

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 88 :
 :
 v. : Case No. PERA-C-17-29-E
 :
 BATH BOROUGH :

PROPOSED DECISION AND ORDER

On February 3, 2017, the American Federation of State, County and Municipal Employees District Council 88 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Bath Borough (Borough or Employer), alleging that the Borough violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA or Act) by cancelling negotiations scheduled for January 18, 2017 and refusing to engage in further negotiations with AFSCME before a question of representation has arisen.

On February 15, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of seeking resolution of the matters in dispute through mutual agreement of the parties, and designating March 10, 2017, in Harrisburg, as the time and place of hearing, if necessary. On February 23, 2017, the Borough filed an Answer to the Complaint, essentially denying all material averments contained within the specification of charges. The hearing was subsequently continued to April 3, 2017 at the request of both parties due to inclement weather.

A hearing was necessary and was held before the undersigned Hearing Examiner of the Board on April 3, 2017, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Borough filed a post-hearing brief on April 19, 2017. AFSCME filed a post-hearing brief on May 30, 2017.¹

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 Borough is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5-6)
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)
3. On September 17, 2015, the Board certified AFSCME as the exclusive bargaining representative for a unit described as "all full-time and regular part-time nonprofessional employes including but not limited to laborers, clerical employes, crossing guards and public works crew leaders; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the Act." (PERA-R-15-158-E)
4. Since the Board's certification of AFSCME as the exclusive bargaining representative of Borough employes on September 17, 2015, the Borough and AFSCME have engaged in collective bargaining negotiations, but have not entered into a collective bargaining agreement (CBA). (**In the Matter of the Employes of Bath Borough**, 48 PPER 55 (Proposed Order of Dismissal, 2016); PERA-D-16-282-E)
5. On October 3, 2016, the Borough filed with the Board a petition for decertification pursuant to Section 607 of PERA alleging a good-faith doubt of

¹ The Borough filed its post-hearing brief before the Board even received the hearing transcript, which occurred on April 26, 2017.

the majority support for AFSCME, which was docketed at PERA-D-16-282-E. The parties litigated the petition, and Hearing Examiner Jack Marino issued a Proposed Order of Dismissal (POD) on December 16, 2016, concluding that the petition was not supported by a good-faith doubt regarding AFSCME's majority status. As a result, Hearing Examiner Marino dismissed the petition for decertification. No exceptions were filed to the POD. (**In the Matter of the Employees of Bath Borough**, 48 PPER 55 (Proposed Order of Dismissal, 2016) ; PERA-D-16-282-E)

6. On January 5, 2017, the Borough filed another petition to decertify the unit, which was docketed at PERA-D-17-23-E. (PERA-D-17-23-E)
7. On January 9, 2017, Borough Manager Bradford Flynn sent a letter to AFSCME representative Jim Irwin, which provided, in pertinent part, as follows:

The Borough has received the enclosed Petition from employees stating that they do not wish to be represented by your organization and requesting that the Borough withdraw recognition.

Based on this Petition, the Borough withdraws recognition from AFSCME at this time. Accordingly, the negotiations scheduled for January 18, 2017 must be cancelled.

(N.T. 16; Employer Exhibit 1)

8. On January 19, 2017, Kenneth Fogel, a Borough employe, filed a petition to decertify the unit, which was docketed at PERA-D-17-2-E. (PERA-D-17-2-E)
9. By email dated January 23, 2017, Flynn indicated the following, in pertinent part, to Irwin:

In furtherance of our telephone conversation this morning, I have attached a copy of the decertification petition signed by 50% of the employees. The Borough received this petition on January 5, 2017, which was hand delivered by an employee. You did, or should have, received a copy of this petition by US mail. Based upon receiving that petition (not my opinion, hearsay, rumors or otherwise) the Borough concluded that the [U]nion does not enjoy majority status needed to continue with negotiations. The Borough maintains this position.

(Union Exhibit 1)

10. On February 22, 2017, the Secretary of the Board sent a letter to the parties in both PERA-D-17-2-E and PERA-D-17-23-E stating as follows:

Pursuant to 34 Pa. Code Section 95.81, the Secretary will defer at this time from issuing any order in the above matter due to the outstanding unfair practice charge filed to Case No. PERA-C-17-29-E.

(PERA-D-17-2-E & PERA-D-17-23-E)

DISCUSSION

AFSCME avers that the Borough has violated Section 1201(a)(1) and (5) of the Act² by cancelling negotiations and withdrawing recognition from the Union before a question of

² 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

representation has arisen. The Borough, for its part, contends that the charge should be dismissed because it lawfully withdrew recognition from AFSCME based on a showing that AFSCME had lost support of a majority of employees in the bargaining unit.

In **Williamsport-Lycoming County Recreation Authority**, 14 PPER ¶ 14128 (Final Order, 1983), the Board opined as follows:

...we ruled in **Franklin County Commissioners (Prison Board)**, 8 PPER 193 (1977), **aff'd** 8 PPER 304 (1977), that an employer asserting doubt regarding a certified representative's continued majority status cannot refuse to negotiate. Therein, we noted that while an employer can file a petition for decertification under the rules and regulations adopted by this Board, it cannot simply refuse to negotiate.

* * *

As correctly noted by the Hearing Examiner, this Board in **Commonwealth of Pennsylvania (Pennsylvania Liquor Control Board)**, 10 PPER ¶ 10031 (1979), adopted the principle set forth in **Mid-West Piping and Supply Company, Inc.**, 63 NLRB 1060 (17 LRRM 40 (1945)) that an employer commits an unfair practice if it recognizes or bargains with one of two rival unions where a question of representation exists. Thereafter, we ruled in **Jefferson County**, 10 PPER ¶ 10081 (1979) that a public employer was under no obligation to bargain where a question of representation existed by virtue of decertification petitions. Finally, in **Pennsylvania Liquor Control Board** we determined that a question of representation arises for purposes of applying the doctrine when we order a representation hearing or Pre-Hearing Conference, rather than upon the mere filing of the petition.

In this case, AFSCME has clearly sustained its burden of proving that the Borough violated the Act. The record not only shows that the Borough simply refused to negotiate with AFSCME while asserting doubt as to AFSCME's majority status, but also that the Borough did so before any question of representation had arisen within the meaning of **Williamsport-Lycoming County Recreation Authority, supra**. The Board certified AFSCME as the exclusive bargaining representative of a unit of nonprofessional employees on September 17, 2015, after which the parties engaged in collective bargaining negotiations but did not reach an agreement. On January 5, 2017, the Borough filed a petition to decertify the unit, alleging a good-faith doubt regarding AFSCME's majority status. Then, on January 9, 2017, the Borough Manager withdrew recognition from AFSCME and cancelled negotiations, which were scheduled for January 18, 2017. The Borough Manager reiterated his conclusion that AFSCME does not retain majority status by email dated January 23, 2017 to AFSCME's staff representative. However, there has never been a question of representation here, as the Board Secretary deferred from issuing any order, notice of hearing, or pre-hearing conference in either pending decertification proceeding due to the blocking nature of the instant charge. As a result, there is nothing in the record which would relieve the Borough from its obligation to bargain with AFSCME.³ Therefore, the Borough has committed unfair practices in violation of Section 1201(a)(1) and (5) of the Act.

collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

³ In **Montgomery County Community College**, 15 PPER ¶ 15136 (Proposed Decision and Order, 1984), the Hearing Examiner observed that Judge Doyle of the Commonwealth Court stated that **Commonwealth of Pennsylvania, supra**, must be read narrowly and applies only to circumstances such as arise in a representation contest between two rival unions. **Northampton County Court of Common Pleas**, 13 PPER ¶ 13236 (Pa. Cmwlth. 1982). Thus, under this analysis, the Borough herein would still be obligated to bargain with AFSCME, as even the issuance of an Order and Notice of Hearing on the decertification petitions would not insulate it from bargaining. See also **Northampton County**, 14 PPER ¶ 14000 (Pa. Cmwlth. 1982).

CONCLUSIONS

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

1. The Borough 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.
3. The Board has jurisdiction over the parties hereto.
4. The Borough 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 Borough 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) Upon demand, bargain in good faith with the Union;
 - (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 16th day of June, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 88

v.

BATH BOROUGH

:
:
:
:
:

Case No. PERA-C-17-29-E

AFFIDAVIT OF COMPLIANCE

The Borough 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, upon demand, bargained in good faith with the Union; 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.

Signature/Date

Title

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

Signature of Notary Public