COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CITY OF PHILADELPHIA	:	
	:	
v.	:	CASE NO. PERA-C-12-305-E
	:	
AMERICAN FEDERATION OF STATE	:	
COUNTY AND MUNICIPAL EMPLOYEES	:	
DISTRICT COUNCIL 33 LOCAL 159	:	

PROPOSED DECISION AND ORDER

On September 25, 2012, the City of Philadelphia (City) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the American Federation of State County and Municipal Employees, District Council 33, Local 159 (AFSCME or Union) violated Section 1201(b)(3) and (9) of the Public Employe Relations Act (PERA or Act). The City specifically alleged that the Union bargained in bad faith in the manner in which it pursued a grievance against the Philadelphia Prison System (PPS or Prison System).

On October 12, 2012, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on December 13, 2012, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. Both parties presented closing arguments in lieu of filing post-hearing briefs.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)

3. The parties' collective bargaining agreement contains a Grievance Procedure. The Grievance Procedure provides, in relevant part, as follows:

> Grievances shall be processed and resolved in accordance with the following procedure:
>
> . . . .
>
> **Step III**
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> If the grievance is not resolved or no reply is given the Grievant in Step II, the Grievant or Union Representative must refer the grievance, in writing, within fourteen (14) days of the Step II answer (or its due date) to the Department Head or Commissioner. A meeting shall be held between the Department Head or Commissioner or his designee, the appropriate Union Official and the aggrieved. The Department Head shall provide a written reply within fourteen (14) days of the submission of a grievance. In the event of a failure to resolve or respond, the Grievant or Union may process the grievance to Step IV at the end of the above time period.
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> **Step IV**
>
> If the grievance is not resolved or no reply is given the Grievant, it must be referred by the Union within twenty (20) days of the Step III answer (or its due date) to the Personnel Director. A meeting shall be held between the Personnel Director or his designee, the appropriate Union official(s) and a representative of the Department within ten (10) days of the presentation of the grievance at this step. The Personnel Director shall

provide a written reply within twenty (20) days of the date of the above meeting.

(Joint Exhibit 1 at 24-25)

4. Step V of the Grievance Procedure is a voluntary step which provides that, by agreement of the parties, the grievance may be submitted to a six member panel with equal representation of the parties. Step VI of the Grievance Procedure provides that, where a grievance that remains unresolved after having been processed through Step IV, "the Union may within fifteen (15) days of the Step IV answer or the Step V conclusion, if the step is utilized, refer the grievance to binding arbitration. . . ." Weekends and holidays are excluded from the computation of time under the Grievance Procedure. (Joint Exhibit 1 at 25)

5. On May 3, 2012, the Union filed a Step 3 Grievance with the Prison System claiming that the Prison System violated the parties' collective bargaining agreement by jeopardizing the health and safety of corrections officers by utilizing "Restricted Movement" during staff shortages and requesting that the Prison System discontinue the Restricted Movement practice.[1] There are six jails in the Philadelphia Prison System. (N.T. 13-14, 26, 45; City Exhibit C)

6. Under the collective bargaining agreement, the Prison System's response was due fourteen business days after May 1, 2012, which was Monday, May 21, 2012. On May 22, 2012, the Union advanced the Grievance to Step 4 and filed it with the City's Office of Human Resources. The Union did not receive a response to the Step 3 Grievance filing before it advanced the Grievance to Step 4 on May 22, 2012. Under the collective bargaining agreement, the Union is permitted to advance a grievance to Step 4 if 14 days have elapsed without a response from the employer. (N.T. 17-18, 27; Joint Exhibit 1; City Exhibit C)

7. On June 13, 2012, after the Grievance had been filed at Step 4, the Human Resources Office of the Philadelphia Prison System responded to the Grievance for the first time and scheduled a Step 3 Grievance hearing for June 20, 2012. (N.T. 14-15, 26-27; City Exhibit D)

8. The Union did not attend the meeting scheduled for June 20, 2012. (N.T. 15)

9. On July 5, 2012, Human Resources Manager Dellcsha C. Brown informed the Union as follows:

> After being notified as to the date and time of the hearing in conjunction with this grievance, neither the Union nor the grievant appeared for the hearing nor notified this office concerning rescheduling the hearing.
>
> . . . .
>
> Therefore, this grievance is denied due to lack of pursuance on the part of the grievant parties.

(City Exhibit E)

10. At Step 4 of the Grievance Procedure, the City must respond within 20 days. On July 11, 2012, the Union filed a request for arbitration with the American Arbitration Association, which is more than 20 days after the Grievance was filed at Step 4. The Union did not receive a response from the City and within the 20-day deadline at Step 4. Arbitration at Step 6 is the next step when the parties do not agree to Step 5. (N.T. 27-28; Joint Exhibit 1; City Exhibit I)

11. On July 30, 2012, Rene Vargas, from the Mayor's Labor Relations Office, wrote the Union as follows:

> On July 11, 2012, Local 159 filed a demand for arbitration regarding Restricted Movement at the Philadelphia Prisons. The Union contends that the Prisons violated the collective bargaining agreement, and threatened the health and

[1] The Grievance is dated May 1, 2012. The Philadelphia Prison System time-stamped the Grievance as "RECEIVED" on May 3, 2012. The time-stamp is substantial, competent evidence of the date that the Prison System received the Grievance. Accordingly, I have designated May 3, 2012, as the filing date of the Grievance.

safety of members, by conducting Restricted Movement during staff shortages. As a remedy, the Union seeks to have this practice discontinued.

Local 159 filed a third step grievance with the Prisons on May 3, 2012, regarding this issue. A grievance hearing was scheduled for June 20, 2012, where the Union could present their case. Local 159 failed to appear for the hearing, and never asked to have the hearing rescheduled. Even before the June 20th hearing was conducted, Local 159 filed a fourth step grievance with my office at the end of May. However, a proposed hearing date had not been discussed with the Union when Local 159 proceeded to file for arbitration this month. The Union's actions at the third and fourth level appear to be circumventing the grievance process contained in the collective bargaining agreement.

In addition to the irregularities in the grievance process, Local 159 did not provide any specifics regarding its claim that Restricted Movement violated the contract when it filed the grievance. Therefore, I am making a formal request to Local 159 for the following information:

1. Date(s), time, and institution when Restricted Movement occurred
2. Date(s), time, institution, and name of any officer injured during Restricted Movement
3. Union to identify contract provision that it believes was violated by the Use of Restricted Movement
4. Date(s), time, institution, and name of any officer Local 159 believes was adversely affected by Restricted Movement, and a detailed description of how the officer was affected

In order to handle this grievance in accordance with our obligation under the collective bargaining agreement and ACT 195, it would be appreciated if the requested information was submitted to me by August 17, 2012.

(City Exhibit F)

12. On August 9, 2012, the Union submitted a request for information to the City's Deputy Commissioner of Operations for the Philadelphia Prison System. The Union's letter provides, in relevant part, as follows:

Local 159 has serious concerns about the PPS's use of Restricted Movement. The PPS is using Restricted Movement to open the jails and run normal activit[ies] while the institution is dangerously short of staff.

As part of an investigation into a potential grievance on the issue, Local 159 requests the following information:

1. Copies of any and all documents concerning or relating to the implementation of Restricted Movement at the PPS from January 1, 2011 to date.
2. Copies of all Restricted Movement reports for CFCF, HOC, RCF, DC, PICC, and ASD from January 1, 2011 to date.
3. A list of all Officers injured on duty, providing date of injury, nature of injury, and time lost as a result, from January 1, 2011 to date.
4. Copies (color or electronic) of all Corestar Monthly Statistical Reviews from April 2010 to date.

These requests are made without prejudice to the union's right to file subsequent requests. Please forward the requested the [sic] information directly to the union office on or before August 30, 2012.

(City Exhibit J)

13. On August 27, 2012, Mr. Vargas again sent a second request for the same information that he requested on July 30, 2012. In this letter, Mr. Vargas warned as follows: "If this information is not provided to me by September 4, 2012, I will have to

consider filing an Unfair Labor Practice charge against Local 159 for failing to provide requested information." (N.T. 23-24, 29; City Exhibit G)

14. The collective bargaining agreement provides that time limits may be extended by mutual agreement. The City did not request any extensions of time to respond at any step of the Grievance Procedure for the Health and Safety Grievance. (N.T. 38)

15. On August 31, 2012, the Union President responded to the City's information requests via email addressed to Mr. Vargas at his City Hall email address. The email response did not respond to all the information requested by Mr. Vargas. It was based on the information that the Union President had at the time. (N.T. 51-52, 54; Union Exhibit 1)

16. The Union's August 31, 2012 email provides, in relevant part, as follows:

> Approximately 9:00 pm (2) Officers were hurt at RCF after being attacked by inmates; a full response had to be called after other inmates got involved.
>
> Riverside Correction facility is overcrowded and understaffed.
>
> In addition, RCF was running restrictive movement and Commissioner of Prisons refuses to comply with the 64-1 ratio of Correctional Officers to inmates and as a result our people continue to be put in harm's way.

(Union Exhibit 1)

DISCUSSION

As an initial matter, I am dismissing the City's cause of action under Section 1201(b)(9), which provides that it shall be an unfair practice for an employe organization to refuse to comply with the requirements of "meet and discuss." 43 P.S. § 1101.1201(b)(9). The Union is the exclusive collective bargaining representative of the bargaining unit employes in the Prison System. The parties in this case have a collective bargaining relationship and a collective bargaining agreement. They have gone to interest arbitration to resolve collective bargaining issues and impasses. Therefore, the parties owe each other an obligation to bargain, and there is no obligation to "meet and discuss." Accordingly, the cause of action under Section 1201(b)(9) is unavailable to the City in this case as a matter of law.

The City argues that the Grievance is not arbitrable because "Restricted Movement is not mentioned in the Collective Bargaining Agreement. It's therefore not a subject of the Grievance process." (N.T. 56). The City maintains that the Union is not entitled to avail itself to the grievance process and the proper way to challenge Restricted Movement in the Prison System is through the interest arbitration process. However, the Board has consistently rejected the City's position on arbitrability here. The Board has held that an employer does not have the right to unilaterally determine which grievances are arbitrable and that arbitrability is for the arbitrator to decide in the first instance. Permitting an employer's interpretation to control would permit employers to effectively deny any and all grievances. **East Pennsboro Area School District v. PLRB**, 467 A.2d at 1358, 1359.

The Board has held that even frivolous grievances must be submitted to an arbitrator and that, even if the employer's position regarding arbitrability is correct, the employer must submit the grievance to arbitration and argue arbitrability to the arbitrator. **City of Pittsburgh**, 481 Pa. 66, 391 A.2d 1318; **Palmerton Area Education Association v. Palmerton Area School District**, 41 PPER 153 (Proposed Decision and Order, 2010). The Commonwealth Court expressly rejected the exact argument made here by the City in **York County Area Vo-Tech Educ. Ass'n v. York County Area Vo-Tech Sch.**, 570 A.2d 105 (Pa. Cmwlth. 1990). The **York County Area Vo-Tech** Court specifically held that an arbitrator properly determined arbitrability in favor of the grievant ***even though the agreement was silent on the grievance issue*** because an arbitrator may base his conclusions on the implications of the agreement. Indeed, the City has characterized the issue to be decided under the contract as "Restricted Movement," which it claims is not addressed by the contract/award. Therefore, the City argues that the Grievance is not arbitrable under the Grievance Procedure. However, the Union's contract issue is the

health and safety of officers which are allegedly being threatened by the Prison System's use of Restricted Movement. Even though Restricted Movement may not be expressly addressed by the parties' collective bargaining agreement/interest award, an arbitrator may base his/her conclusions about the health and safety of officers on the implication of the parties' agreement/award. **York Area Vo-Tech, supra.** Accordingly the Union is not engaging in bad faith bargaining for pursuing the Health and Safety Grievance to arbitration.

The City next argues that, although the Union followed the time lines contained in the Grievance Procedure, it did not follow the spirit of the collective bargaining agreement. (N.T. 57). The City maintains that Mr. Vargas and the Union president speak several times per week and that, at no time between the filing of the Grievance, on May 3, 2012, and August 2012, did the Union President mention the Health and Safety Grievance. (N.T. 57). In addition, the City contends that the Grievance does not explain which institution the Union is concerned about, which officers may have been injured or instances that may have occurred during Restricted Movement. (N.T. 57-58). In this context, the City further argues that Mr. Vargas attempted to conduct fact-finding by meeting with the Union and by requesting information, but the Union did not adequately respond to his information request or attend the scheduled meeting. Without the Union's participation in the fact-finding process, the City claims that Mr. Vargas was unable to discern the extent and nature of the Union's complaint. (N.T. 58). The Union responded to the information request, claims the City, only after Mr. Vargas's second information request and the information provided was incomplete.

The City argues that, although the City did not respond to the Grievance on time, custom and practice permitted the parties to take more time than the collective bargaining agreement provides. (N.T. 59-60). The City recognizes the Union's right to advance the Grievance to protect its rights under the collective bargaining agreement but maintains that the Union did not act in good faith and engage in the spirit of the grievance process to resolve the grievance before arbitration. (N.T. 60). The City believes that the Union is using the grievance process to obtain through grievance arbitration what it did not obtain during interest arbitration, by not responding to requests for information, just to get the issue before an arbitrator. (N.T. 60-61).

The Union has an absolute obligation to preserve its rights to advance grievances under the CBA. As argued by the Union, it had a sound contractual basis for advancing its Health and Safety Grievance to the next level, as required by the contractual time limits, where the City failed to respond to the Grievance before those time limits expired and where the City scheduled meetings beyond the expiration of the contractual time limits without reaching out to the Union for extensions or waivers. The City did not request extensions to respond leaving the Union with no choice but to avail itself to the contractual language and advance its grievances. In this regard, the City is being disingenuous by arguing that the Union bargained in bad faith by not following the spirit of the collective bargaining agreement because the meetings were scheduled beyond the City's response dates. The City seems to believe that it is following the spirit of the collective bargaining agreement by choosing which contractual obligations it likes to follow. Although the Union could have still participated in the meeting after advancing its Health and Safety Grievance, the meeting was not mandated under the contract, after the response expiration date, without a time waiver from the Union.

Although the City claims that custom and practice relieved the City of its obligation to abide by the contractually mandated timelines, there is no evidence on this record that such a practice suspended the Grievance Procedure timelines without communicating with or obtaining consent from the Union. Consequently, the conclusory argument about custom and practice, which lacks support and specificity, does not establish that the City was authorized to unilaterally ignore the contractual time limits contained in the Grievance Procedure. The City criticized the Union president for not discussing the Grievance with Mr. Vargas at any time during their weekly discussions, but Mr. Vargas did not raise the Grievance with the Union President either. Also, the Union was well aware of the City's position on the safety of officers during Restricted Movement because the matter was exhausted during interest arbitration. Therefore, the Union's advancing of the Grievance within the timelines mandated by the collective bargaining agreement, without attending the meeting, scheduled by the City after

response-time expiration, was in accordance with both the terms and the spirit of the collective bargaining agreement.

In this same vein, Ms. Brown's July 5, 2012 letter ignores the Union's bargained for rights and obligations under the Grievance Procedure. In that letter, Ms. Brown, after the City missed two deadlines to respond to the Union's Step 3 and Step 4 Grievance, denied the Grievance "due to lack of pursuance on the part of the grievant parties," because "neither the Union nor the grievant appeared for the hearing nor notified this office concerning rescheduling the hearing." (F.F. 9). Ms. Brown's conclusion conveniently neglected to consider that it was the City that failed to provide a response to the May 3, 2012 Grievance until approximately 62 days after it was filed and after contractually imposed deadlines were missed by the City, without agreement from the Union, which rendered the meetings nugatory.

A reasonable Union person could naturally fear that the City was attempting to avoid the timely processing of the Grievance. The City engaged in the following conduct: Multiple delays in responding to the Grievance beyond the contractually imposed deadlines without agreement; the scheduling of meetings beyond those deadlines, while the Union had a contractual obligation to advance the Grievance; denying the Grievance based on the Union's claimed failure to pursue the Grievance, when in fact it had advanced it to the next level, and not based on investigated information. An inference the Union could draw from the totality of these circumstances is that the City was attempting to catch the Union off-sides hoping the Union would fail to timely advance its Grievance.

The City also claims that the Union bargained in bad faith by failing to provide requested information and by failing to participate in meetings with the City. The information and the meetings were necessary, argues the City, because the Health and Safety Grievance was vague on its face. The Grievance indeed did not provide any information regarding the specific jails or officers negatively affected by Restricted Movement. However, the information sought from the Union is in the possession of the City. The City would have an obligation to conduct its own independent investigation, even after receiving information from the Union, if for nothing else than to verify the information supplied by the Union and to make an informed decision regarding the Grievance. In this regard, the City's position on its information request is simply without merit. Moreover, the Union was clearly complaining about all the prison facilities systemwide where the Prison System employed Restricted Movement. The record also establishes that the Union did not possess the information requested by the City. On August 9, 2012, the Union sent an information request to the City's Deputy Commissioner of Operations, wherein the Union requested much of the same information from the City as Mr. Vargas seemingly needed and requested from the Union.

Despite the fact that the City was better situated than the Union to investigate the Grievance, the Union did respond to the second information request with the limited information that it could obtain by the second deadline imposed by the City. The Union's response demonstrated that two officers were injured at the Riverside Correction Facility after being attacked by inmates as a result of Restricted Movement. It further provides that the Commissioner of Prisons is not complying with the 64-1 ratio of officers to inmates systemwide. Even after the Union provided limited information, however, the record is devoid of evidence that the City opened its own investigation to verify and discover the use of Restricted Movement and the alleged injuries sustained by officers after being attacked by inmates during Restricted Movement.

The City also seems to posit that the Union is somehow foreclosed from raising the health and safety issues related to Restricted Movement because Restricted Movement was raised and fully presented during the interest arbitration procedure and the interest award did not address Restricted Movement. The City, however, has not cited any case law supporting such a proposition. Furthermore, the Union's pursuit of eliminating Restricted Movement as an ongoing safety issue for employes does not constitute bad faith bargaining just because it did not obtain its goal of eliminating Restricted Movement during interest arbitration. The Union is vigorously pursuing collective bargaining avenues to protect the safety of its members. As long as the safety of bargaining unit members regarding a practice is an issue, the Union may grieve that safety issued until an arbitrator decides that very safety question.

The Union had a right to advance its grievance to arbitration, in this case, where the City was not timely responding to the Union, where the Union was well aware of the City's position on the Union's safety concerns regarding Restricted Movement from the interest arbitration process, where the City was in a better position to obtain the information that it claimed it needed and where the Union provided the information that it did have. The Union simply did not engage in unfair practices or bad faith bargaining by following the Grievance Procedure to advance a grievance to arbitration when the City was repeatedly delinquent in failing to timely respond on multiple occasions. Also, there was no obligation to meet with the City when the City's unilaterally scheduled meetings were after grievance deadlines in the contract.

Accordingly, the City's charge of unfair practices under Section 1201(b)(3) and (9) is dismissed and the complaint is rescinded.

CONCLUSIONS

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

1. The City is a public employer under PERA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Union has **not** committed unfair practices within the meaning of Section 1201(b)(3) or (9).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is 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 twenty-sixth day of October, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner