

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME COUNCIL 13 :  
 :  
 v. : Case No. PERA-C-16-309-E  
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 COMMONWEALTH OF PENNSYLVANIA :

**PROPOSED DECISION AND ORDER**

On October 24, 2016, the American Federation of State, County and Municipal Employees Council 13 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania (Commonwealth or Employer), alleging that the Commonwealth violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA or Act) by refusing to comply with a grievance settlement agreement.

On November 17, 2016, the Secretary of the Board issued a Complaint and Notice of Hearing, designating February 15, 2017, in Harrisburg, as the time and place of hearing, if necessary.

A hearing was necessary and was held before the undersigned Hearing Examiner of the Board on February 15, 2017, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties both filed post-hearing briefs in support of their respective positions on April 24, 2017.

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 Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (N.T. 3)
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 3)
3. AFSCME is the exclusive bargaining representative for a unit of nonprofessional employes, which includes clerks and tax examiners employed with the Commonwealth, predominantly in the Department of Revenue. (N.T. 9)
4. In 2015, Steven Johnson had been employed as a Tax Examiner 2 with the Commonwealth in the Department of Revenue for approximately 16 years. Prior to that, Johnson worked for the Commonwealth in the Department of Labor and Industry as a Clerk Typist 2 for five or six years. (N.T. 21-22)
5. On November 6, 2015, the Commonwealth suspended Johnson pending an investigation, and subsequently discharged him on November 26, 2015. (N.T. 10, 43; Union Exhibit 1)
6. AFSCME subsequently filed a grievance contesting the discipline. (N.T. 10, 23, 43)
7. In February 2016, the parties resolved the grievance by way of a settlement agreement, which was signed by Johnson, George Estright, who is an AFSCME staff representative, and Jane Baldo, the Commonwealth's chief of labor relations for the Department of Revenue. (N.T. 11, 23, 44; Union Exhibit 1)
8. The grievance settlement agreement provides, in pertinent part, as follows:

Mr. Johnson's suspension pending investigation and subsequent discharge, effective November 6, 2015 and November 26, 2015, respectively, will be converted to a retirement, contact former agency, effective November 6, 2015 provided Mr. Johnson contacts the State Employees Retirement System (SERS) to request such retirement. Should Mr. Johnson fail to contact SERS to retire, his suspension pending investigation and subsequent discharge will be converted to a resignation, contact former agency, effective November 6, 2015.

Mr. Johnson agrees not to seek future employment with the Department of Revenue.

The Department utilizes the Work Number for reference checks[.] The Work Number is used by the Commonwealth to verify employment and salary information. Mr. Johnson should provide the Work Number contact information to prospective employers outside the Commonwealth for reference checks regarding his Department of Revenue employment...

Mr. Johnson shall receive a one-time lump sum payment of exactly \$44,600...

(Union Exhibit 1)

9. Following execution of the settlement agreement, Johnson applied for a number of positions with the Commonwealth. He took the Civil Service examination for the clerk typist position and also applied with the Department of Treasury. Between April and June 2016, he had two interviews with the Department of Health for a clerk typist 2 position and one interview with the Public Utilities Commission for a clerk typist 3. He did not receive a job offer for any of these positions. (N.T. 26-28)

10. In May or June 2016, Johnson received a job availability notice for a clerk typist 2 position with the Commonwealth Department of Education. After returning the form, Johnson received a letter dated July 13, 2016 from Diane Hershey, Bureau of Human Resources Director for the Department of Education, which provided in pertinent part as follows:

Dear Mr. Johnson:

This is to inform you that the Department of Education will be requesting the State Civil Service Commission's approval to remove your name from consideration for all Clerk Typist jobs in our Department. Most of the Clerk Typists handle sensitive documents, such as educator discipline information, student records, and personnel records. These types of documents must remain confidential by law. Violation of confidentiality requirements could subject the Department to severe penalties including monetary sanction and loss of significant federal funding as well as lawsuits. You were terminated from the Department of Revenue in November 2015 for unauthorized release and/or use of confidential taxpayer information. Confidentiality is important for our positions...

(N.T. 28-30; Union Exhibit 3)

11. Upon receipt of the letter, Johnson contacted Hershey by phone and asked how she obtained this information, to which Hershey replied that it was in his official personnel folder (OPF). Hershey explained that Johnson could write an appeal letter and that she would contact the Civil Service Commission to remove his name from consideration. Johnson did not receive an interview for the position. (N.T. 29-33)

12. By email dated July 27, 2016, Estright confirmed with Baldo a recent telephone conversation, during which he informed her of the July 13, 2016 correspondence Johnson received from the Department of Education. (Union Exhibit 2)

13. By email dated July 28, 2016, Baldo contacted Estright and informed him as follows:

I've spoken with Ms. Hershey of the Department of Education. She will be rescinding her request to remove Mr. Johnson from the Civil Service list.

When we received the [electronic] OPF request - we followed up on our help desk ticket to ensure his OPF was appropriately purged[.] I understand that during this time, Ms. Hershey was able to view a document that has now been removed.

We apologize that Mr. Johnson was inconvenienced. Ms. Hershey indicated she would notify me of the rescinding and I'll notify you as well.

(Union Exhibit 2)

14. The document Baldo was referring to, which Hershey was able to view and which was subsequently removed from the OPF, was Johnson's termination letter. (N.T. 60)

#### DISCUSSION

AFSCME alleges that the Commonwealth violated Section 1201(a)(1) and (5) of the Act<sup>1</sup> by failing to abide by the terms of the grievance settlement agreement when the Commonwealth Department of Revenue allowed the termination letter to remain in Johnson's personnel file, such that other Commonwealth agencies were permitted to view the letter and rely on it to deny Johnson employment opportunities. The Commonwealth, on the other hand, contends that the charge should be dismissed because AFSCME failed to show a violation of the settlement agreement. Specifically, the Commonwealth asserts that the settlement agreement requires only that Johnson's suspension pending investigation and subsequent discharge be converted to a resignation, which was done through the Commonwealth's computer system. The Commonwealth maintains that the settlement agreement says nothing regarding Johnson's personnel file, much less that the Commonwealth must remove anything therefrom.

Where a grievance has been resolved through a settlement, a public employer violates its duty to bargain under Section 1201(a)(1) and (5) of PERA when it refuses to comply with a grievance settlement agreement. **Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania, Department of Corrections, Rockview SCI**, 47 PPER 43 (Final Order, 2015). Where there is a settlement agreement, the Board will determine (1) if a meeting of the minds on the settlement actually exists; (2) whether the parties' intent is apparent from the settlement agreement; and (3) whether the party has failed to comply with the agreement's provisions. **AFSCME District Council 47 Local 2187 v. City of Philadelphia**, 36 PPER 124 (Final Order, 2005). The burden is on the complainant to establish by substantial evidence that the respondent has failed or refused to comply with the terms of the settlement agreement. **Rockview SCI, supra**.

In this case, AFSCME has sustained its burden of proving that the Commonwealth failed to comply with the terms of the grievance settlement agreement. First of all, the record clearly shows that a valid settlement agreement exists. Indeed, there is no dispute among the parties that they resolved the grievance pursuant to a February 2016 settlement agreement, duly executed by both sides, as well as the grievant himself. Similarly, the record shows that the parties' intent is apparent from the settlement agreement, which provides as follows:

Mr. Johnson's suspension pending investigation and subsequent discharge, effective November 6, 2015 and November 26, 2015, respectively, will be

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<sup>1</sup> 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.

converted to a retirement, contact former agency, effective November 6, 2015 provided Mr. Johnson contacts the State Employees Retirement System (SERS) to request such retirement. Should Mr. Johnson fail to contact SERS to retire, **his suspension pending investigation and subsequent discharge will be converted to a resignation, contact former agency, effective November 6, 2015.**<sup>2 3</sup>

(Emphasis added).

The dispute in this matter hinges on the Commonwealth's failure to remove Johnson's termination letter from his personnel file, such that other Commonwealth agencies could view the letter and potentially rely on it to deny him employment opportunities. AFSCME insists that the Commonwealth was required to remove the termination letter by the terms of the settlement agreement, while the Commonwealth submits that the agreement contains no such requirement and does not even mention termination letters or personnel files. According to the Commonwealth, it was only required to convert the suspension pending investigation and subsequent discharge to a resignation, contact former agency, which was done through the Commonwealth's SAP system.

Although the settlement agreement does not expressly refer to the removal of anything from the personnel file, it does explicitly state that the "suspension pending investigation and subsequent discharge will be converted to a resignation, contact former agency, effective November 6, 2015." Webster's Encyclopedic Unabridged Dictionary, Deluxe Edition, Revised and Updated, 1996, defines the term "convert" as follows: "to change (something) into a different form or properties; transmute; transform." Thus, the parties plainly agreed that the suspension pending investigation and subsequent discharge would be changed to a resignation, contact former agency. By allowing the termination letter to remain in Johnson's personnel file, the Commonwealth failed to effectively change or alter the prior discipline to a resignation, contact former agency, as the parties agreed. As such, the Commonwealth will be found to have committed unfair practices under Section 1201(a)(1) and (5) of the Act.

Turning to the issue of a remedy, AFSCME contends that Johnson should be awarded make whole relief in the form of wages he would have earned because the Commonwealth Department of Education used the termination letter to deny him employment opportunities. However, as the Commonwealth correctly points out, there is no evidence to support the conclusion that the Department of Education would have offered Johnson a position had it not been for the termination letter. To the contrary, the record simply shows that Hershey initially sought to remove Johnson from the Civil Service list, but later rescinded her request for the same. Furthermore, there is no evidence whatsoever that the other agencies where Johnson applied ever saw the termination letter, much less that they used it to deny him employment opportunities. As a result, AFSCME's request for make whole relief in the form of lost wages must be denied.

#### CONCLUSIONS

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

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA.
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.

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<sup>2</sup> The record shows that Johnson did not contact SERS to request a retirement in accordance with the first provision of the settlement agreement set forth above. As a result, the Commonwealth coded his departure from the Department of Revenue as a resignation, contact former agency. (N.T. 46).

<sup>3</sup> The parties agree that "contact former agency" means that other prospective Commonwealth employers can contact the former agency, or Department of Revenue in this case, to obtain information regarding the totality of the employe, but cannot use the fact of the employe's converted termination to deny employment. Prospective employers other than the Commonwealth are supposed to be provided with the Work Number for reference checks. (N.T. 17-18, 45, 54)

3. The Board has jurisdiction over the parties hereto.

4. The Commonwealth 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 Public Employe Relations Act, the Examiner

**HEREBY ORDERS AND DIRECTS**

that the Commonwealth 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) Immediately comply with the grievance settlement agreement by changing Steven Johnson's suspension pending investigation and subsequent discharge, effective November 6, 2015 and November 26, 2015, respectively, to a resignation, contact former agency, effective November 6, 2015;

(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 the bargaining unit 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 with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 5<sup>th</sup> day of June, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME COUNCIL 13

v.

COMMONWEALTH OF PENNSYLVANIA

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Case No. PERA-C-16-309-E

**AFFIDAVIT OF COMPLIANCE**

The Commonwealth hereby certifies that it has ceased and desisted from its violation of Section 1201(a) (1) and (5) of the Public Employee Relations Act; that it has immediately complied with the grievance settlement agreement by changing Steven Johnson's suspension pending investigation and subsequent discharge, effective November 6, 2015 and November 26, 2015, respectively, to a resignation, contact former agency, effective November 6, 2015; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Union at its principal place of business.

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Signature/Date

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Title

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

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Signature of Notary Public