COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| GAS WORKS EMPLOYEES UNION LOCAL 686 UWUA | : | |
| v. | : | Case No. PERA-C-12-99-E |
| PHILADELPHIA GAS WORKS | : | |

**FINAL ORDER**

Gas Works Employees Union, Local 686 UWUA (Union) filed timely exceptions and supporting brief with the Pennsylvania Labor Relations Board (Board) on August 14, 2013, challenging a Proposed Decision and Order (PDO) issued on July 26, 2013. In the PDO, the Board's Hearing Examiner concluded that Philadelphia Gas Works (Employer) did not violate Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by failing to provide the Union with copies of witness statements in a grievance/arbitration case.[1] Pursuant to an extension of time granted by the Secretary of the Board, the Employer timely filed a response to the exceptions and a supporting brief on October 4, 2013.

The facts of this case are summarized as follows. The parties' current collective bargaining agreement, which was effective May 15, 2011, includes a grievance/arbitration procedure. Joseph Horan is the Vice President of the Union and Chairman of the Union's Grievance Committee. The Grievance Committee meets on a monthly basis to determine whether to proceed with grievances, process grievances to arbitration or withdraw them. Even after the Grievance Committee votes to submit a grievance to arbitration, the Union has occasionally requested additional information from the Employer necessary to prepare its case.

On August 1, 2011, the Employer was suspicious that Mark Silver, after reporting that he was ill, had left work to go to a support hearing instead of his doctor's office. Mr. Silver had previously requested the day off to attend the support hearing, but the request was denied due to the fact that he did not have any time off available. The Employer's Labor Relations Director, Joffie Pittman, instructed Jack Marcolongo and Alex Breyer, individuals employed by the Employer through a consulting service, to go to the courthouse. Thereafter, Mr. Marcolongo and Mr. Breyer prepared separate written statements detailing what they had observed.

On August 3, 2011, the Employer discharged Mr. Silver for alleged sick leave fraud and refusal to work. The Employer held a disciplinary hearing, also known as a Union Contact meeting, on that same date, during which Mr. Pittman questioned Mr. Silver regarding the August 1, 2011 incident. The Employer alleged that Mr. Silver left work early that day after falsely reporting an illness in order to attend a support hearing at the courthouse. During the disciplinary hearing, Mr. Silver denied going to the support hearing and insisted that he had gone to his doctor's office.

Union Representative Robert Merritt participated in the Union Contact meeting and asked for verification of the allegations, and the notes, minutes and names of the individuals who allegedly saw Mr. Silver at the courthouse. The Employer did not respond to Mr. Merritt's request for information. Approximately three days later, Mr. Merritt forwarded an e-mail to Mr. Pittman reiterating his request for the information. Mr. Pittman verbally told Mr. Merritt to see the Union's attorney about the request.

On August 9, 2011, Mr. Silver filed a grievance through the Union alleging unjust termination. On September 14, 2011, the Union Grievance Committee voted to take Mr. Silver's grievance to lawyer's review because they did not have all the information to make a decision regarding arbitration.

On September 29, 2011, the Union's attorney requested through e-mail that the Employer provide him with the information they had regarding Mr. Silver's case as soon as possible.

[1] The Hearing Examiner also concluded that the Employer violated Section 1201(a)(1) and (5) of PERA when it failed to provide the Union with the names of the witnesses who had given statements to the Employer. No exceptions were filed to the Hearing Examiner's decision regarding witness names, and the Employer filed an Affidavit with the Board on August 23, 2013, stating that it had complied with the relief directed in the Hearing Examiner's PDO.

When the Union did not receive the information, Mr. Horan advised his attorney to file a demand for arbitration because the Union was running up against the 45-day contractual deadline. Mr. Horan knew the Union still had the option to withdraw the case at a later date. In October 2011, the Union learned that the arbitration date for Mr. Silver's grievance was scheduled for June 2012.

On March 21, 2012, Mr. Horan sent a letter to the Employer's Vice President of Human Resources, William Muntzer, requesting "[c]opies of all evidence, including witness statements, that the [Employer] relied upon to justify its decision to terminate Mark Silver, including any and all evidence [the Employer] intends to introduce at arbitration." Mr. Horan took this step because the Union had still not received the information that it needed to determine whether to proceed with the case.

On April 19, 2012, the Union's attorney wrote to the Employer's Chief of Staff, Charles J. Grant, reiterating the Union's request, providing case law that allegedly supported its position, and stating that the information was needed prior to the June 2012 arbitration date so that the Union could decide whether it should process Mr. Silver's grievance to arbitration. The Union did not receive any response to the April 19, 2012 letter.

The Union requested a postponement of the June 12, 2012 arbitration hearing. The arbitrator denied the Union's request and the Employer turned over the documents in question at the arbitration hearing.

The Union filed its Charge of Unfair Practices on April 13, 2012, alleging that the Employer violated Section 1201(a)(1) and (5) of PERA by failing to provide information regarding the termination of Mr. Silver. A hearing was held before the Board's Hearing Examiner on October 16, 2012, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

The Hearing Examiner concluded in the PDO that the Employer did not violate Section 1201(a)(1) and (5) of PERA because it was not obligated to provide the Union with the witness statements of Mr. Marcolongo and Mr. Breyer. However, the Hearing Examiner further concluded that the Employer violated Section 1201(a)(1) and (5) of PERA when it failed to provide the Union with witness names. No exceptions were filed to the Hearing Examiner's finding of a violation of Section 1201(a)(1) and (5) of PERA. Rather, the Union's exceptions solely concern the Hearing Examiner's determination that the Employer was not required to provide the Union with the witness statements. In its exceptions, the Union urges the Board to overturn its long-standing policy that witness statements are exempt from disclosure and to adopt the balancing test that was recently set forth by the National Labor Relations Board (NLRB) in **American Baptist Homes of the West d/b/a Piedmont Gardens**, 194 L.R.R.M. 1406 (2012).

Pursuant to Section 1201(a)(5) of PERA, a public employer is obligated to provide the employe representative with information that is relevant to its processing of a grievance. **Commonwealth of Pennsylvania v. PLRB**, 527 A.2d 1097 (Pa. Cmwlth. 1987). Relevancy is determined under a liberal, discovery-type standard whereby the Board need only find (1) that the employe representative is advancing a grievance which on its face is governed by the parties' agreement, and (2) that the information will be useful to the employe representative. **Id.** For example, the Board has required that a public employer provide investigative reports and the names of witnesses to an employe representative. **AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Department of Corrections**, 17 PPER ¶ 17072 (Proposed Decision and Order, 1986), 18 PPER ¶ 18057 (Final Order, 1987), **aff'd sub nom., Commonwealth of Pennsylvania, Department of Corrections, State Correctional Institution at Muncy v. PLRB**, 541 A.2d 1168 (Pa. Cmwlth. 1988); **AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Department of Corrections, Graterford**, 19 PPER ¶ 19039 (Final Order, 1988). However, the Board adopted the NLRB's holding in **Anheuser-Busch, Inc.**, 237 NLRB 982 (1978), that witness statements are excluded from an employer's duty to provide information. **Id.; Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Department of Corrections, Greene SCI**, 34 PPER 52 (Final Order, 2003).

The Union alleges that the NLRB has overturned its holding in **Anheuser-Busch** and adopted a balancing test in which the employer is required to provide witnesses statements unless the employer establishes that there is a legitimate and substantial confidentiality interest that outweighs the union's need for the witness statements. Because the NLRB has overturned its holding in **Anheuser-Busch**, the Union asserts that the Board should overturn its long-standing

policy that relied on the holding set forth in **Anheuser-Busch**. However, it is well-settled that decisions of the NLRB may be considered for guidance, but are not binding on the Board in determining questions of state law under PERA, especially where the Board has been consistent with its policy and the NLRB has not. **PLRB v. State College Area School District**, 461 Pa. 494, 337 A.2d 262 (1975); **American Federation of State, County and Municipal Employees, Council 13, AFL-CIO v. PLRB**, 529 A.2d 1188 (Pa. Cmwlth. 1987); **American Federation of State, County and Municipal Employees, District Council 83, AFL-CIO v. PLRB**, 553 A.2d 1030 (Pa. Cmwlth. 1989); **PLRB v. Chartiers-Houston School District**, 14 PPER ¶ 14056 (Final Order, 1983). Further, the reversal of NLRB policy does not require a reversal of the Board's policy. **American Federation of State, County and Municipal Employees, Council 13, supra; American Federation of State, County and Municipal Employees, District Council 83, supra; Chartiers-Houston School District, supra.**

The rationale behind the Board's policy for excluding witness statements is to promote full and open disclosure by persons who may have knowledge of alleged employe misconduct and to prevent the risk that witnesses may be coerced or intimidated by either party. **Department of Corrections, Graterford, supra.** The ability of either party to collect necessary and relevant information is not impeded by the Board's policy because the names of witnesses are required to be provided, thereby enabling both the employer and the union to interview witnesses and obtain their statements. **Id.** The adoption of the NLRB's balancing test set forth in **Piedmont Gardens** would not promote the Board's policy. Under the NLRB's new view concerning witness statements, employes with knowledge of alleged employe misconduct may be reluctant to come forward, thereby hindering an employer's ability to properly investigate allegations of such misconduct. Further, the employer would be able to unduly delay the grievance arbitration process, which is mandatory under PERA, while the parties litigate whether the requested witness statements should be excluded from disclosure before the Board and the Courts. Therefore, the Board reaffirms its long-standing policy that witness statements are excluded from disclosure and declines to adopt the balancing test set forth in **Piedmont Gardens.**[2] Accordingly, the Hearing Examiner properly concluded that the Employer did not violate Section 1201(a)(1) and (5) of PERA when it failed to provide the witness statements to the Union.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 Gas Works Employees Union, Local 686 UWUA are hereby dismissed, and the July 26, 2013 Proposed Decision and Order be and the same is hereby 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, James M. Darby, Member, and Robert H. Shoop, Jr., Member, this seventeenth day of December, 2013. 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.

[2] The Board also notes that the NLRB's decision in **Piedmont Gardens** is of questionable value. In **Noel Canning v. NLRB**, 705 F.3d 490 (D.C. Cir. 2013), **cert. granted**, 133 S. Ct. 2861 (U.S. 2013), the United States Court of Appeals for the District of Columbia held that three of the five NLRB board members were not properly appointed to their positions and therefore any decisions made by the NLRB were void as it lacked a quorum.