBLIC HEALTH¹ :

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 Employees District Council 47, Local 2187 (AFSCME) on April 18, 2008, alleging that the City of Philadelphia (City) violated Section 1201(a)(1), (3) and (5) of the Public Employee Relations Act (PERA). On May 14, 2008, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on July 2, 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 July 21, 2009. On that date, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Neither party filed a post-hearing brief.

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 is an employe organization.

3. Bajram "Ben" Nela has been employed by the City since 2004 when he started working in Air Management Services, Philadelphia Department of Public Health. In 2008, Nela's immediate supervisor was Keith Lemchak. Lemchak, in turn, reported to Roger Faye, Facility Compliance Enforcement. Faye, in turn, reported to Ed Braun, Regulatory Program services, who reported to Tim Huynh, Director of Air Management Services. In 2008, Nela was the local shop steward for AFSCME, at his work location. (N.T. 8-11).

4. Sometime during the first week of February, 2008, Nela contacted Robert Coyle, the chief steward of District Council 47, because Nela felt he was working out of class, performing enforcement functions, without adequate remuneration. On February 7, 2008, Coyle met with Huynh about Nela's concerns. During that meeting Huynh assured Coyle that he would attempt to get Nela properly paid. (N.T. 12, 13, 25-27, 33, 34, 36; City Exhibit 1, City Exhibit 3).

5. On the morning of Friday, February 8, 2008, Huynh went to Nela's work cubicle to inform Nela of Coyle's visit and to assure Nela that he was working on a solution. (N.T. 35-36).

6. Later in the morning of February 8, 2008, Nela was told by Ed Braun, his second-in-command, that another employe, Jeffrey Forester, had been pressured by Nela to stop doing assigned enforcement duties. Huynh convened a meeting that afternoon with Nela, Braun, Forester and himself. (N.T. 37-38).

7. At that meeting, Forester reiterated that he was pressured by Nela not to perform assigned enforcement duties. Nela did not deny the accusation. Forester was reluctant to continue to perform enforcement duties without written authorization to do so. The following Monday, February 11, 2008, Forester e-mailed Huynh a list of his enforcement duties, and Huynh responded that Forester was to continue to do those duties. Huynh also sought guidance from the human resources department. (N.T. 37-40; City Exhibit 2).

¹ The caption appears as amended by the Hearing Examiner.

8. Huynh conducted an investigation of the incident concerning Forester and discovered that Lemchak had also tried to dissuade Forester from performing his enforcement duties. The dénouement of the investigation was that both Nela and Lemchak received verbal warnings. (N.T. 40-42; City Exhibit 4, City Exhibit 5).

DISCUSSION

AFSCME charges the City with violating Section 1201(a)(1), (3) and (5) of PERA when it issued a verbal reprimand to Nela, the local steward. The City denies any wrongdoing, and alleges that the verbal reprimand was warranted by Nela's actions. AFSCME has not shown sufficient evidence to sustain a finding of unfair practices. Therefore, this charge is dismissed.

We will first examine the applicable law, and then review AFSCME's evidence and the City's defense.

Under Board law, to successfully prosecute a violation of Section 1201(a)(3) of PERA, AFSCME must show that the employe in question participated in protected activity, that the City was aware of that protected activity, and that but for that protected activity the adverse action would not have been taken against the employe. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

AFSCME charges that Nela, an employe in the City's Department of Public Health, was given a verbal warning because he complained to his union representative that he, Nela, had not been paid for working out of class for some years. The City parries that allegation by asserting that Nela's verbal reprimand was in response to his directing another employe, Forester, not to perform assigned enforcement duties.

Sometime during the first week of February in 2008, Nela contacted his chief steward, Coyle, to report that he had been working out of class without proper remuneration. Coyle arranged a meeting with Huynh, the director of Nela's department for the morning of February 7, 2008. According to Coyle, that meeting went along swimmingly, and Huynh agreed to be helpful in getting Nela paid out of class. The next morning, Huynh came to Nela's cubicle and told Nela about Coyle's visit on February 7. The meeting was cordial.

Later that same morning, Huynh was made aware that Nela, and Nela's immediate supervisor, Lemchak, had told another employe, Forester, not to perform certain enforcement duties assigned to him. To discuss that revelation, in the afternoon of February 8, Huynh summoned Nela, Forester and Braun, Huynh's second-in-command, to a meeting. At the meeting Forester told those assembled that Nela had asked him not to perform certain assigned enforcement duties. Nela did not deny the allegation.

After checking with the Human Resources Division, Huynh issued Nela a verbal warning, which was memorialized in an e-mail dated March 12, 2008. (City Exhibit 5). Keith Lemchak, Nela's immediate supervisor, also received a verbal warning for his participation in those conversations with Forester. The fact that Lemchak also received a verbal warning for the same reason Nela received one militates against AFSCME's allegations.

Nela's and Huynh's renditions of material events divaricate sharply. But, a close reading of the record leads me to credit Huynh's version, for the following reasons.

Nela's e-mail to Coyle dated February 20, 2008, has incorrect dates, even though it was written within days of the material events. It states that Coyle visited Huynh on February 15, 2008. That is simply impossible, because Coyle sent Huynh an e-mail dated February 11, 2008, thanking Huynh for meeting with him *the previous week!* Moreover, the e-mail asserts that Huynh came to Nela's cubicle at 11:00 A.M. on February 15, 2008, and that the afternoon meeting with Huynh, Forester and Braun took place that day, too. Those dates appear to be a week out of sync.²

² Nela testified that all these events happened on February 15, 2008; Forester pegged the meeting with him, Huynh, Braun and Nela as February 7, 2008; Huynh puts the meeting with Coyle on February 7 and the meeting with Nela, Forester and Braun the next day.

I have credited Huynh's rendition of his February 8, 2008, meeting in Nela's cubicle. That is because City Exhibit 1, though dated the day before, was written after Huynh met with Coyle, and evidences Huynh's willingness to advocate for getting Nela out of class pay. There are no intervening events between that e-mail and the meeting in Nela's cubicle that would cause Huynh to alter his position.

It is only after Huynh was made aware that Nela and Lemchak told Forester not to perform assigned enforcement duties that things changed. Huynh then called a meeting with Forester, Nela and Braun to discuss the allegations.³

According to Huynh, at this meeting Forester reiterated his allegation that Nela instructed him not to perform certain assigned enforcement duties. Forester was hesitant to perform those duties in the future without written verification from Huynh. The following Monday, February 11, 2008, Forester sent an e-mail of the enforcement duties in dispute, and Huynh e-mailed back that Forester should continue to do these tasks, even in the face of AFSCME's challenge not to.

Nela's recollection of this meeting was simply not persuasive. Nela spoke of "berating" and "getting yelled at." (N.T. 19-20). Essentially, Nela was describing a meeting where he was berated for complaining to AFSCME. However, Huynh's testimony and the introduced documents, except one authored by Nela, all point to Nela's admonition to Forester as the meeting's focus.

Forester was a witness at the hearing, but his testimony was the benchmark for equivocacy. Forester calls himself a "contract employee," but, just what that means was never fleshed out in the hearing. One thing is clear from Forester's testimony—he was "uncomfortable about proceeding without direction," (N.T. 45) but only after talking to Nela and Lemchak. So uncomfortable, in fact, that he wanted written permission from Huynh before continuing to perform his enforcement duties.

Forester acknowledges the conversation with Nela and Lemchak when his enforcement duties were discussed, but he is so tergiversatory that he merely says that it was just a conversation about work, the duty I was doing. I was doing enforcement activity for asbestos, and it had come up—I was left with the impression that maybe I should talk to my supervisor about the work I was doing. Again, I [sic] conscious about the work of civil service, so I was uncomfortable, so I went and talked to my supervisor, Ed Braun, about the conversation. (N.T. 46-47).

Despite Forester's purposely veiled references, the obvious conclusion is that Nela and Lemchak put so much pressure on him to cease his enforcement work that he needed the express, written direction of his superior merely to continue performing his assigned duties. And that is precisely the basis for the verbal reprimand given.

The fact that Nela's contact with Coyle happened in such close proximity to his conversation with Forester is mere serendipity. Pressuring Forester to cease his enforcement work is the sole basis for Nela's verbal reprimand, on this record.

AFSCME has not proved that Nela's protected activity in contacting Coyle formed any basis for his verbal reprimand. Rather, the City has established that Nela was reprimanded solely for his instruction to another employe not to perform assigned duties. Under these facts there is no violation of Section 1201(a)(3) of PERA. Additionally, AFSCME has presented no evidence that could support a violation of Section 1201(a)(5) of PERA. Consequently, this charge is dismissed in its entirety.

CONCLUSION

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 within the meaning of Section 301(1) of PERA.

³ While Lemchak was also given a written warning over just this set of facts, there is no evidence that he attended this meeting.

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The City has not committed unfair practices within the meaning of Section 1201(a)(1), (3) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eleventh day of June, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, HEARING EXAMINER