

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 47, LOCAL 2187 :
: Case No. PERA-C-09-96-E
v. :
: :
CITY OF PHILADELPHIA, CITY OF :
PHILADELPHIA PRISONS¹ :

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 March 12, 2009, alleging that the City of Philadelphia, City of Philadelphia Prisons (City) violated Section 1201(a)(1), (3) and (5) of the Public Employee Relations Act (PERA). On April 1, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on May 13, 2009, in Philadelphia, Pennsylvania. A granted continuance request resulted in the hearing being held on July 17, 2009. On that date, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Each 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. AFSCME Local 2187 represents these job classifications at the prisons; social workers, psychologists, recreation leaders, volunteer services coordinators, administrative and computer technicians, and accountants. About ninety to one-hundred bargaining unit members fill these positions. (N.T. 29-30, 40, 48).
4. Most prison facilities are located within a four block area on State Road. But for two exceptions, AFSCME has bargaining unit members at all facilities. AFSCME has its office in downtown Philadelphia, on the 1600 block of Walnut Street. There is only public parking for that location. (N.T. 19-20, 24-25, 35).
5. The prison's AFSCME members work staggered schedules that begin as early as 7:30 A.M. and end as late as 9:00 P.M. They may take up to an hour for lunch and may leave their work location during that time. Prison inmates lunch at 11:30 A.M. and correctional officers lunch prior to that. Prisons are secured from 10:30 A.M. to 12:30 P.M. Social services are usually not provided while inmates lunch. (N.T. 15, 23, 27, 28, 39-40, 99, 102).
6. AFSCME has historically held lunchtime meetings at prison facilities with its members since at least 1983, without incident. In that time the prison has never denied AFSCME's request for lunchtime meetings with members. The meetings usually take about thirty to thirty-five minutes, in order to give members adequate time to return to work. Usually AFSCME holds about two meetings a year, except during contract negotiations when additional meeting may be scheduled. It takes most members about five to seven minutes to walk, and about two minutes drive from their work location to the meetings. (N.T. 12-18, 20-21, 25-26, 31, 33, 37-40, 48).
7. Article 4(B) of the parties' collective bargaining agreement, grants AFSCME permission to "hold meetings and conduct normal union business" at prison facilities provided such business does not interfere with the prison's "normal work." That article

¹ Caption appears as amended by the Hearing Examiner.

has been a part of collective bargaining agreements between the parties since 1975. (N.T. 14; City Exhibit 1, Union Exhibit 1).

8. In an e-mail dated February 13, 2009, AFSCME asked Warden Gainey for permission to have Kahim Boles, AFSCME Local 2187's president, meet with members in the prison chapel on February 19, 2009, at noon. Gainey is warden of the Curran-Fromhold Correctional Facility (CFCF), and the request was to use the CFCF chapel. At 9:38 A.M. on February 19, Gainey sent the following e-mail response, "This request is denied." (N.T. 64-66; Union Exhibit 2).

9. After receiving this denial two hours before the requested meeting time, and a week after the request was made, Boles telephoned the Commissioner of Prisons, Louis Giorla. In that telephonic conversation, Giorla was adamant that AFSCME could not hold membership meeting in prison facilities. Giorla told Boles that AFSCME should hold membership meetings at the union's offices, either before or after the workday. Boles explained to Giorla that "traditionally" AFSCME was allowed to hold lunchtime membership meeting in prison facilities and that other times and other locations presented insurmountable logistical problems. Boles also told Giorla of the contractual provision giving AFSCME permission to hold membership meetings in prison facilities. Giorla still refused to allow AFSCME to hold lunchtime membership meetings in prison facilities. (N.T. 66-67, 93).

10. Boles then called Rene Vargas, Deputy Director of the City's Office of Labor Relations to discuss Giorla's denial of AFSCME's request for membership meeting in prison facilities. Boles reiterated that there was a contractual provision giving AFSCME permission to hold membership meeting in prison facilities and Vargas told Boles that he would speak to Giorla about the denial. (N.T. 67-69, 109-111).

