

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 47, Local 2187 :  
 :  
 v. : Case No. PERA-C-09-398-E  
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 CITY OF PHILADELPHIA, STREETS :  
 DEPARTMENT :

**FINAL ORDER**

The American Federation of State, County and Municipal Employees, District Council 47, Local 2187 (AFSCME) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on January 31, 2011, to a January 11, 2011 Proposed Decision and Order (PDO). In the PDO, the Board Hearing Examiner dismissed AFSCME's Charge of Unfair Practices, which had alleged that the City of Philadelphia, Streets Department (City) violated Section 1201(a) (1), (3) and (5) of the Public Employee Relations Act (PERA) by laying off Marguerite Morgan. The Secretary of the Board granted AFSCME an extension of time to file a brief in support of the exceptions, and AFSCME timely filed its brief on February 25, 2011. Following an extension of time granted to the City, the City filed its brief in response to the exceptions on April 4, 2011.

The facts found by the Hearing Examiner in the PDO are summarized as follows. In June of 2009, the City initiated a series of layoffs. The Streets Department Commissioner, Clarena Tolson, determined the classification of employees in the Streets Department to be laid off due to lack of funds. The position of departmental accounting system specialist in the Administrative Section of the Streets Department was included in that layoff. At the time, there were only two departmental accounting system specialists; Marguerite Morgan and Rosemary Ray.

Morgan was the AFSCME Executive Board Liaison for both the Streets Department and the Municipal Services Building. She was also chief steward for the Streets Department, which was the department in which she worked. Ray was a shop steward, but for another department.

The parties' collective bargaining agreement provides for "super seniority for shop stewards and elected union officials." More specifically, "shop stewards and elected union officials shall be credited with total layoff score points equal to one more than the highest total points of any other employee in their appropriate layoff units and classes." The contractual super seniority applied to "layoffs under the system established by Civil Service Regulation 16 - LAYOFFS."

Considering both Ray and Morgan as shop stewards, and because they were the only two employees in the position of departmental accounting system specialist, the City did not afford either Morgan or Ray the super seniority credit. Under the City's understanding, as both Morgan and Ray were union shop stewards, neither could have one more layoff point than the other. Accordingly, the City simply utilized the tie-breaking procedure set forth in the Civil Service Regulations, as adopted in the City's Layoff Policies and Procedures.<sup>1</sup>

Using the tie breaker provisions, Ray had a total layoff score of 48.57, and Morgan had a total layoff score of 37. Ray's score resulted from 28.57 performance points and 20 seniority points. Morgan's score resulted from 25 performance points and 12 seniority points. As a result, Morgan was the laid-off employee,<sup>2</sup> and Ray retained her position.

<sup>1</sup> The tie-breaking procedure, as prescribed by the Civil Service Regulations, enumerates four tie-breakers in their order of importance -- performance reports, seniority, total City service, and eligibility list ranking. An employee who has the highest performance points gets the higher lay off score. If both employees have equal performance points, then seniority is the tie breaker, and so forth down the list.

<sup>2</sup> Morgan exercised her bumping rights under the collective bargaining agreement to take a lower classified position with the City.

The Hearing Examiner found that the City had a sound arguable basis for applying the tie-breaking procedures to determine whether Morgan or Ray would be laid off. Therefore, the Hearing Examiner dismissed AFSCME's claim that the City had violated its bargaining obligation under Section 1201(a)(5) of PERA. Further, having determined that the City based its decision to lay off Morgan on the application of the tie breaking procedures, and not on union animus, the Hearing Examiner also dismissed AFSCME's claim of discrimination under Section 1201(a)(3).<sup>3</sup>

In its exceptions, AFSCME argues that Morgan, as the Executive Board Liaison and as the steward for the department in which she worked, was entitled to super seniority in the Streets Department, not Ray. AFSCME also argues that the Hearing Examiner erred in finding that the City established a sound arguable basis defense because the City's Layoff Policies and Procedures, upon which it relied for the tie-breaking procedures, was not a negotiated agreement with AFSCME. In addition, AFSCME argues that the Hearing Examiner erred in failing to find that the City discriminatorily chose to lay off Morgan because Morgan was an active union officer and steward in the Streets Department.

