

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME, District Council 33, :  
LOCAL 394 :  
 :  
v. : Case No. PERA-C-09-104-E  
 :  
CITY OF PHILADELPHIA<sup>1</sup> :

**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 March 18, 2009, alleging that the City of Philadelphia Water Department (City) violated Section 1201(a)(1), (3) and (5) of the Public Employee Relations Act (PERA). On April 2, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on June 5, 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. The parties' collective bargaining agreement, entered into in 2008, included the following language involving compensatory time:

Compensatory Time

1. Employees may request compensatory time in lieu of overtime pay to which they would otherwise be entitled. When granted, compensatory time shall be earned at the same rate as cash overtime under the terms of the existing contract.
2. An employee's request to receive compensatory time in lieu of overtime must be made in the time and manner set by the Department for doing so. The Department has the sole discretion to grant the employee's request for compensatory time on a case-by-case basis or to pay the employee cash overtime at the appropriate rate. Departments will make reasonable attempts to accommodate such requests consistent with the Department's operational needs.
3. Employees may accumulate no more than one hundred twenty (120) hours of compensatory time at any given time, exclusive of holiday compensatory time.
4. Employees must seek permission from their Department to use accumulated compensatory time. Departments will make reasonable attempts to accommodate such requests consistent with the Department's operational needs.
5. Employees will be compensated for any accumulated, unused compensatory time at separation from employment.
6. Denials of requests to earn or use compensatory time under this section shall be at the discretion of the Department.

(Joint Exhibit 1)

---

<sup>1</sup> Caption appears as amended by the Hearing Examiner.

4. Initially, the City implemented the compensatory time provision of the collective bargaining agreement. In October of 2008, however, the City stopped granting compensatory time, and bargaining unit members were only offered overtime. The City was concerned that the compensatory time provision might run afoul of applicable Civil Service regulations. In May of 2009, the City reinstated the compensatory provision, but only for selected bargaining unit members. (N.T. 10-12, 16-19; AFSCME Exhibit 1, 2).

#### DISCUSSION

AFSCME charges the City with violating Section 1201(a) (1), (3) and (5) of PERA, because the City no longer honored bargaining unit employees' requests for compensatory time, in violation of the last, negotiated collective bargaining agreement.

The City defends its actions on the grounds that it has discretion as to whether the compensatory time provisions are implemented under the collective bargaining agreement, and that its interpretation of the collective bargaining agreement is "accurate." (N.T. 42, 44).

AFSCME urges me to read the parties' collective bargaining agreement, and after doing so, rule that the City has unilaterally violated the portion that relates to compensatory time.

Because the City has a sound arguable basis for its actions, however, this charge is dismissed. A review of Board law shows why.

Incorporating federal labor law into its decision, the Board, in Jersey Shore Area School District, 18 PPER ¶ 18117 (Final Order, 1987), adopted the proposition that:

Where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the NLRB will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct.

18 PPER at 341 (citation omitted).

Here, the City points to contractual provisions that give the City "the sole discretion to grant the employee's request for compensatory time on a case-by-case basis or to pay the employee cash overtime at the appropriate rate[,] and the right to deny "requests to earn or use compensatory time. . . shall be at the discretion of the [City]." (Joint Exhibit 1).

Such language establishes that the City has a "sound arguable basis for its contractual interpretation and a substantial claim of contractual privilege." 18 PPER at 340 (internal quotation marks omitted).

In applying the Jersey Shore rationale, I make no determination as to whether the City's action is based upon the correct interpretation of the applicable contract provision, but merely acknowledge that the City has an argument sufficient to apply the Jersey Shore rationale.

AFSCME also charges the City with violating Section 1201(a) (3) of PERA. The record, however, does not support such a violation. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

Contractual privilege is a complete defense to a charge of unilateral change, and, therefore, this charge is dismissed. Philadelphia Housing Authority, 38 PPER 14 (Proposed Decision and Order, 2007), *dismissed in part and sustained in part*, 38 PPER 79 (Final Order, 2007).

#### 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.
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 fifth day of August, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

---

TIMOTHY TIETZE, HEARING EXAMINER