11. On March 5, 2009, Vargas sent Boles a copy of an e-mail from Giorla which stated, "I received a request from Rene Vargas to accommodate the DC 47 meeting with the General (sic) membership here at the PPS after we expressed our position not to allow union meeting at our facilities. I agreed to Rene's request on a one time basis." (N.T. 69-71; Union Exhibit 3).

DISCUSSION

In its charge, AFSCME alleges that the City committed unfair labor practices in violation of Section 1201(a)(1), (3) and (5) of PERA when it refused to allow AFSCME use of prison facilities for union meetings, in violation of an established past practice and a contractual provision guaranteeing that right.

The City counters that it did not repudiate the parties' collective bargaining agreement. And, moreover, argues the City, it had a contractual privilege defense.²

Because the City placed unreasonable conditions on AFSCME's ability to communicate with its own constituency, and acted in contravention of a contractual provision, it has violated Section 1201(a)(1) and (5) of PERA. An examination of the facts as presented at the hearing is a helpful place to start.

The collective bargaining agreement between the parties contains language that gives AFSCME permission to hold meetings to conduct union business at prison facilities, provided that the use of such space does not interfere with the normal work of the prison. This provision has been in past contracts since at least 1983. AFSCME noon meetings at prison facilities have taken place, problem free, since at least that year.

In an e-mail dated February 13, 2009, AFSCME asked Warden Gainey for permission to have Boles, the Local's president, meet with members in the prison chapel on February 19, 2009, at noon. AFSCME represents social workers, psychologists, recreation leaders, volunteer services coordinators, administrative and computer technicians, and accountants employed by the City's prison system. These positions total between ninety and one-hundred employees.

² As set forth in Jersey Shore Area School District, 18 PPER ¶ 18061 (Proposed Decision and Order, 1987), 18 PPER ¶ 18117 (Final Order, 1987).

On February 19, 2009, about two hours before the meeting was to be held, Gainey sent an e-mail response to AFSCME that simply stated, "This request is denied." Boles then telephoned the Prison Commissioner, Giorla, to ask where the meeting might be held since (he assumed) the requested venue was unavailable. Giorla responded that AFSCME could not hold meetings at any prison facility, and that AFSCME should hold meetings with its members at its own facility.

Boles told Giorla that meeting other than over lunch at a prison facility was simply not feasible because of members' varied work schedules. Boles told Giorla that AFSCME had "always" held lunch time meetings in various prison facilities without any problems. Moreover, Boles reminded Giorla of the contractual provision that gave AFSCME the right to hold off-hour meetings in available prison facilities as long as those meetings did not "interfere with the normal work" of the prison. Giorla then told Boles that the request was denied because he thought such a meeting would be "too disruptive."

After that conversation, Boles contacted the Deputy Director of Labor Relations for the City, Rene Vargas. Vargas had discussions with Giorla concerning AFSCME's contractual right to hold meeting in prison facilities. On March 5, 2009, Vargas forwarded to Boles a copy of an e-mail that Giorla had written to Deputy Commissioner Brockenbrough. In that e-mail, Giorla informed Brockenbrough that Boles had Giorla's one-time permission to have a membership meeting in the gym after the prison's monthly general staff meeting.

The e-mail's text makes it clear that Giorla is not enamored with the meeting taking place: "I received a request from Rene Vargas to accommodate the DC 47 meeting with the General membership here at the PPS *after we expressed our position not to allow union meetings at our facilities. I agreed to Rene's request on a one time basis.* (Union Exhibit 3)(emphasis added). This e-mail was sent after Vargas made it clear to Giorla that he was contractually required, within certain limitations, to allow membership meetings in prison facilities. (N.T. 94).

Giorla's e-mail makes his position clear—these meeting won't be taking place in prison facilities, but he's making a singular exception only because the Deputy Director of Labor Relations requested one. Starkly absent from this e-mail is Giorla's acknowledgement that he's contractually bound to allow these meetings in an available space, so long as they do not "interfere with the normal work" of the prison.

At the hearing, Giorla attempted to mitigate his e-mail remarks. When asked what he meant by the "one-time basis" language, Giorla answered, "I meant that, you know, I didn't want this to be a regularly scheduled activity at the facilities unless we knew about it." (N.T. 95-96). If, indeed, that's what he meant, that's clearly not what he wrote. And, since the custom between the parties was for AFSCME to ask for times and dates to hold meetings in the prison's facilities, Giorla's after the fact explanation makes little sense.

When an employer imposes unreasonable restrictions upon a union's ability to conduct union business with its members, that employer violates Section 1201(a)(1) and (5) of PERA. Philadelphia School District, Gaeton Zorzi 33 PPER ¶ 33197 (Proposed Decision and Order, 2002); Millcreek Township, 30 PPER ¶ 30208 (Proposed Decision and Order, 1999), *aff'd in part, vacated in part*, 31 PPER ¶ 31056 (Final Order, 2000).

AFSCME members work staggered schedules at the prison, and the AFSCME Local's office is on Walnut Street, in center city, a distance that makes lunchtime meetings there, unfeasible. The close juxtaposition of prison facilities makes meetings over the lunch hour feasible. The only practicable time and place for AFSCME to hold membership meetings is over the lunch hour, at prison facilities, as evidenced by the inclusion of Article 4(B) in the parties' collective bargaining agreement. For the City now to refuse AFSCME the only viable time and place to meet with its members, places unreasonable restrictions on its ability to conduct union business with members, and ignores clear contract language.

AFSCME has not proved, on this record, a violation by the City of Section 1201(a)(3) of PERA.

The City argues that the rejection of AFSCME's request to hold a meeting on February 19, 2009, was "contractually privileged" under the holding of Jersey Shore Area

School District, 18 PPER ¶ 18117 (Final Order, 1987), for two reasons: that Article 4(B) gives the prison the right to deny the request to meet; and that the management rights clause of the parties' collective bargaining agreement allows the prison to "manage all operations," including the "direction of personnel." (City's post-hearing brief at 9-10). These arguments do not carry the day.

Jersey Shore established that when there are two possible interpretations of a contractual provision specifically on point, and the employer has a sound arguable basis for the interpretation upon which it has acted, the Board will not enter the fray to serve the arbitrator's function of determining which party's characterization is correct. This doctrine, when proved, is a defense to charges that arise under Section 1201(a)(5) of PERA. Philadelphia Housing Authority, 38 PPER 14 (Proposed Decision and Order, 2007), *dismissed in part and sustained in part*, 38 PPER 79 (Final Order, 2007).

But there are not two possible interpretations of Article 4(B). There is but one. The City argues that it can deny specific requests when operational needs are upset by AFSCME's request to hold membership meetings in prison facilities. But, that's not what the City did here. It issued a blanket denial for AFSCME to hold any future meetings in prison facilities, in contravention of a specific article in the collective bargaining agreement.

The management rights clause in the collective bargaining agreement does not provide a contractual privilege defense to the City, either. The City's argument mixes apples and oranges. There is no part of the management rights clause that is open to two interpretations; rather the management rights clause is simply a boilerplate set of recitations that do not evidence a legally sufficient waiver by AFSCME of any specific bargaining rights. Jersey Shore Area School District, *supra*.

For the above-stated reasons, the City has violated Section 1201(a)(1) and (5) of PERA.

CONCLUSIONS

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

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

ORDER

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

HEREBY ORDERS AND DIRECTS

that the City shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
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. 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 employees and have the same remain so posted for a period of ten (10) consecutive days.

4. Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and 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 pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this twenty-fourth day of June, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

The City hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has posted the Proposed Decision and Order as directed therein; and that it has served a copy of this affidavit on AFSCME District Council 47, Local 2187, 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