

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME, District Council 33, :
LOCAL 394¹ :
 :
v. : Case No. PERA-C-08-436-E
 :
CITY OF PHILADELPHIA :
WATER DEPARTMENT :

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 Counsel 33, Local 394 (AFSCME) on November 17, 2008, alleging that the City of Philadelphia Water Department (City) violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA). On January 16, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on March 10, 2009, in Philadelphia, Pennsylvania. Granted continuance requests resulted in the hearing being held on July 23, 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. Brett Johnson has been a custodial worker in the City's Water Department for the last three and a half years. In July of 2008 he received his annual evaluation, with an overall rating of unsatisfactory. The rater was Stephen Meier, Johnson's group leader. (N.T. 4-5; AFSCME Exhibit 1).

4. Sometime in April of 2008, Meier and Johnson had a verbal disagreement over Johnson's failure to complete assigned work, which culminated in Meier calling Johnson an asshole. Johnson complained to Anthony Falcone, an Assistant Superintendent of the Water Department, about Meier's comment. A meeting was then held, in late April, with Falcone, Johnson, Meier, and Jack Gallagher, the shop steward, present. At that group meeting Meier apologized to Johnson. (N.T. 5-7, 9).

5. Johnson was given his performance evaluation in a meeting on July 18, 2008. Johnson disagreed with the overall unsatisfactory rating he was given and requested a subsequent meeting with Falcone, who was designed as the reviewing officer for Johnson's evaluation process. The purpose of that meeting was to give Johnson the opportunity to present evidence that might militate against the unsatisfactory rating. Should such evidence prove compelling, the City could upgrade the overall rating. At that meeting, in August of 2008, Johnson requested union representation, but Falcone denied that request. (N.T. 9-13, 15; AFSCME Exhibit 1).

6. In the year covered by the evaluation, Johnson received a verbal warning over vehicle mileage sheets that were incorrectly completed because they did not reflect Johnson's unauthorized stops when using a City vehicle. Also in that year, Johnson received a written warning for incorrect notification when calling in sick. (N.T. 16, 33-36; City Exhibit 1, City Exhibit 2).

7. During the period covered by the unsatisfactory evaluation, Meier, and others, had meetings with Johnson about his failure to complete the work assigned. In a meeting where Falcone, Meier, Johnson, and Gallagher were present, Johnson's work schedule was changed in response to Johnson's complaint that the existing schedule was hard to follow. (N.T. 38-40; City Exhibit 3).

¹ Caption appears as amended by the Hearing Examiner.

DISCUSSION

AFSCME charges the City with violating Section 1201(a)(1) of PERA when the City disallowed Johnson's request for union representation at the initial meeting to review his annual evaluation. AFSCME also argues that Johnson's overall evaluation score was unsatisfactory, not because it accurately reflected deficiencies on his part, but because the City was retaliating against him for his prior protected activity, in violation of Section 1201(a)(3) of PERA.

The City parries these allegations by arguing that Johnson had no right to union representation at a meeting to review his annual performance evaluation. The City further argues that Johnson was simply a poorly performing employe for whom accommodations had been made previously. The City calls attention to prior verbal and written warnings given to Johnson. All these factors, according to the City, added up to this evaluation being one that was proper and based upon Johnson's record, and not discriminatory motives.

AFSCME has not shown that the City violated PERA by giving Johnson an overall unsatisfactory rating. AFSCME has shown, however, that the City violated Section 1201(a)(1) of PERA when it refused Johnson's request for union representation at the second meeting to review his annual performance evaluation.

Under Board law, first set forth in 1981, an employe has the right to union representation at any meeting beyond the first, to discuss a performance evaluation. In Conneaut School District, 12 PPER ¶ 12155 ((Final Order, 1981), the Board opined,

We believe PERA mandates. . . the right of a public employe to assistance and representation by his or her bargaining representative at any further meeting or interview beyond the first meeting to discuss or review a public employe's performance evaluation or rating. This right shall not impair the employer's right to initially meet with an employe to discuss a performance evaluation or rating without the participation of the bargaining representative.

12 PPER at 242.

The Conneaut School District opinion is based upon the United States Supreme Court decision in NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959 (1975). The Conneaut School District holding, however, enlarged the limitations within which Weingarten previously applied. According to the Board, "This rule [Weingarten] should[,] however[,] not be limited solely to investigatory interviews in anticipation of disciplinary action." 12 PPER at 242.

The meeting for Johnson to appeal his annual performance evaluation was the second meeting concerning that evaluation; the first was when the evaluation was presented to Johnson. Consequently, the City was remiss in not allowing Johnson union representation at that second meeting.

AFSCME does not fare so well in its allegation of discrimination under Section 1201(a)(3) of PERA. Aside from the possible inference from timing, AFSCME has not shown any nexus between Johnson's purported protected activity and the subsequent negative evaluation. And, the Board has consistently ruled that timing alone is insufficient to establish a violation of Section 1201(a)(3) of PERA. Westmoreland County Court-Related Employees Association v. Westmoreland County, 39 PPER 167 ((Final Order, 2008).

The City has shown that there was a factual basis for the unsatisfactory sections in Johnson's evaluation. Albeit, there was some discrepancy between the City's documentary evidence presented in its defense, Johnson's written evaluation, and the testimony of Johnson's assistant superintendent, Falcone.

More specifically, Falcone initially testified that Johnson had garnered a verbal warning and a written warning, while the evaluation clearly referenced two written warnings. Initially, Falcone testified that there was only one written warning, but he later awkwardly changed his testimony to allege two written warnings. The City never introduced a second written warning into the record.

While Falcone's testimony was somewhat cavalier and toplofty, that does not prove union animus, nor does it prove retaliation. Falcone's clumsy handling of contradictory testimony bespeaks his lack of preparation but does not prove animus or retaliation.

Johnson's performance evaluation is not out of the ordinary, considering his shortcomings in the evaluation period. Moreover, the rater's comments, while highlighting those deficiencies that led to the overall unsatisfactory rating, also acknowledged Johnson's potential, calling him "a true asset to our unit." (AFSCME Exhibit 1). This kind of measured and balanced observation hardly bespeaks evidence of retaliation against Johnson. Quite the opposite; it reveals the rater's intention to offer Johnson an opportunity to improve, and assistance in doing so.

The City, then, has not violated Section 1201(a) (3) of PERA when it gave Johnson an overall unsatisfactory rating on his annual performance review based upon Johnson's past performance.

The City has, however, violated Section 1201(a) (1) when it refused Johnson's request for union representation at a subsequent performance evaluation meeting.

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. The Board has jurisdiction over the parties hereto.
4. The City has committed unfair practices within the meaning of Section 1201(a) (1) of PERA.
5. The City has not committed unfair practices within the meaning of Section 1201(a) (3) 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. Take the following affirmative action that the Hearing Examiner finds necessary to effectuate the policies of PERA:

(a) 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;

(b) 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 second day of August, 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) 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 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