The Board has recognized that super seniority for union officers and officials with respect to furloughs and layoffs is a mandatory subject of bargaining under PERA. PLRB v. Commonwealth of Pennsylvania, Department of Labor and Industry, 15 PPER 15205 (Final Order, 1984). Here, the parties negotiated for super seniority for all AFSCME stewards and officials. Indeed, Section 17 of the parties' collective bargaining agreement concerning layoffs, provides as follows:

For layoffs under the system established by Civil Service Regulation 16 - LAYOFFS: District Council 47 shop stewards and elected union officials shall be credited with total layoff score points equal to one more than the highest total points of any other employee in their appropriate layoff units and classes.

It is well accepted that a public employer may defend against an alleged bargaining violation arising from changes to a mandatory subject of bargaining by relying on agreed-upon contract language that arguably supports its actions. Capitol Police Lodge No. 85, Fraternal Order of Police v. PLRB, 10 A.3d 407 (Pa. Cmwlth. 2010); Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000); Jersey Shore Area Education Association v. Jersey Shore Area School District, 18 PPER ¶ 18117 (Final Order, 1987). While AFSCME argues that the City's use of the tie-breaking procedures under these circumstances does not comport with its interpretation of the collective bargaining agreement, in assessing whether the City has established a sound arguable basis defense, the Board will not endorse one interpretation of the contract over another. North Cornwall Township Police Association v. North Cornwall Township, 33 PPER ¶ 33054 (Final Order, 2002).

AFSCME also argues that the City could not have a sound arguable basis because it relied on the tie-breaking procedures set forth in the City's Layoff Policies and Procedures. However, as the Hearing Examiner found, the City's Layoff Policies and Procedures are modeled after the tie-breaking procedures set forth in Civil Service Regulations. Indeed, Section 16.0116 of the Civil Service Regulations, provides as follows:

**Breaking Ties on Layoff Credit.**

When two or more employees have the same combined total points from seniority credit and performance rating credit, the order of layoff shall be determined by giving preference or retention in the following sequence: (1) employee with the highest report of performance rating credit used in determining order of layoff; (2) employee with the greatest total service in the City service.

As noted in Section 17 of the parties' collective bargaining agreement, and specifically with respect to super seniority, layoffs are to be in accordance with Section 16 of the Civil Service Regulations. Thus, arguably the tie-breaking procedures outlined in the Civil Service Regulations, as adopted in the City's Layoff Policies and Procedures, were

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<sup>3</sup> Accordingly, AFSCME's claims of a derivative violation of Section 1201(a)(1) were dismissed as well.

incorporated into the parties collective bargaining agreement.<sup>4</sup> As such, the Hearing Examiner did not err in concluding that the City established a sound arguable basis that it could rely on those tie-breaking procedures to determine whether Morgan or Ray would be laid off from their position in the Streets Department.

AFSCME further contends that a union has the right to select who among its members is entitled to super seniority for purposes of a layoff or furlough. AFSCME asserts that Morgan, who was an officer and the steward in the department where she worked, was entitled to super seniority, and Ray, the steward for a different department, was not.

Generally, AFSCME is correct that it is a union's prerogative to determine its officers and stewards, and who among its members are to receive the benefit of the negotiated super seniority provisions. Department of Labor and Industry, supra. However, as the Board noted in Department of Labor and Industry, where there is a collective bargaining agreement providing for the assignment of super seniority, the employer does not commit an unfair practice by relying on a collective bargaining agreement providing for the designation of union representatives to determine who is entitled to super seniority. Section 17(C) of the parties' collective bargaining agreement vests all union officials and stewards with super seniority without regard to the department in which they work or serve. There is nothing in the collective bargaining agreement to suggest that Morgan, but not Ray, was entitled to super seniority.

Because Morgan and Ray were the only two departmental accounting system specialists in the Streets Department, and neither could have one more layoff point than the other, a tie-breaking determination was necessary. As noted above, the parties' collective bargaining agreement arguably incorporated the tie-breaking procedures under the Civil Service Regulations. Using these tie breaker provisions, Ray had 28.57 performance points and 20 seniority points. Morgan had 25 performance points and 12 seniority points. As Ray had more performance points and more seniority points, under the tie-breaking procedure, Morgan was the laid-off employe and Ray retained her position. Whether the City properly interpreted the collective bargaining agreement, or correctly applied the tie-breaking procedures to calculate the layoff points, is within the province of a grievance arbitrator, not the Board. Port Authority Transit Police Association v. Port Authority of Allegheny County, 39 PPER 147 (Final Order, 2008); Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 480 Pa. 194, 389 A.2d 577 (1978); see also National Labor Relations Board Office of General Counsel (Kaiser Permanente), 2010 NLRB GCM LEXIS 44 (2010) (how to properly allocate super seniority between two union stewards is generally a matter of contract interpretation); Technicolor Graphic Services, 245 NLRB 473 (1979) (absent discriminatory motive, the interpretation of the super seniority clause of the collective bargaining agreement is a matter for a tribunal other than the Board).<sup>5</sup>

AFSCME also argues on exceptions that the Hearing Examiner erred in failing to find an unlawful discriminatory motive in the City's decision to lay off Morgan. To establish a *prima facie* case of discrimination under Section 1201(a)(3) of PERA, the complainant must establish that an employe engaged in activity protected by the PERA, and that with knowledge of that activity, the employer took adverse action against the employe because of union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). For a claim of discrimination, it is the employer's motive that creates the offense. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969).

AFSCME contends, as it did before the Hearing Examiner, that the City harbored animus against Morgan because she was active in her union duties as an officer and steward. AFSCME points to testimony of its witnesses that the persons responsible for compiling the list of employes to be laid off in the Streets Department, Clarena Tolson, Commissioner of the Streets Department, and Michael Zaccagni, Deputy Commissioner for the Streets Department, had previously complained to AFSCME about Morgan's union activities. Although the Hearing

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<sup>4</sup> In addition, Section 17(A)(5) of the parties' agreement, provides that "layoffs shall be in accordance with existing layoff procedures..."

<sup>5</sup> On November 2, 2009, AFSCME filed an Amended Charge of Unfair Practices to reflect the filing of a grievance which concerned, *inter alia*, the City's decision to lay off Morgan.

Examiner noted that these City witnesses were somewhat vague in their responses to questions concerning their knowledge of Morgan's union activities, the Hearing Examiner unequivocally accepted the testimony of the City's witnesses that the decision to lay off Morgan, as opposed to Ray, was strictly a function of the tie-breaking procedures set forth in the City's Layoff Policies and Procedures and Civil Service Regulations.<sup>6</sup>

As the Hearing Examiner credited the City's testimony of a non-discriminatory basis which resulted in Morgan's layoff, AFSCME failed to establish that absent her protected activity, Morgan would have been treated any differently. See Lakeland Educational Support Professionals v. Lakeland School District, 40 PPER 120 (Final Order, 2009); see Wright Line, Inc., 251 NLRB 150, 105 LRRM 1169 (1980). Accordingly, the Hearing Examiner did not err in concluding that AFSCME failed to sustain its burden of proving a discriminatory motive under Section 1201(a)(3) of PERA.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the City sustained its burden of establishing a sound arguable basis in the collective bargaining agreement for using tie-breaking procedures to determine which of two union stewards were subject to the layoff in the Streets Department. Further, because the credible testimony indicates that the determination to lay off Morgan was the result of the application of the tie-breaking procedures, the Hearing Examiner did not err in finding that AFSCME failed to prove a discriminatory motive. Thus, the Hearing Examiner did not err in concluding that, on this record, AFSCME failed to establish that the City violated Section 1201(a)(1), (3) and (5) of PERA. Accordingly, AFSCME's exceptions to the PDO shall be dismissed, and the Hearing Examiner's PDO shall be made final.

#### ORDER

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

#### HEREBY ORDERS AND DIRECTS

that the exceptions filed by the American Federation of State, County and Municipal Employees, District Council 47, Local 2187 are hereby dismissed, and the January 11, 2011 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and James M. Darby, Member, this seventeenth day of May, 2011. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

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<sup>6</sup> Upon review of the record, there is no compelling reason to reverse the Hearing Examiner's credibility determinations in this case. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).