COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 47 LOCAL 2187, AFL-CIO	:	
	:	
	:	Case No. PERA-C-17-187-E
v.	:	
	:	
CITY OF PHILADELPHIA PRISON SYSTEM	:	

PROPOSED DECISION AND ORDER

On July 12, 2017, the American Federation of State, County, and Municipal Employees District Council 47, Local 2187 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the City of Philadelphia Prison System (City or PPS), alleging that the City violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by unilaterally altering a past practice whereby AFSCME selected its own representative to a peer review panel to consider the scope of discipline to be imposed upon employes.

On July 24, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on October 2, 2017, in Harrisburg, if necessary. After several continuances, the hearing ensued on May 30, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The City filed a post-hearing brief on August 31, 2018. AFSCME filed a post-hearing brief on September 4, 2018.

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

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

3. AFSCME represents a unit of administrative, professional, and technical employes who work for the City. (N.T. 22)

4. AFSCME and the City are parties to a collective bargaining agreement (CBA) governing the terms and conditions of employment for the employes in the unit. (N.T. 22-23)

5. The PPS has written disciplinary procedures that apply to employes working at PPS. (Joint Exhibits 3, 4, 5)

6. Under these procedures, employes that are accused of an infraction which potentially carries more than a nine-day suspension are subject to a formal disciplinary board hearing on the charges before two managers and a peer member. (Joint Exhibits 3-6)

7. The disciplinary board hears the charges against the employe, along with any evidence supporting those charges, and determines whether those charges will be sustained, as well as what, if any, penalty will be recommended based on those charges. (Joint Exhibit 6)

8. The employe charged with misconduct may have a Union advocate present during the disciplinary board hearing, which is a separate position from the peer board member. (Joint Exhibits 3-6)

9. The disciplinary board hearing is a preliminary step in the disciplinary process. While a hearing ensues before the disciplinary board and the disciplinary board makes a recommendation of penalty, the employe may appeal the decision to the Commissioner. Employes may then challenge any discipline imposed through the grievance procedure set forth in the CBA. (N.T. 29-32, 40-42; Joint Exhibits 3-6)

10. Prior to March 16, 2012, the City selected peer members for all formal disciplinary board hearings. (N.T. 28)

11. On March 16, 2012, an interest arbitration panel issued an award which gave AFSCME District Council 33, Local 159, another union with members employed as corrections officers with the PPS, the right to designate the peer member for any formal disciplinary board involving one of its members. (Joint Exhibit 1)

12. The CBA between AFSCME District Council 47, Local 2187, the charging party herein, and the City, does not include the right to designate the peer member for any disciplinary board hearings. (N.T. 45)

13. Since the March 16, 2012 interest award covering the unit of corrections officers, the City allowed AFSCME to designate the peer member for disciplinary board hearings on October 29, 2015 and February 18, 2016 involving the unit of administrative, professional, and technical employes. There have been at least 13 other disciplinary board hearings for employes in the AFSCME unit between 2013 and 2017. (N.T. 28-39, 48-50; Exhibit C-1)

14. On March 22, 2016, the parties met to discuss a grievance involving the City's discipline of Cherone Hall. During the meeting, PPS Deputy Commissioner Robert Tomaszewski learned that Union steward Na'im Ali, who served as the peer member at Hall's disciplinary board hearing, had allegedly revealed to the Union the content of the disciplinary board's deliberations. Tomaszewski became irate, began criticizing Ali, and stated that he was not going to permit the Union to select a peer in the future. (N.T. 26-27, 41; Joint Exhibit 2)

15. By email dated April 12, 2016, Tomaszewski confirmed to the Union in writing that he was denying the Union's grievance over discipline imposed on Hall. Tomaszewski also made a series of allegations regarding Ali, including that Ali had acted unethically by revealing allegedly confidential deliberations of the disciplinary board. (N.T. 26-27; Joint Exhibit 2)

16. Since April 12, 2016, the City has not allowed AFSCME to select a peer member for formal disciplinary board hearings, nor has the City allowed Ali to sit as a peer member on any disciplinary boards. (N.T. 32-34, 39)

DISCUSSION

AFSCME's charge alleges that the City violated Section 1201(a)(1) and (5) of PERA[1] by unilaterally altering a past practice whereby AFSCME selected its own representative to a peer review panel to consider the scope of discipline to be imposed upon employes and by excluding Ali from that panel. The City contends that the charge should be dismissed because the decision regarding who issues discipline is a managerial prerogative, and there was no past practice of the Union selecting its own peer.

Section 1505 of PERA provides that "[n]o petition or charge shall be entertained which relates to acts which occurred or statements that were made more than four months prior to the filing of the charge." 43 P.S. § 1101.1505. A charge will be considered timely if it is filed within four months of when the charging party knew or should have known that an unfair practice was committed. Community College of Beaver County Society of Faculty, PSEA/NEA v. Beaver County Community College, 35 PPER 24 (Final Order, 2004). The statute of limitations begins to run when the union receives notice of the employer action that is the subject of the unfair practice charge. Upper Gwynedd Township, 32 PPER § 32101 (Final Order, 2001). However, notice to employes is not considered notice to the union unless it is shown that the employes are the union's agents. Teamsters Local 77 v. Delaware County, 29 PPER ¶ 29087 (Final Order, 1998), aff'd sub nom., County of Delaware v. PLRB, 735 A.2d 131 (Pa. Cmwlth. 1999), appeal denied, 561 Pa. 679, 749 A.2d 473 (2000); AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Department of Military Affairs, 22 PPER ¶ 22205 (Final Order, 1991).

In this case, the record shows that the charge was untimely as a matter of law. Indeed, Tomaszewski informed the Union on March 22, 2016 that he would not permit the Union to select a peer for formal disciplinary board hearings in the future. Likewise, the record shows that the City selected the peer for all disciplinary board hearings after April 12, 2016, which included May 12, 2016, June 16, 2016, July 7, 2016, December 15, 2016, January 12, 2017, September 7, 2017, and September 21, 2017. (N.T. 39; Exhibit C-1). As a result, the Union should have known of the alleged unfair practice by May 12, 2016 at the latest. However, the Union did not file the instant charge until July 12, 2017, well beyond the four-month limitations period contained in the Act. Therefore, the charge must be dismissed. Even if the charge was timely, however, the Union has not demonstrated that the City violated the Act.

In determining whether an employer has committed a bargaining violation by contravening an established past practice, the Board must initially decide whether the change involves a mandatory subject of bargaining. South Park Township Police Ass'n v. PLRB, 789 A.2d 874 (Pa. Cmwlth. 2002); City of Wilkes-Barre Police Benevolent Ass'n v. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002). An employer may not act unilaterally regarding a mandatory subject of bargaining without satisfying its statutory bargaining

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

obligations with its employes' union representative. Teamsters Local Union 764 v. Lycoming County, 41 PPER 8 (Proposed Decision and Order, 2010). It is well settled that matters of employe discipline and disciplinary procedures are generally regarded as mandatory subjects of bargaining. Fairview Township, 31 PPER ¶ 31019 (Final Order, 1999).

In City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order, 2002), the Board noted that it has consistently applied the definition of past practice adopted by the Pennsylvania Supreme Court in County of Allegheny v. Allegheny County Prison Employees Independent Union, 381 A.2d 849 (Pa. 1978) and stated as follows:

> [A] custom or practice is not something which arises simply because a given course of conduct has been pursued by management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to underlying circumstances presented. *Id.* quoting County of Allegheny, at 852, n. 12. In Ellwood City Police Wage and Policy Unit v. Ellwood City, 29 PPER ¶ 29214 (Final Order, 1998), aff'd, 731 A.2d 670 (Pa. Cmwlth. 1999), the Board stated that '[t]he definition of past practice requires that the parties must develop a history of similar responses or reactions to a recurring set of circumstances.' *Id.* at 507. In Pennsylvania Liquor Control Board Officers III v. Pennsylvania State Police, Bureau of Liquor Control Enforcement, 24 PPER ¶ 24171 (Final Order, 1993), the Board held that, where evidence of past practice revealed a divergent application of a seniority system in selecting vacation periods, there was no past practice.

Here, the Union has not sustained its burden of proving that the City unilaterally changed a past practice of allowing the Union to select the peer member of the disciplinary board to hear charges of employe misconduct. The Union adduced evidence at the hearing of two specific instances, one on October 29, 2015 and one on February 18, 2016, where the Union selected the peer member of the disciplinary board. However, there were at least five other disciplinary board hearings between 2013 and 2016 when the City allegedly committed the unfair practice according to Exhibit C-1. The Union urges the Board to make an inference that the Union selected the peer in these other instances because the peer was a full-time Union representative or official. I decline to make such an inference on this record. Indeed, the City presented the testimony of Terrell Bagby, who was the Human Services Program Administrator between 2013 and 2016. (N.T. 52-55). Bagby credibly testified that he was responsible for selecting the Union's peer in disciplinary board cases and that he did so during the time in question. Bagby convincingly described how he would attempt to do so by selecting a peer from an institution which was separate from the one where the incident allegedly occurred. (N.T. 54-55). In any case, even without the testimony of Bagby, it does not follow that, because the peer was a Union representative, that individual would have been chosen by the Union. It is equally as likely that the City would choose a Union representative to avoid having a full-time employe pulled away from his or her work assignment to

serve on a disciplinary board. On this record then, I am unable to conclude that the accepted course of conduct between the parties was to have the Union select the peer member of the disciplinary board to hear charges of misconduct against employes in the unit. Accordingly, the charge will be dismissed.

CONCLUSIONS

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 under Section 301(1) of PERA.

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

3. The Board has jurisdiction over the parties hereto.

4. The charge is untimely pursuant to the statute of limitations in Section 1505 of PERA.

5. The City has not committed unfair practices in violation of Section 1201(a)(1) or (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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 7th day of December, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner