COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES COUNCIL 13	:	
v.	:	Case No. PERA-C-09-483-E
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF PUBLIC WELFARE	:	

PROPOSED DECISION AND ORDER

On December 2, 2009, the American Federation of State, County and Municipal Employees (AFSCME) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Pennsylvania Department of Public Welfare (Commonwealth) violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by refusing to comply with the terms of an agreement in settlement of a charge in Case No. PERA-C-90-34-E. On December 23, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on May 5, 2010. The hearing examiner held the hearing as scheduled and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On July 29, 2010, AFSCME filed a brief by deposit in the U.S. Mail. On July 30, 2010, the Commonwealth filed a brief by hand-delivery.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

FINDINGS OF FACT

1. AFSCME is the exclusive representative of a bargaining unit that includes rank and file clerical employes of the Commonwealth working in county assistance offices. Income maintenance caseworkers are not members of the bargaining unit. (N.T. 14, 16-17, 20-21, 47)

2. On August 8, 1991, the Secretary issued a nisi order of withdrawal granting a request by AFSCME to withdraw a charge of unfair practices in Case No. PERA-C-90-34-E subject to a settlement reached by the parties as follows:

> "1. The Department commits that the Office of Income Maintenance will, whenever possible, design future automated systems in such a way as to ensure that data entry functions are performed by AFSCME represented employees.
>
> 2. If an automated system cannot be designed so that data entry duties are performed by AFSCME represented employees, the Department commits to meet with AFSCME to discuss the matter prior to starting design activities. During the meeting, management will provide a detailed explanation of the problems/factors that prohibit data entry by AFSCME represented employees. The Department also commits to providing AFSCME an opportunity to consider the problems/factors and to make recommendations regarding resolutions that permit data entry to be performed by the employees they represent. Finally, the Department commits to give serious consideration to all viable suggestions presented by AFSCME.
>
> 3. If a transfer of bargaining unit work is at issue in the system design, the Department commits to negotiating over the matter.
>
> 4. Acceptance of this proposal by the parties shall neither establish precedent nor prejudice their rights in any other matter."

(AFSCME Exhibit 1)

3. Effective July 1, 2007, the parties entered into a four-year collective bargaining agreement providing in relevant part as follows:

"ARTICLE 43
PRESERVATION OF BARGAINING UNIT WORK

Section 1. The provisions of Sections 1 through 6 of this Article shall apply only to Master Agreement bargaining unit work performed on July 1, 1996 by employees in rank and file units represented by AFSCME in the particular agency affected.

Section 2.

a. Except as provided in Section 8, the Employer shall not contract/assign Master Agreement bargaining unit work included within the scope of Section 1 to independent contractors, consultants or other non-Master Agreement bargaining unit state employees where (1) such contract/assignment would result in the layoff or downgrading of an employee, or (2) such contract/assignment would prevent the return to work of an available, competent employee, or (3) the duration of the work to be performed under the contract/assignment is expected to be more than 12 consecutive months, or (4) the work is performed on an annually reoccurring basis; except for the reasons set forth in Subsection b.

b. The Employer may contract/assign Master Agreement bargaining unit work described in Subsection a. for any of the following reasons: (1) legitimate operational reasons resulting in reasonable cost savings or improved delivery of service, (2) legitimate operational reasons resulting from technological changes, (3) or where there are insufficient numbers of available, competent employees on layoff on the applicable recall list within the agency to perform the required work.

Section 3.

a. Except as provided in Section 8, the Employer shall not contract/assign Master Agreement bargaining unit work included within the scope of Section 1 which becomes available as a result of a retirement, resignation, termination, promotion, demotion or reassignment of an employee to independent contractors, consultants or other non-Master Agreement bargaining unit state employees, except for the reasons set forth in Subsection b.

b. The Employer may contract/assign Master Agreement bargaining unit work described in Subsection a. for any of the following reasons: (1) legitimate operational reasons resulting in reasonable cost savings or improved delivery of service, (2) legitimate operational reasons resulting from technological changes, (3) or where there are insufficient numbers of available, competent employees on layoff on the applicable recall list within the agency to perform the required work.

Section 4. The Employer shall provide the union with as much advance notice as possible of a proposed contract/assignment of Master Agreement bargaining unit work included within the scope of Section 1 which meets the conditions set forth in Section 2.a or 3.a.

Section 5. At each site where a proposed contract/assignment of Master Agreement bargaining unit work is to occur and provided the work is included within the scope of Section 1 and meets the conditions set forth in Sections 2.a and 3.a, local labor/management committees shall meet and discuss over the reasons for the contract/assignment. At this meeting the Employer shall provide to the union all information it has to support a claim (a) of reasonable cost savings or improved service, (b) of legitimate operational reasons resulting from technological changes, (c) that there are insufficient numbers of available, competent employees on layoff on the applicable recall list within the agency to perform the required work, or (d) that the duration of the contract/assignment is not expected to exceed 12 consecutive months duration. The union shall have the opportunity to provide alternative methods to attaining the Employer's desired result. In the event that the parties at the local level are unable to resolve the issue, the contact or the assignment may be implemented and the matter shall be referred to a committee comprised of Council 13, the Agency and the Office of Administration. Should the parties be unable to resolve the issue, the union shall notify the Office of Administration in writing of its intent to submit the matter to the grievance procedure.

Section 6. The Employer and the Union agree to meet and discuss, on an ongoing basis, at the statewide or agency level to develop a list of contract/assignment exemptions from the provisions of Sections 1 through 5 of this Article. Examples of criteria to be used by the parties for developing the list of exemptions are: duration of the project; total cost of the contract; availability of the necessary skills and/or equipment within the agency's existing resources; ability to complete the project with the Agency's workforce within the required time frames.

Section 7. The Employer agrees to meet and discuss regarding any contract/assignment involving work of the type traditionally performed by the employees covered by the Master Agreement, but excluded by Section 1 of this Article, upon request of the union and presentation by the Union of an alternative which may result in reasonable cost savings or improved delivery of service.

Section 8. This agreement will not be construed so as to prevent other non-Master Agreement bargaining and first-level supervisory unit state employees who are in class titles represented by employee organizations other than AFSCME from performing Master Agreement bargaining unit work for the purpose of instruction, illustration, lending an occasional hand or in emergency situations to carry out the functions and programs of the Employer or maintain the Employer's standard of service.

Section 9. The Employer and the Union acknowledge the above represents the results of negotiations conducted under and in accordance with the Public Employe Relations Act and constitutes the full and complete understanding regarding the issues of contracting out and transfer of bargaining unit work."

(Commonwealth Exhibit 1)

4. By letter dated October 21, 2009, the Commonwealth's director of the bureau of operations in the office of income maintenance (Joanne Glover) wrote to AFSCME's executive director (David Fillman) as follows:

> "The purpose of this correspondence is to advise you of the proposed realignment of work processes being pursued by the Office of Income Maintenance. These proposed changes will increase productivity in the County Assistance Offices, specifically concerning the Phase IV-B process. The enclosed documents provide details and justifications for this action.
>
> In challenging economic times, the Office of Income Maintenance must examine all of our work processes to assure efficient and effective results. Our goal is to enable our staff to continue to provide excellent customer service to the citizens of Pennsylvania. We look forward to working with you and your staff on these changes. If you have any questions, please feel free to contact me at [phone number omitted]."

(AFSCME Exhibit 2)

5. Under the proposed realignment of work processes being pursued by the office of income maintenance, data entry work performed by clerical employes would be transferred to income maintenance caseworkers. (N.T. 14, 20-21, 39-40)

6. Enclosed with Ms. Glover's letter was a form (BLR-1) entitled "NOTIFICATION OF COP'S INTENT TO SUBCONTRACT/ASSIGN BARGAINING UNIT WORK," paragraph B of which she filled out as follows:

> "In accordance with Article 43, Section 5 of the Master Agreement we are notifying you that we are considering the other than temporary transfer of Master Agreement bargaining unit work to PSSU in the CIS Phase IV-B implementation. The Basis for this transfer is __X__ Reasonable Cost Savings and/or __X__ Improved Delivery of Service."

(AFSCME Exhibit 2)

7. Enclosed with Ms. Glover's letter was documentation supporting her claim that the basis for the transfer was reasonable cost savings and/or improved delivery of service. (N.T. 41, 58-60, 63; AFSCME Exhibit 2)

8. By letter dated November 9, 2009, a staff representative for AFSCME (Michael Andrejco) wrote to Ms. Glover as follows:

> "AFSCME Council 13 has received the BLR-1 form for the [Phase IV-B realignment] subcontracting issue.
>
> The Department of Public Welfare is considering a realignment of work processes to increase productivity in the County Assistance Offices, specifically concerning the Phase IV-B process.
>
> Attached please find a copy of the BLR-1 form formally notifying you of AFSCME's request for a meet and discuss.
>
> Please contact me to schedule a suitable time and location for our meeting."

(AFSCME Exhibit 2)

9. On November 19, 2009, the parties held a meet and discuss session. The Commonwealth afforded AFSCME the opportunity to respond to the realignment of work processes under consideration by the office of income maintenance. The Commonwealth did not offer to revise the realignment or to accommodate any "ideas" by AFSCME. (N.T. 15-16, 32-34, 64)

DISCUSSION

AFSCME has charged that the Commonwealth committed unfair practices under sections 1201(a)(1) and (5) by refusing to comply with the terms of an agreement in settlement of a charge in Case No. PERA-C-90-34-E.

In the settlement, the Commonwealth "commit[ted] that the Office of Income Maintenance will, whenever possible, design future automated systems in such a way as to ensure that data entry functions are performed by AFSCME represented employees" (finding of fact 2). The Commonwealth also agreed to the following:

> "If an automated system cannot be designed so that data entry duties are performed by AFSCME represented employees, the Department commits to meet with AFSCME to discuss the matter prior to starting design activities. During the meeting, management will provide a detailed explanation of the problems/factors that prohibit data entry by AFSCME represented employees. The Department also commits to providing AFSCME an opportunity to consider the problems/factors and to make recommendations regarding resolutions that permit data entry to be performed by the employees they represent. Finally, the Department commits to give serious consideration to all viable suggestions presented by AFSCME."

Id.

According to AFSCME, when the parties met on November 19, 2009, to discuss an October 21, 2009, proposal by the Commonwealth to transfer data entry work from members of the bargaining unit (clerical employes) to nonmembers of the bargaining unit (income maintenance caseworkers), the Commonwealth violated the settlement agreement (1) by "inform[ing] AFSCME that it intended to incorporate all of the changes enumerated in the October 21, 2009 correspondence, which constitutes the design of an automated system that by agreement should be designed for clerical," and (2) by "not offer[ing] any explanation as to why it would be impossible for clerical employees to maintain data entry duties" (specification of charges).

The Commonwealth contends that the charge should be dismissed because it met and discussed with AFSCME in conformity with its obligation to do so as set forth in article 43, section 5, of the parties' current collective bargaining agreement.

An employer commits unfair practices under sections 1201(a)(1) and (5) if it violates the terms of an agreement in settlement of a charge. Avery v. Commonwealth of Pennsylvania, 509 A.2d 888 (Pa. Cmwlth. 1986). No violation of those sections may be found, however, if the employer has a sound basis for interpreting an agreement of the parties to mean that it could act as it did. Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000)(construing the analogous provisions of the Pennsylvania Labor Relations Act as read in pari materia with Act 111 of 1968). In such a case, the defense of contractual privilege prevails. Id. Such is the case here. Accordingly, the charge must be dismissed.

The record shows that after the parties entered into the settlement agreement they negotiated a collective bargaining agreement (findings of fact 2-3).

A close review of the collective bargaining agreement reveals that it provides at article 43, section 5, as follows:

> "At each site where a proposed contract/assignment of Master Agreement bargaining unit work is to occur and provided the work is included within the scope of Section 1 and meets the conditions set forth in Sections 2.a and 3.a, local labor/management committees shall meet and discuss over the reasons for the contract/assignment. At this meeting the Employer shall provide to the union all information it has to support a claim (a) of reasonable cost savings or improved service, (b) of legitimate operational reasons resulting from technological changes, (c) that there are insufficient numbers of available, competent employees on layoff on the applicable recall list within the agency to perform the required work, or (d) that the duration of the contract/assignment is not expected to exceed 12 consecutive months duration. The union shall have the opportunity to provide alternative methods to attaining the Employer's desired result. In the event that the parties at the local level are unable to resolve the issue, the contact or the assignment may be implemented and the matter shall be referred to a committee comprised of Council 13, the Agency and the Office of Administration. Should the parties be unable to resolve the issue, the union shall notify the Office of Administration in writing of its intent to submit the matter to the grievance procedure"

(finding of fact 3).

Given that the collective bargaining agreement post-dates the settlement agreement and expressly addresses the Commonwealth's obligations with respect to the transfer of work from the bargaining unit, the defense of contractual privilege prevails so long as the Commonwealth has a sound basis for interpreting the collective bargaining agreement to mean that it could act as it did.

Notably, article 43, section 5, of the collective bargaining agreement provides that "local labor/management committees shall meet and discuss over the reasons for the contract/assignment," that the Commonwealth is to provide AFSCME with "all information it has to support a claim (a) of reasonable cost savings or improved service" for any transfer of bargaining unit work and that "[t]he union shall have the opportunity to provide alternative methods to attaining the Employer's desired result." Id. Thus, it is apparent that the Commonwealth has a sound basis for interpreting the collective bargaining agreement to mean that the November 19, 2009, meet and discuss session was for AFSCME to be afforded the opportunity to provide alternative methods to attaining the Commonwealth's desired result as set forth in Ms. Glover's letter of October 21, 2009.

The record shows that prior to the November 19, 2009, meet and discuss session the Commonwealth provided AFSCME with documentation to support its claim of reasonable cost savings and improved service if the data entry work being performed by clerical employes were transferred to income maintenance caseworkers (findings of fact 6-7). The record also shows that at the November 19, 2009, meet and discuss session the Commonwealth afforded AFSCME the opportunity to respond to the proposed realignment of work processes (finding of fact 9).

On that record, it is apparent that that the Commonwealth held the November 19, 2009, meet and discuss session in conformity with its interpretation of article 43, section 5, of the collective bargaining agreement. Thus, the Commonwealth's conduct was contractually privileged.

CONCLUSIONS

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

1. The Commonwealth is a public employer under 301(1) of the PERA.

2. AFSCME is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. The Commonwealth has not committed unfair practices under sections 1201(a)(1) and (5) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the change 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixteenth day of August 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner