

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On April 13, 2012, the Gas Works Employees Union, Local 686 Utility Workers of America, (Local 686 or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Philadelphia Gas Works (Employer or PGW) alleging that the Employer violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA) by refusing to provide certain information about the termination of a member of the bargaining unit necessary for the Union to fulfill its obligation as the exclusive representative of the Employer's employees.

On May 8, 2012, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator, for the purpose of resolving the matters in dispute through the mutual agreement of the parties, and October 16, 2012 in Harrisburg was assigned as the time and place of hearing if necessary.

A hearing was necessary and was held as scheduled, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

On or about July 3, 2013, the Chief Counsel of the Board reassigned the case to the undersigned for decision.

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. Philadelphia Gas Works is a public employer within the meaning of Section 301(1) of PERA. (Union Exhibit 1)
2. The Gas Works Employees Union, Local 686 Utility Workers of America, is an employe organization within the meaning of Section 301(3) of PERA. (Union Exhibit 1)
3. Local 686 and PGW have a current collective bargaining agreement, which became effective May 15, 2011 and which includes a grievance and arbitration process. (N.T. 22, 25-26; Union Exhibit 1)
4. Joseph Horan is the Vice President of the Union and Chairman of the Union's Grievance Committee, which meets on a monthly basis to determine whether to proceed with grievances or withdraw them. The Union represents ten different work groups of PGW employes. (N.T. 21, 24-25)
5. The Grievance Committee meets and makes a determination as to whether the Union should proceed to arbitration. Even after the Grievance Committee votes to submit a grievance to arbitration, the Union has occasionally requested additional information from PGW necessary to prepare its case. (N.T. 28)

6. On August 3, 2011, the Employer discharged employe Mark Silver for an alleged sick leave fraud and refusal to work. The Employer held a disciplinary hearing or Union Contact meeting on that date, during which its Labor Relations Director, Joffie Pittman, questioned Silver regarding an incident from August 1, 2011. The Employer alleged that Silver left work early that day after falsely reporting an illness in order to attend a support hearing at the courthouse instead. Silver had previously requested the day off to attend the support hearing, but the request was denied because he did not have any time off available. (Employer Exhibit 1, August 3, 2011 Memo)
7. The Employer was suspicious that Silver had gone to his support hearing instead of his doctor's office on August 1, 2011. As a result, Pittman instructed two individuals, Jack Marcolongo and Alex Breyer, employed by PGW through a consulting service to go to the courthouse, after which they prepared separate written statements detailing what they had observed. (N.T. 71-72; Employer Exhibits 1, August 3, 2011 Memo, & 3)
8. In providing their statements to the Employer, the two investigators were not promised confidentiality. (N.T. 70)
9. During the disciplinary hearing, Silver denied going to the support hearing, and insisted he had gone to his doctor's office. (Employer Exhibit 1, August 3, 2011 Memo)
10. Union Representative Robert Merritt participated in the disciplinary hearing and asked for a verification of the allegations, notes, minutes, and the names of the individuals who allegedly saw Silver at the Family Court facility. The Employer did not respond to his demand for information. (N.T. 57-58)
11. Approximately three days later, Merritt forwarded an email to Pittman reiterating his demand for the information. Although Pittman did not respond to the email, he verbally told Merritt to see his lawyer about the request. (N.T. 58-59)
12. On August 9, 2011, Silver filed a grievance through the Union alleging an unjust termination. (Union Exhibit 3)
13. On September 14, 2011, the Local 686 Grievance Committee voted to take the Silver grievance to lawyer's review because they did not have all the information, including the witness statements, to make a decision regarding arbitration. (N.T. 33-34)
14. On September 29, 2011, Union counsel again requested by email that the Employer provide him with the information they had regarding the Silver case as soon as possible. (N.T. 67-68; Union Exhibit 8)
15. When the Union did not receive the information, Horan advised his counsel to file a demand for arbitration anyway because the Union was running up against the 45 day deadline. Horan figured the Union still had the option to withdraw the case later on. (N.T. 35)
16. In October 2011, the Union learned that the arbitration date for Silver's termination was scheduled for June 2012. (N.T. 35)
17. On March 21, 2012, Horan sent a letter to William Muntzer, Vice President of Human Resources for PGW, demanding, *inter alia*, "[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 PGW intends to introduce at arbitration." (N.T. 35-36; Union Exhibit 4)
18. Horan took this step because the Union had still not received the information that it needed to determine whether to proceed with the case. The Employer did not respond to the demand. (N.T. 36)

19. On April 19, 2012, Union counsel wrote to PGW Chief of Staff Charles J. Grant, Esquire, reiterating the Union's demand, providing case law that allegedly supported its position, and stating that the information was needed prior to the June 12 arbitration date, so that Local 686 could decide whether it should process Silver's grievance to arbitration. (Union Exhibit 5)
20. The Union did not receive any response to the April 19, 2012 letter. (N.T. 37).
21. The Union requested a postponement of the June 12, 2012 arbitration hearing in the Silver case. (N.T. 37)
22. The Arbitrator denied the Union's request, and the Employer turned over the documents in question at the June 12, 2012 arbitration hearing. (N.T. 37-40)

DISCUSSION

In its charge, the Union alleged that the Employer refused to provide it with information about the termination of a member of the bargaining unit, necessary for the Union to fulfill its obligations as the exclusive bargaining representative of PGW's employees. More specifically, the Union contends that the Employer violated the law by failing to timely provide it with the statements or reports of two (2) investigators relative to Mark Silver's grievance. See Union brief at 7.

It is well settled that public employers have a statutory duty pursuant to Section 1201(a) (5) of PERA to furnish information which would enable unions to make informed decisions about whether to pursue grievances. **Commonwealth of Pennsylvania v. PLRB**, 527 A.2d 1097 (Pa. Cmwlth. 1987). Where no meaningful difference exists between established policies of PERA, 43 P.S. § 1101.1201, and the National Labor Relations Act (NLRA), 29 U.S.C. §§ 15-168, Pennsylvania courts look to federal decisions for guidance. *Id.* at 1099. Where a union seeks discovery of relevant materials in order to make an intelligent evaluation of the merits of a grievance claim, relevancy should be determined under a discovery-type standard wherein the courts of necessity must follow a more liberal standard as to relevancy. *Id.* at 1099 (citing **National Labor Relations Board v. Acme Industrial Co.**, 385 U.S. 432 (1967)).

The complainant in an unfair practices proceeding has the burden of proving the charges alleged. **St. Joseph's Hospital v. PLRB**, 373 A.2d 1069 (Pa. 1977). If the record contains substantial and legally credible evidence that the union requested relevant information and the employer improperly denied the request, the employer must be found in violation of its bargaining obligation. **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).

As a preliminary matter, the Union has established the relevancy of the information requested. The Employer discharged Mr. Silver for alleged sick leave fraud and refusal to work, which was grieved by the Union. The Employer had in its possession the statements or reports of two investigators it sent to observe whether Silver reported to Family Court on August 1, 2011. It is clear that access to this information would have assisted the Union in carrying out its duties as the collective bargaining representative of PGW's employees.

Significantly, PGW does not contend that the information requested was not relevant under the liberal standard espoused by the courts. Instead, PGW argues that because the Union received all of the documents it requested on the date of the Silver arbitration hearing, which was before the hearing in this proceeding, the charge has now been rendered moot. As a result, PGW posits that this case should not be adjudicated on the merits. PGW's argument is unavailing.

Although courts generally will not decide a moot case because the law requires the existence of an actual controversy, the Pennsylvania Supreme Court has recognized two "well-organized exceptions to the mootness doctrine." **Association of Pennsylvania State College and University Faculties v. PLRB**, 8 A.3d 300, 305 (Pa. 2010) (quoting **In re Gross**, 382 A.2d 116, 119 (Pa. 1978)). The Pennsylvania Supreme Court has reviewed moot

matters, in its discretion, when the issue presented is one of great public importance or is one that is capable of repetition yet evading review. *Id.* at 305 (citing **Rendell v. Pa. State Ethics Comm'n**, 983 A.2d 708, 719 (Pa. 2009)); **Gross, supra**.

First of all, I am unable to conclude that this charge was rendered moot once PGW provided the Union with the information requested at the June 12, 2012 arbitration hearing. As the Union pointed out in its brief, the crux of the charge was that the information was not provided in a timely manner, not simply that it was never provided. See Union brief at 7. Indeed, the Union was at a serious disadvantage in trying to determine whether to take this grievance to arbitration because it did not have all the relevant information pertaining to the Silver case. Despite making repeated requests for the information dating all the way back to the August 3, 2011 disciplinary hearing, the Union was denied the ability to make an informed decision on its duty to enforce the collective bargaining agreement. As such, the Union was forced to continually preserve its right to avail itself of the grievance arbitration process, pursuant to the parties' labor contract, when the cost of such proceedings could have potentially been avoided had the Employer simply provided the Union with all the relevant information. To conclude that a public employer is entitled to withhold relevant information from a union in this instance only to turn it over at the last minute on the date of the arbitration hearing, and have a corresponding unfair practices charge dismissed as moot, would frustrate the entire grievance arbitration process, for which the parties expressly bargained. Such conduct also runs counter to the Employer's statutory duty to furnish information to the Union to permit informed decisions about whether to pursue grievances.

In any event, even if the case could be construed as moot, the Union has presented a classic exception to the mootness doctrine for a situation that is capable of repetition yet evading review. In **Temple University Hospital Nurses Ass'n v. Temple University Health System & Temple University Hospital**, 42 PPER 55 (Proposed Decision and Order 2011), Hearing Examiner Wallace, facing a mootness claim by the employer after it allegedly amended a policy which unlawfully prohibited employees from wearing items critical of the hospital in certain areas of the facility, found that "the moot parts of the charge would not be subject to dismissal because by the simple expedient of amending the policy as soon as a charge is filed [the Employer] would be able to evade review of conduct that is capable of repetition."

In the same vein, PGW by the simple expedient of turning over the obviously relevant information at the arbitration hearing after withholding it for nearly an entire year, despite repeated requests for the information, could effectively evade review of conduct that is very clearly capable of repetition. Further, it is significant that the Union's Grievance Committee meets on a monthly basis to assess and vote on the merits of grievances on behalf of ten different work groups that represent the PGW employees. (N.T. 25-26, 28). As such, it is highly probable that there will be grievances in the future regarding employee discipline where the Union is seeking similar information to the instant matter. Accordingly, this case also falls into one of the well organized exceptions to the mootness doctrine and must be reviewed on the merits.

Next, PGW contends that it was not obligated to turn over the requested information here because the information consisted of witness statements, which are specifically excluded from the Employer's general duty to share information. The Union, meanwhile, maintains that the requested information did not consist of privileged witness statements, but was rather more akin to investigative reports, which are subject to the general disclosure requirements.

Based on the record here, I find that the requested information consisted of two separate witness statements, which are specifically excluded from the Employer's duty to share information.

In **AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Department of Corrections, Graterford**, 19 PPER ¶ 19039 (Final Order 1988), the Board had occasion to consider this very same issue. In that case, the union sought disclosure of a typewritten statement prepared by a state trooper who had interviewed a corrections officer who admitted that the information he previously gave to the police during an investigation into

the death of an inmate was not true. The Board summarized the caselaw, noting that unions must be provided with the names of witnesses, citing **AFSCME v. Commonwealth of Pennsylvania, Department of Corrections**, 18 PPER ¶ 18057 (Final Order, 1987), and with reports generated from internal investigations, citing **PSSU v. Commonwealth of Pennsylvania, Department of Public Welfare**, 17 PPER ¶ 17042 (Final Order, 1986). The Board noted, however, that a union's right to information is not absolute under PERA or the NLRA, citing **AFSCME v. Commonwealth of Pennsylvania, Department of Agriculture**, 18 PPER ¶ 18003 (Final Order, 1986); **Detroit Edison**, 440 U.S. 301, 100 LRRM 272 (1979). Indeed, the Board recognized that witness statements have been specifically excluded and took note of **Department of Corrections, supra**, wherein the holding of **Anheuser Busch, Inc.**, 99 LRRM 1174, 237 NLRB No. 146 (1978), was adopted. The Board described the **Anheuser Busch** ruling and indicated that the statutory obligation to furnish information was not properly "extended so as to require an employer to provide a union with statements obtained during the course of an employer's investigation of employee misconduct." **Pennsylvania Department of Corrections, supra**, (quoting **Anheuser Bush** at 99 LRRM 1176).

As a result, the Board concluded that the state trooper's participation in the events leading up to the disciplinary hearing of the corrections officer was that of a witness to the alleged misconduct. *Id.* Because the trooper's statement detailed his knowledge of the corrections officer's conduct, i.e. the alleged admission that he had previously lied to police, the Board found that the trooper's statement was not an investigative report concerning the employee, but rather was a witness statement. *Id.* Therefore, the Board held that the employer did not violate Section 1201(a)(1) and (5) of PERA when it refused to provide the union with the trooper's statement. *Id.*

I find that the same reasoning applies to the instant dispute. In this case, the Union sought relevant information from the two investigators who physically went to the Family Court facility on August 1, 2011 to determine if Silver had gone to his support hearing that day. The investigators each prepared separate statements detailing what they witnessed firsthand that day. See Employer Exhibit 3. In fact, the investigators were actual witnesses to the alleged employee misconduct, much like the state trooper in **SCI Graterford, supra**, who witnessed the alleged admission by the corrections officer. As such, their statements are not investigative reports subject to disclosure like those in **AFSCME District Council 47, Local 2187 v. City of Philadelphia**, 43 PPER 25 (Proposed Decision and Order, 2011) & **Commonwealth of Pennsylvania (Department of Public Welfare)**, 16 PPER ¶ 16179 (Proposed Decision and Order, 1985), **affirmed** 17 PPER ¶ 17042 (Final Order, 1986). Instead, they are clearly witness statements, like the one at issue in **SCI Graterford, supra**, which are specifically excluded from disclosure under the current Board law. Accordingly, the Employer did not violate Section 1201(a)(1) or (5) of PERA when it refused to provide the Union with these statements.

This does not, however, end the analysis. The Union contends that since **Anheuser Busch** came down, the NLRB has begun limiting its application on a number of occasions. Specifically, the Union notes that the NLRB affirmed an administrative law judge's (ALJ) finding that an employer violated its duty to furnish information when it refused to provide the union with statements from supervisors and guards relating to alleged picket line misconduct of employees in **Facet Enterprises, Inc.**, 290 NLRB 152 (1988). See Union brief at 12-13. The Union points out that the ALJ found that the concern in **Anheuser Busch** regarding witness intimidation was inapplicable. See Union brief at 13. Likewise, the Union cites **New Jersey Telephone Co.**, 300 NLRB 42 (1990) for the proposition that statements taken by employer investigators of alleged employee misconduct do not constitute privileged witness statements if there is no assurance of confidentiality made to the witness. Carrying this argument to its logical conclusion, the Union asserts that the **Anheuser Busch** exception to the Employer's duty to furnish information is not applicable here because there were no concerns about witness intimidation or confidentiality in this case.

I do not find these arguments persuasive. Although the National Board has had occasion to limit the **Anheuser Busch** doctrine in several instances, and even recently reversed the entire rule in **American Baptist Homes of the West d/b/a Piedmont Gardens and Service Employees International Union, United Healthcare Workers-West**, 359 NLRB No. 46 (2012), this Board has not followed suit. To the contrary, this Board seems to have

reached the opposite result when it held that witness statements were not subject to the disclosure requirements in **SCI Graterford, supra**, even though there did not appear to be any confidentiality concerns. I recognize that there were absolutely no confidentiality concerns in the instant matter; however, I am without authority to depart from the consistent line of Board decisions in this area. See also **Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Department of Corrections Greene SCI**, 34 PPER ¶ 52 (Final Order, 2003). Even the complete reversal of the National Board's rule is of no consequence here, as this Board is not required to reverse its own policy, despite adopting the National Board's rule in the first instance. **Chartiers-Houston School District**, 14 PPER ¶ 14056 (Final Order, 1983).

Finally, however, I find that the Employer violated Section 1201(a)(1) and (5) of PERA by failing to provide the Union with the names of the witnesses who gave the statements at issue. It is well settled that the names of witnesses are included within the liberal discovery standard and are subject to disclosure. **AFSCME, Council 13, AFL-CIO v. Commonwealth of Pennsylvania, Department of Corrections**, 17 PPER ¶ 17072 (Proposed Decision and Order, 1986) **aff'd**, 18 PPER ¶ 18057 (Final Order, 1987) **aff'd, Commonwealth of Pennsylvania, Department of Corrections, SCI Muncy v. PLRB**, 541 A.2d 1168 (Pa. Cmwlth. 1988).

Here, the Union requested the names of the individuals as far back as August 3, 2011 during the disciplinary hearing for Silver. (N.T. 58). What is more, the Union continually requested this information following that meeting. Indeed, Union Representative Robert Merritt specifically requested the names of the individuals who allegedly saw Silver leave the courthouse facility on August 3, 2011 and forwarded an email approximately three days later reiterating this request. (N.T. 58-59). Union counsel subsequently requested that the Employer provide the information they had on Silver in an email in late September 2011. (N.T. 68). Then, on March 21, 2012, Vice President Joseph Horan sent a request for "[c]opies of all evidence, including witness statements, that the [Employer] relied upon to justify its decision to terminate Mark Silver," (N.T. 36, Union Exhibit 4), which necessarily includes the names of the witnesses. And, Union counsel once again sent a request for the information on April 19, 2012. (Union Exhibit 5). However, the Employer did not comply with any of the requests until it finally turned over the actual witness statements on the date of the arbitration hearing on June 12, 2012. (N.T. 39).

This was clearly a violation of the Act. Although Mr. Pittman testified that Marcolongo's name was provided to the Union during the disciplinary conference, this testimony is not accepted as credible. Notably, this assertion was unsupported by the Employer's own exhibit, an August 3, 2011 detailed summary of the Union Contact or disciplinary hearing for Silver, which contains absolutely no mention of the investigators' names being provided. See Employer Exhibit 1. In addition, Mr. Pittman acknowledged that he could not recall whether Breyer's name was provided to the Union at that time, which casts considerable doubt upon his overall recollection regarding this specific meeting. (N.T. 76-77). In short, Mr. Pittman's testimony was not sufficient to rebut the Union's credible evidence, illustrating the multiple requests they made for the information. Accordingly, the Employer violated Section 1201(a)(1) and (5) of PERA by failing to provide the Union with the names of its witnesses to the alleged misconduct.

CONCLUSIONS

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

1. Philadelphia Gas Works is a public employer within the meaning of Section 301(1) of PERA.
2. Gas Works Employees Union, Local 686 Utility Workers of America, is an employee organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.

4. Philadelphia Gas Works has committed unfair practices in violation of Section 1201(a)(1) and (5) 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 PGW 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 the names of the witnesses it relied on in terminating Mark Silver and who provided witness statements in connection therewith;
 - (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 its employes, 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 Union.

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 twenty-sixth day of July, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

GAS WORKS EMPLOYEES UNION
LOCAL 686, UWUA

v.

PHILADELPHIA GAS WORKS

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Case No. PERA-C-12-99-E

AFFIDAVIT OF COMPLIANCE

Philadelphia Gas Works hereby certifies that it has ceased and desisted from its violations of Section 1201(a) (1) and (5) of the Public Employe Relations Act; that it has provided the Union with the names of the witnesses it relied on in terminating Mark Silver and who provided witness statements in connection therewith; that it has posted a copy of the Proposed Decision and Order in the manner prescribed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid

Signature of Notary Public