COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYEES DISTRICT COUNCIL 47, LOCAL 2187	:	
v.	:	Case No. PERA-C-10-306-E
CITY OF PHILADELPHIA	:	

PROPOSED DECISION AND ORDER

On September 2, 2010, the American Federation of State, County and Municipal Employees, District Council 47, Local 2187 (AFSCME or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the City of Philadelphia (Respondent or City) alleging that the City violated Sections 1201(a)(1),(2),(3) and (5) of the Public Employe Relations Act (PERA.

On September 14, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing in which the case was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and November 23, 2010, in Philadelphia was scheduled as the time and place of hearing if necessary.

A hearing was necessary but was continued to January 18, 2011 and again to February 24, 2011, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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 of Philadelphia is a public employer within the meaning of Section 301(1) of PERA.

2. The American Federation of State, County and Municipal Employees, District Council 47, Local 2187 is an employe organization within the meaning of Section 301(3) of PERA.

3. AFSCME, District Council 47, Local 2187, represents professional, technical and administrative employees of the City of Philadelphia.

4. In 1984, Mayor W. Wilson Goode created the Office of the Inspector General (OIG) by Executive Order No. 10-84 to eliminate waste, fraud and abuse in City government. The Inspector General reports directly to the Mayor of the City of Philadelphia. (N.T. 99, Joint Exhibit 1)

5. Mayor Goode's successors continued the OIG by a series of executive orders that made amendments to the original order. (N.T. 99; Joint Exhibit 1).

6. On November 28, 1994, Mayor Edward G. Rendell issued Executive Order No. 4-94, further amending the Office of Inspector General. The Order set forth the Organization and Mission of the OIG:

> SECTION 1. ORGANIZATION AND MISSION OF THE OIG
>
> A. The OIG is designated as the independent centralized office within the Executive Branch with authority to receive and investigate criminal and/or serious integrity-related complaints of fraud, corruption, and abuse involving City employees/officials and contactors doing business with the City.
>
> B. The OIG is operationally independent of all departments, offices, and agencies within City government and reports directly to the Mayor

C. The OIG's mission is to enhance the public confidence in the integrity of the City government by establishing and implementing procedures for reporting, investigating, and resolving complaints of fraud, corruption, and abuse of office; to provide leadership and guidance in recommending programs and/or policies which educate and raise the awareness of all City officials/ employees to integrity and ethics-related issues; and to provide assistance to the respective department/agency heads on all integrity and ethics-related matters through its support of the City-wide Integrity Officer System.

(N.T. 99, Joint Exhibit 1)

7. The present Inspector General is Amy Kurland, Esquire, a career prosecutor. (N.T. 85-87)

8. Ms. Kurland supervises a staff which includes investigators, accountants, support staff and attorneys. (N.T. 99-100)

9. Ms. Kurland testified that she and the other attorneys in the office function as investigators and not as attorneys. (N.T. 99)

10. Ms. Kurland testified that the OIG has jurisdiction over 20,000 City employes, over persons who are on a board controlled by the Mayor and over any business or company doing business with the City. (N.T. 87)

11. The OIG does not provide legal advice or representation to the City or its departments. Those tasks are done by attorneys in the City Law Department. (N.T. 99-100)

12. The OIG does consult with the Law Department in order to be sure that the facts developed in an OIG investigation do consist of violations. (N.T. 100)

13. The OIG website is at www.phila.gov/oig, which restates of the mission of the OIG from the Executive Order 4-94. (N.T. 92, City Exhibit 1)

14. The OIG website also tells persons how to report a complaint. It states:

> Report a wrongdoing by calling the OIG at 215-686-1770 or complete the complaint form below.
>
> Remaining anonymous is optional when is optional when reporting fraud, waste, abuse, or mismanagement of City funds. You may remain anonymous if you wish; however, you are encouraged to identify yourself so that we may follow up on your complaint. You also have the option of providing your identifying information for follow-up and then requesting to be a confidential informant. Should this be the option you choose, your identity will be protected to the maximum extent of the law. In addition there are certain provisions under the Pennsylvania Whistleblower Act that protect City employees from retaliation under certain circumstances. If you believe that submitting a report to the OIG will place you at risk of retaliation, you should inform the OIG of this concern.
>
> **When reporting information to the OIG, please be as specific and provide as much detail as possible. The more information you provide, the more thorough the OIG's initial investigation can be. Any relevant information or knowledge you acquire after filing a report with the OIG should be reported in a follow-up letter, phone call or email.** [Bold in original.]
>
> [The website then provides space for details of the complaint to be submitted to the OIG via click of the SUBMIT button.]

