

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE :
COUNTY AND MUNICIPAL EMPLOYEES, :
DISTRICT COUNCIL 89 :
 : Case No. PERA-C-15-36-E
v. :
 :
LANCASTER COUNTY :

PROPOSED DECISION AND ORDER

On February 9, 2015, the American Federation of State, County and Municipal Employees, District Council 89 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Lancaster County (County or Employer), alleging that the County violated Section 1201(a)(1) and (2) of the Public Employe Relations Act (PERA or Act) by refusing to process grievances. On February 19, 2015, the Secretary of the Board declined to issue a Complaint and dismissed the charge, stating that AFSCME failed to allege sufficient facts to support a finding of a violation of Section 1201(a)(1) or (2) of PERA. The Secretary was also unable to determine whether the charge was timely because AFSCME failed to allege the date on which it believed an unfair practice had occurred. AFSCME filed an amended charge of unfair practices with the Board on March 2, 2015, alleging that the County violated Section 1201(a)(1) and (5) of PERA by refusing to process grievances to arbitration on November 25, 2014, which the Board treated as exceptions to the dismissal of the charge, because it was filed within the twenty-day period for filing exceptions.¹

On March 17, 2015, the Board issued an Order Directing Remand to the Secretary for Further Proceedings based on the allegations set forth in the charge and the further clarification on exceptions. On April 2, 2015, the Secretary issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and designating October 26, 2015, in Harrisburg, as the time and place of hearing, if necessary.

A hearing was necessary and was held before the undersigned Hearing Examiner of the Board as scheduled on October 26, 2015, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The County filed a post-hearing brief in support of its position on December 14, 2015. AFSCME filed a post-hearing brief in support of its position on December 17, 2015.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4)
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)
3. AFSCME is the exclusive bargaining agent for a unit of guards working at the Lancaster County prison. (Joint Exhibit 1)
4. AFSCME and the County are parties to a collective bargaining agreement (CBA) which was effective from January 1, 2012 through December 31, 2015. The CBA contains a grievance procedure, culminating in arbitration. (Joint Exhibit 1)
5. On May 2, 2014, AFSCME filed grievances on behalf of William Miller and Tyler Phillips, who were corrections officers discharged by the County for an alleged

¹ AFSCME did not except to the Secretary's dismissal of its allegation of a violation of Section 1201(a)(2) of PERA.

incident which occurred on April 21, 2014. AFSCME alleged in the grievances that the County lacked sufficient cause for the terminations, which was a violation of the CBA. (Joint Exhibits 5, 6)

6. On May 9, 2014, the County denied both grievances at Step 2 of the process. (N.T. 29-30; Joint Exhibits 5, 6)
7. On May 14, 2014, AFSCME moved the grievances forward through the process. (Employer Exhibit 3)
8. By email dated May 15, 2014, Sue Dry, the County's Director of Human Resources, communicated with AFSCME's local president, Brian Secor, as follows:

The grievance should be processed through Step 2. Because these two individuals were probationary officers, the CBA clearly provides that the grievance stops at Step 2. The County will not agree to process the grievance further because the parties already have a clear agreement on the ability of probationary officers to process grievances. This grievance is not arbitrable past Step 2. While AFSCME may disagree with the County's position, this is the County's position.

(Employer Exhibit 3)

9. On May 20, 2014, Dry sent a letter regarding each grievance to Steve Mullen, Director of AFSCME District Council 89, which provided in relevant part as follows:

Dear Steve,

Please allow this to respond to Grievance 502-73 [502-74]. The Grievance claims a violation of Article XX section 1 of the Collective Bargaining Agreement ("The Contract") between AFSCME District Council 89 and the County of Lancaster...

In review of this former employee's personnel file the employee was hired June 4th, 2013 and therefore was in his probationary period when he was terminated from employment by the County of Lancaster on April 21, 2014.

The Collective Bargaining Agreement, Article XX, Section 4 states that *"Employees shall serve a one (1) year probationary period. During such probationary period the conditions imposed by the grievance procedure of this Article shall not be applicable to probationary employees. However, probationary employees shall share in all other benefits except as specifically abridged or excluded by this Agreement and shall be entitled to grieve actions up to Step 2, Article XIX after sixty (60) days of continuous service."*

Since this grievance has already been processed to the Prison Warden as set forth in Step 2 of the grievance procedure, the County will apply the language of the agreement between the parties. As such, it is the County's position that the Union cannot-and the County will not-process this grievance beyond Step 2. Accordingly, the grievance is denied at Step 2 and the County's decision to terminate is final.

(Employer Exhibits 2, 3) (Emphasis in original)

10. On May 22, 2014, Mullen responded with a letter to Dry, which provided as follows:

Dear Ms. Dry,

The Employer's responses to the above reference grievances are unsatisfactory. Therefore, AFSCME District Council is appealing the above referenced grievances to **ARBITRATION**.

Should you have any questions, please feel free to contact me...

(Union Exhibit 2) (Emphasis in original)

11. The County did not respond to AFSCME's May 22, 2014 demand for arbitration. (N.T. 15)
12. By email dated June 17, 2014, Mullen followed up and asked the Employer's Counsel, Michael McAuliffe Miller, whether he preferred arbitrating the two grievances together or separately for purposes of requesting a list from the Bureau of Mediation. (N.T. 16; Union Exhibit 2)
13. By email dated June 17, 2014, Attorney Miller responded by stating "[l]et me see what Crystals (sic) position is. My recollection is that there is an issue regarding arbitrability. I will get back to you." Crystal was the County solicitor at the time. (N.T. 16; Union Exhibit 2)
14. By email dated July 17, 2014, Mullen again followed up with Attorney Miller and Dry asking "[d]o you have a response to this? I want to move the grievances forward as soon as possible." The County did not respond until November 2014. (N.T. 15-16; Union Exhibit 2)
15. By email dated November 25, 2014, Attorney Miller provided the following response, in pertinent part, to Mullen:

Following our discussion today, I wish to reaffirm the County's position that Probationary Officers Miller and Phillips are not entitled to the grievance procedure. Article XVI, Section 2 ("Probationary employees who are discharged, demoted, suspended or disciplined may process a grievance based on the foregoing **only to the second step** after sixty (60) days of continuous employment.")

[Probationary Officers] Miller and Phillips were probationary employees when they were terminated and, by agreement of the parties, they cannot process this grievance to Step 3 and select an arbitrator. As such, the County is not required to strike those two lists because-again, by prior agreement of the parties-the arbitrator cannot assume jurisdiction at all...

(Union Exhibit 2) (Emphasis in original)

DISCUSSION

AFSCME has alleged that the County violated Section 1201(a) (1) and (5) of the Act² by refusing to process grievances. The County argues that it has not committed unfair practices in violation of the Act because AFSCME's charge was untimely and the CBA does not permit probationary employees access to arbitration.

Section 1505 of the Act provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months

² Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act... (5) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

prior to the filing of the charge." 43 P.S. § 1101.1505. It is well settled that a charge of unfair practices for refusal to arbitrate need not be filed when a public employer earlier announces its intent to subsequently refuse to arbitrate, although such activity when it occurs might be regarded as a refusal to bargain in good faith. **Allegheny Court Associated Professional Employees v. Allegheny County**, 38 PPER 116 (Final Order, 2007). The timeliness of the specific refusal to arbitrate the disputed claim is measured from when the arbitration duty arose and the employer refused a demand to arbitrate. *Id.* Thus, for purposes of an alleged refusal to arbitrate a grievance, the four-month limitations period commences to run from the employer's refusal to arbitrate. *Id.*

In this case, the four-month limitations period did not begin to run in May 2014, as alleged by the County. At that time, the County simply announced its position that "the Union cannot-and the County will not-process this grievance beyond Step 2. Accordingly, the grievance is denied at Step 2 and the County's decision to terminate is final." The County did not indicate that it was refusing to arbitrate the grievance at any time in May 2014. AFSCME filed a demand for arbitration with the County immediately following Dry's May 20, 2014 letter, to which the County did not respond. In fact, the County's attorney equivocated in his June 2014 email in response to a follow-up from AFSCME regarding the selection of an arbitrator, specifically stating "[l]et me see what Crystals (sic) [the County solicitor] position is. My recollection is that there is an issue regarding arbitrability. I will get back to you." It was not until November 25, 2014, when the County's attorney wrote to AFSCME and advised that the County was not required to strike the list for an arbitrator in each of the grievances, that the County was refusing to arbitrate. As a result, AFSCME's February 9, 2015 charge of unfair practices was filed with the Board within four months of the County's refusal to arbitrate, and is therefore, timely.

The County also contends that the charge should be dismissed because the language of the CBA states that grievances from probationary employees will not be processed past the second step of the grievance procedure. As such, the County argues that the grievances are not arbitrable. However, it has been repeatedly held for decades that the question of the scope of the grievance arbitration procedure is for the arbitrator, at least in the first instance; meaning that an arbitrator has sole and exclusive jurisdiction to hear disputes related to collective bargaining agreements, including disputes of whether a matter is arbitrable.. **PLRB v. Bald Eagle Area School District**, 451 A.2d 671 (Pa. 1982); **Abington Heights School District v. PLRB**, 709 A.2d 990 (Pa. Cmwlth. 1998); **Chester Upland School District v. McLaughlin**, 655 A.2d 621 (Pa. Cmwlth. 1995). Even frivolous grievances must be submitted to the arbitrator. **Palmerton Area Education Ass'n, PSEA/NEA v. Palmerton Area School District**, 41 PPER ¶ 153 (Proposed Decision and Order, 2010) *citing Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh*, 391 A.2d 1318 (Pa. Cmwlth. 1978). Refusal to submit a grievance to arbitration constitutes a per se bargaining violation. **Indiana Area Education Ass'n, PSEA/NEA v. Indiana Area School District**, 35 PPER ¶ 56 (Final Order, 2004). To permit the employer to unilaterally refuse to submit a dispute to arbitration would in effect allow the employer's interpretation to control. **East Pennsboro Area School District v. PLRB**, 467 A.2d 1356 (Pa. Cmwlth. 1983).

On this record, AFSCME has sustained its burden of proving that the County violated Section 1201(a)(1) and (5) of PERA. Indeed, the record clearly shows that the County has refused to arbitrate the grievances, which AFSCME filed on behalf of two corrections officers.³ Although the County maintains that these officers are not entitled to process their grievances to arbitration, it is well settled and beyond dispute that the County must present that argument to the arbitrator in the first instance. The County cannot refuse to proceed to arbitration and expect this Board to delve into the reasons and/or merits for its refusal. The determination of whether the corrections officers are entitled to process their grievances to arbitration is for an arbitrator to decide, and

³ During the hearing, the County made a motion to dismiss the charge once AFSCME rested its case-in-chief, averring that AFSCME had not satisfied its burden of proof. (N.T. 45-51) The County's motion to dismiss is denied. The record shows that AFSCME clearly sustained its burden of proving the County violated the Act by refusing to process the grievances to arbitration.

not the County.⁴ Accordingly, the County has committed unfair practices in contravention of 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 as follows:

1. The County 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 hereto.
4. The County has committed unfair practices in violation of Section 1201(a)(1) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the County 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 the employe organization which is the exclusive representative of employes in the appropriate unit, including but not limited to discussing of grievances with the exclusive representative.
3. Take the following affirmative action:
 - (a) Immediately submit the aforementioned grievances (Nos. 502-73 & 502-74) for arbitration in accordance with the process contained in the parties' collective bargaining agreement by either mutually selecting an arbitrator or striking names from the list of arbitrators provided by the Pennsylvania Bureau of Mediation until an arbitrator is selected to hear each of the disputes;
 - (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 the bargaining unit 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; and
 - (d) Serve a copy of the attached Affidavit of Compliance upon the Union.

⁴ The County also contends that AFSCME waived the right to process grievances to arbitration on behalf of probationary employes. However, this argument is without merit. There is absolutely no evidence whatsoever that the parties agreed to allow the County to unilaterally determine whether certain classifications of employes, including probationary employes, have access to the grievance arbitration procedure.

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 14th day of January, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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AFFIDAVIT OF COMPLIANCE

Lancaster County hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (5) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union 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