

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME, District Council 33, :
LOCAL 394 :
 : Case No. PERA-C-08-368-E
v. :
 :
CITY OF PHILADELPHIA WATER :
DEPARTMENT¹ :

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 33, Local 394 (AFSCME) on September 22, 2008², alleging that the City of Philadelphia Water Department (City) violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA). On November 18, 2008, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on January 22, 2009, in Philadelphia, Pennsylvania. A granted continuance request resulted in the hearing being held on March 16, 2009. On that date, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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. On August 29, 2008, Darryl Reid, the AFSCME shop steward, received the notice that he was suspended without pay for three days. The reason for that suspension, according to the City's Notice of Suspension form was "On June 23, 2008, you acted in a hostile and abusive manner toward an administrative employee of the Water Department Safety Office. While in the offices of that unit at ARAMARK Tower[,] you argued vociferously with that employee, using a tone of voice loud enough to be heard 50 feet from where you were positioned. For this action you are suspended for three days." (AFSCME Exhibit 1).

4. On June 23, 2008, Reid attended a previously scheduled meeting in the Water Department's executive offices, to advocate for a bargaining unit member, William King, who was returning to work after being injured on duty. The Water Department Safety Office was refusing to allow King's return to work, despite a doctor's clearance. (N.T. 14-16, 32-33, 53).

5. Present at the June 23 meeting were Reid, King, Michael Augustine, Head of Safety for the Water Department, and Barbara Kelly, Augustine's subordinate. Reid was under the impression that his meeting was to be only with Augustine. When Reid, King and their escort, Tom Flemming, Reid's crew chief, arrived at the Water Department's offices, Reid telephoned before they entered the building, and Augustine told them to come right up, he was expecting them. When the party reached Augustine's floor, they spotted him and he invited them into a cubicle. Kelly was seated in that cubicle. That is where the meeting took place. Reid did not know that the cubicle was Kelly's work area. (N.T. 16-17, 18, 19, 22, 28, 29, 30, 33, 41).

6. Reid discussed the problem of King's returning to work with Augustine, and Augustine reached a decision that Reid and King found acceptable. When Augustine rendered that decision, Kelly was adamant that she disagreed with it. Reid and Kelly engaged in a heated verbal disagreement and Reid's voice was so loud it could be heard a distance

¹ Caption appears as amended by the Hearing Examiner (N.T. 37).

² Because of a *vitium scriptoris* in the original charge, the Secretary of the Board sent out an amendment letter, and the Board received an amended charge from AFSCME on October 17, 2008.

away. Another employe, Francis Meyers, heard the raised voices and walked to Kelly's cubicle to see what the ruckus was all about. (N.T. 20-24, 33, 67-68).

DISCUSSION

The City suspended an AFSCME shop steward for what the City characterizes as "hostile and abusive" behavior, when that shop steward "argued vociferously" in his capacity as a shop steward. AFSCME counters that the City punished the shop steward for merely representing a member of the bargaining unit.

While the shop steward's remarks may have been brusque, they were not so extreme as to remove from him PERA's protections. By punishing the shop steward for his protected activity, the City has violated Section 1201(a)(1) and (3) of PERA.

The incident in question as told by Kelly materially divaricates from the version told by Reid and King. Regardless of whose version I accept as true, the City violated section 1201(a)(3) when it disciplined Reid for his protected activity of "arguing vociferously," as the City puts it, in his capacity as the shop steward. A look at Board law on this issue plainly demonstrates the City's violation.

The Board has consistently recognized that "it is not unusual for management and union representatives to become, at times, antagonistic to each other" and that "[w]hile collective bargaining may, at times, be a fragile affair, the parties cannot afford to be personally sensitive." Reading School District, 25 PPER ¶ 25181 at 469 (Proposed Decision and Order, 1994), quoting Ambridge Area School District, 7 PPER 205 (Nisi Decision and Order, 1976). Moreover, "an employe's right to engage in concerted activity permits 'some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect.'" Millcreek Township, 31 PPER ¶ 31056 at 138 (Final Order, 2000); citing Mobile Exploration and Producing U.S., Inc. v. NLRB, 200 F.3d 230, 243 (5th Circuit 1999).

Nevertheless, a union representative does not have *carte blanche* to behave in a manner that "transcends protected activity in the grievance context." SEPTA, 28 PPER ¶ 28025 at 59 (Final Order, 1996). PERA does not protect conduct that is "so obnoxious and violent as to render that employe representative unfit for service." Id.; Commonwealth of Pennsylvania (Department of Corrections), 31 PPER ¶ 31095 (Proposed Decision and Order, 2000); SEPTA, supra; Port Authority of Allegheny County, 28 PPER ¶ 28242 (Proposed Decision and Order, 1997). Additionally, PERA does not protect conduct that is "offensive, defamatory or opprobrious." Washington County, 23 PPER ¶ 23040 at 87 (Proposed Decision and Order, 1992), 23 PPER ¶ 23073 (Final Order, 1992). In Lehigh County, 11 PPER ¶ 11250 (Proposed Decision and Order, 1980), an employe lost PERA's protections by telling a supervisor "to get the fuck out" when the two were arguing. See also Reading School District, 25 PPER ¶ 25181 (Proposed Decision and Order, 1994) (repeated occurrences of profanity in reference to employer's managers, in presence of other employes).

However, conduct that is "merely intemperate, inflammatory or insulting" is protected by PERA. Id. Heated, emotional and loud exchanges between a union representative and the employer off the shop floor do not necessarily lose the protection of PERA simply because the faint of heart may be offended. Millcreek Township, supra; Reading School District, supra, citing NLRB v. Cement Transport Inc., 490 F.2d 1024, 85 LRRM 2292 (6th Circuit 1974) (company president called "son of a bitch"); NLRB v. Thor Power Tool Company, 351 F.2d 584, 60 LRRM 2237 (7th Circuit 1965) (manager called a "horse's ass"); University of Pittsburgh (Book Center), 14 PPER ¶ 14150 (Proposed Decision and Order, 1983) (supervisor called a "whore"); Firch Baking Company, 232 NLRB No. 120, 97 LRRM 1192, 1193 (1977) (manager called an "ass").

There is no allegation that Reid's outburst was other than work related. There were no *ad hominem* or *tu quoque* attacks on Kelly, no obscenities were uttered, and no physical threats were made. Clearly Reid remained under PERA's protections, and the fact that the City's managers did not like the manner in which Reid conducted himself, is simply of no moment. Their disciplining of him for his protected activity is a plainly a violation of Section 1201(a)(3) of PERA.

The condign remedy is for Reid to be made whole for his improper three day suspension, including having all references to this suspension removed from his personnel records, and it is so ordered.

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

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA.
2. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization.
3. Take the following affirmative action that the Hearing Examiner finds necessary to effectuate the policies of PERA:
 - (a) Immediately make Reid whole for the three-day suspension, including removing any reference to that suspension from his personnel records;
 - (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;
 - (c) 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 thirteenth day of July, 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 (3) of the Public Employee Relations Act; that it has made Reid whole for his three day suspension and removed any reference to it from his personnel records; that it has posted the Proposed Decision and Order as directed therein; and that it has served a copy of this affidavit on AFSCME 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