(N.T. 92, City Exhibits 1 and 2)

15. The OIG's annual report for 2009 states that the OIG received 688 complaints in 2009 and 478 complaints in 2008. Ms. Kurland testified that the serious complaints OIG investigates within its office or in conjunction with a criminal investigative agency. The "more administrative type complaints" OIG refers to integrity officers in the various departments and then OIG works with them to process those complaints. (N.T. 91, Joint Exhibit 2)

16. The Union provides pre-disciplinary representation to employees once they have been served with a copy of a notice of charges by thei respective department heads. The Union also represents the employee through the grievance and arbitration process set forth in its collective bargaining agreement. (N.T. 23-31; Joint Exhibit 2).

17. In the representation of its members, the Union generally asks a charging department for copies of all documents and/or other evidence considered by the department in making a decision to terminate or otherwise discipline a bargaining unit member. Generally, that information is provided to the Union. (N.T. 29; 134-135).

18. In the case of disciplinary action emanating from investigations undertaken by the City's Office of Inspector General, the Union is routinely denied access to the investigatory file. Once the Inspector General or her staff conclude an investigation, the report is transmitted to an employee's department head with a recommendation for disciplinary action. Upon receipt of the Inspector General's report, a department head or appointing authority will generally issue a notice of employee violation pursuant to its internal disciplinary practices. The basis for the disciplinary action is the Inspector General's report. (N.T. 29-31)

19. David Mora, vice-president of AFSCME Local 2872 testified that without access to the OIG's reports, the Union is unable to adequately and properly represent its members at the disciplinary stage, and through the grievance and arbitration process. (N.T. 32-33)

20. Also, the Union and its grievance and arbitration committee are unable to make an informed decision as to whether the case should or should not be taken to arbitration. (N.T 33-34, 69-71).

21. On April 9, 2010 and June 25, 2010, Union Vice President Mora made written requests for copies of the Inspector General's report used as the basis for the termination of bargaining unit member Annette Murray. The request was sent to Inspector General Kurland and Dr. Arthur Evans, Director of the Philadelphia Department of Behavioral Health, where Ms. Murray was employed. Mr. Mora was refused a copy of the report by Dr. Evans. In a letter dated May 14, 2010, Inspector General Kurland denied the Union's request, stating that Executive Order 04-94 mandates the limitation of the circulation of the Reports of Investigation. (N.T. 38-39; Joint Exhibit 4)

22. On July 12, 2010, Vice President Mora requested a copy of the report by the Inspector General's Office relating to Raymond Lemon, a bargaining unit member who was in the process of being dismissed from his position in the Revenue Department. The request was addressed to Inspector General Kurland and Revenue Commissioner Richardson. In correspondence dated July 16, 2010, Inspector General Kurland denied the request invoking Executive Order 4-94. (N.T. 39-42; Joint Exhibit 4).

23. On or about August 11, 2010, Union staff representative Robert Coyle sent email correspondence to Inspector General Kurland requesting the Inspector General's investigation of Arlene Gerson, a pharmacist in the employ of the Health Department, who was in the midst of disciplinary action based upon the results of the Inspector General's report furnished to the Health Department. The request was denied. (N.T. 71-74; Joint Exhibit 4)

24. On May 24, 2010, Union business agent Michael Bonetti addressed correspondence to Inspector General Kurland and Department of Human Services Commissioner Ambrose requesting copies of the Inspector General's report which formed the basis for the Department's termination of bargaining unit member Parrish Wilson. Both Commissioner

Ambrose and Inspector General Kurland denied the Union's request. (N.T 80-84; Joint Exhibit 4)

25. Ms. Kurland testified that it was her opinion that by giving citizens the option to be a confidential informant, the OIG has met the problem of people being reluctant to come forward to give information. She testified, "When we allow people to be confidential or to remain anonymous, we often receive more information than we would if a person identified who they were." (N.T. 90-91)

DISCUSSION

The Union's charge of unfair practices alleges that the City violated Sections 1201(a)(1) and (5) of PERA when it refused to provide the Union with copies of the Office of Inspector General's report of investigation which formed the basis for dismissal notices sent to four bargaining unit members. The Union seeks an order that the City give the Union the OIG reports as well as an order that the City cease and desist from refusing to give the Union such reports in the future.

The Union had filed four separate requests for information concerning bargaining unit members who were terminated as a result of investigations undertaken by the City's Office of the Inspector General. In each case, the Union sought the OIG's report of investigation. In each case, the Office of the Inspector General had given the report to the affected employe's department head with the expectation that disciplinary action would be taken against the employe. Subsequently, the employe was informed that charges were pending against him/her and that disciplinary action would be taken. In each instance, the affected employe contacted the Union requesting representation in the pre-disciplinary process, and ultimately through the Union's grievance and arbitration procedure.

A public employer's bargaining obligation includes the duty to provide information that is relevant to the employe representative's policing of the collective bargaining obligation Commonwealth v. PLRB, 527 A. 2d 1097 (Pa. Cmwlth. 1987); North Hills School District, 29 PPER ¶ 29063 (Final Order, 1998). One of the most important functions of an employe organization is the representation of its members in disciplinary matters. A public employer violates Section 1201(a)(5) when it refuses to supply the union with relevant information in disciplinary cases. Pennsylvania Social Services Union, Local 668, SEIU v. Commonwealth of Pennsylvania, 16 PPER ¶ 16179 (Proposed Decision and Order, 1985); 17 PPER ¶ 17042 (Final Order, 1986).

The City raises four defenses to the charge.

The City's first defense is that it has a managerial prerogative to keep private the confidential information in the reports. The City contends that this managerial prerogative stems from Section 702 of PERA, particularly the right to select and direct personnel and to unilaterally set policy directed to facilitate the efficient operation of its business.

The City's defense is based on the premise that information is confidential, which will be discussed below. However, at the outset, it should be stated that a broad assertion that an employer has a managerial right to withhold information has been rejected by the Board. In Pennsylvania Social Services Union, Local 668, SEIU v. Commonwealth of Pennsylvania supra. and North Hills School District, supra. the Board recognized that the duty to supply information is a statutory duty derived from Section 701 PERA which provides for the employer's duty to bargain over mandatory subjects of bargaining. In those cases, the Board held that investigative reports were relevant to the union. Accordingly, the City's managerial prerogative argument must be rejected.

The City, in a related argument, contends that there is nothing in the collective bargaining agreement permitting the union to see this information. As stated above, whether the subject of the information requests appears in the collective bargaining agreement is irrelevant because the right for such information is a statutory right derived from PERA.

The City's second defense is a claim of confidentiality, specifically that the OIG reports contain information obtained after the City promised informants confidentiality. The City contends that if it is forced to release informant's identities, there would be a detrimental and chilling effect on the safe and efficient operation of the City's business, especially the important business of stopping waste, fraud and abuse.

In Pennsylvania Social Services Union, Local 668, SEIU v. Commonwealth of Pennsylvania, supra., the union sought investigative reports on behalf of a disciplined employe. The employer also claimed confidentiality. The Board rejected that defense, agreeing with the hearing examiner's conclusion that the employer's refusal to provide the requested information violated Sections 1201(a)(1) and (5) of PERA. The Board used federal labor law as guidance, citing Detroit Edison Company v. NLRB, 440 U.S. 301, 99 S. Ct. 1123 (1979). The Board agreed for the need to look at each case separately and agreed with the hearing examiner's application of a balancing test that weighed the employer's claim of confidentiality against the union's reasons for the information. A similar balancing approach was endorsed in North Hills School District, supra.

Inspector General Amy Kurland testified that, in her opinion, by giving citizens the option to be a confidential informant, the OIG has met the problem of people being reluctant to come forward to give information. While this may be a legitimate claim, it is outweighed by the Union's right to know the basis for the employer's disciplinary action and the right to confront the employe's accusers. It should also be noted that the OIG also offers informants the ability to make anonymous complaints, which can also be a way to reassure reluctant informants.

The City cites a federal district court decision in a whistleblower retaliation action, denying a motion to disclose the identity of a confidential informant because the movant failed to show that the identity was sufficiently relevant or essential to a fair determination of the action. DiPasquale v. Resolution Trust Co. 1995 U.S. District LEXIS 5739 (1995). However, the facts and the protections at issue in the present case are distinguishable. Here the Union is seeking information under a state labor relations statute to assist employes facing termination. The Union has shown that the disclosure of the informant's name is sufficiently relevant to defending the termination action.

The City's third defense is that the OIG reports contain privileged attorney work product and thus are exempt from production. Inspector General Kurland testified that since she was appointed Inspector General she has changed the process of developing reports so that now the OIG staff analyzes whether the particular facts in a complaint violate a provision of law. On cross examination, Ms. Kurland also testified that the OIG staff consults with the City's law department in order to make sure the facts garnered from the investigations do consist of violations of law. The City contends that this legal analysis is privileged work product and that its inclusion in the reports renders them inadmissible.

There are no Board decisions addressing the question of the application of the work product privilege to union requests for information. In Pennsylvania, the attorney work product privilege is codified in Rule 4003.3 of the Pennsylvania Rules of Civil Procedure.

Scope of Discovery. Trial Preparation Material Generally

> "Subject to the provisions of Rules 4003.4 and 4003.5, a party may obtain discovery of any matter discoverable under Rule 4003.1 even though prepared in anticipation of litigation or trial by or for another party or by or for that other party's representative, including his or her attorney, consultant, surety, indemnitor, insurer or agent. The discovery shall not include disclosure of the mental impressions of a party's attorney or his or her conclusions, opinions, memoranda, notes or summaries, legal research or legal theories. With respect to the representative of a party other than the party's attorney, discovery shall not include disclosure of his or her mental impressions, conclusions or opinions respecting the value or merit of a claim or defense or respecting strategy or tactics."

Pa. R.C.P 4003.3, 42 Pa. C.S.A

The work product rule is closely related to the attorney-client privilege but is broader because it protects any material, regardless of whether it is confidential, prepared by the attorney in anticipation of litigation. Com., Dept. of General Services v. United State Mineral Products Co., 809 A. 2d 1000, 1028 (Pa. Cmwlth. 2002), reversed 898 A. 2d 590, 587 236, appeal after new trial 927 A.2d 717, affirmed 956 A. 2d 967, 598 Pa. 331.

The evidence of record shows that before a report is issued, the investigator consults with either the Deputy Inspector General or the Inspector General to determine the legal provisions that the employe may have violated. Some of these investigators happen to also be attorneys. The current IG is also an attorney. The legal provisions that are considered may be the home rule charter, the civil service regulations, the code of ethics and judicial decisions. The OIG also consults the City's law department attorneys.

It is in the consultation with the City's law department attorneys that legal analysis may be developed that would be covered by the work product privilege. The law department attorneys, unlike the OIG investigators who happen to be attorneys, function as attorneys as Rule 4003.3 contemplates. Their legal analysis, if it appears in the OIG reports, is covered by work product privilege. Accordingly, the City may redact those part of OIG reports that include legal analysis from the City law department before giving the reports to the Union.

The City's fourth defense is that arbitration is the proper forum for the Union to seek the OIG reports of investigation. The City contends that the union should wait until these four termination cases are taken to arbitration, at which time the union could subpoena the reports and allow the arbitrator to determine through an *in camera* inspection whether the reports are admissible. The Board has addressed this argument and rejected it in Pennsylvania Dep't. of Public Welfare, 17 PPER ¶ 17125 (Final Order, 1986). "If demands for information are deferred to the grievance-arbitration procedure, unions would be 'forced to grope blindly through the various stages of the grievance proceedings unless adequate information were preliminarily available.'" Id. citing Curtiss-Wright Corp. v. NLRB, 347 F. 2d. 61, 71, (3rd Cir. 1965).

In the present case, the Union witnesses testified that by not receiving the OIG investigative reports as soon as the employe receives notice of discipline, the Union and its grievance and arbitration committee are unable to make an informed decision as to whether to take the matter to arbitration. Union staff time must be used and money spent to file for arbitration. This time and money could be saved in some cases if the Union had the reports at an earlier stage in the disciplinary process. Accordingly, the City's fourth defense is denied.

In light of the findings of fact and legal precedent, the City's refusal to give the Union the OIG's reports of investigation constitutes a violation of Section 1201(a)(5) of PERA and a derivative violation of Section 1201(a)(1) of PERA.

Finally, there is no evidence of record to demonstrate that the City violated Sections 1201(a)(2) and Section 1201(a)(3) of PERA.

CONCLUSIONS

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

1. That the City of Philadelphia is a public employer within the meaning of Section 301(1) of PERA.

2. That the American Federation of State, County and Municipal Employees, District Council 47, Local 2187 is an employe organization within the meaning of Section 301(3) of PERA.

3. That the Board has jurisdiction over the parties hereto.

4. That the City of Philadelphia has committed unfair practices in violation of Sections 1201(a)(1) and (5) of PERA.

5. That the City of Philadelphia has not committed unfair practices in violation of Sections 1201(a)(2) and (3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the City 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 which the examiner finds necessary to effectuate the policies of PERA:

(a) Provide the union with a copy of the Office of Inspector General reports of investigation sent to the respective City department or agency that lead to the discipline of Annette Murray, Raymond Lemon, Arlene Gerson and Parrish Wilson, redacting legal analysis from the City law department contained in those reports.

(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 employes, in the human resources department of every city department, agency and the Office of Inspector General, 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 Association.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this eighteenth day of July, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner