

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 87 :
 :
 v. : Case No. PERA-C-18-159-E
 :
 LUZERNE COUNTY FLOOD PROTECTION :
 AUTHORITY :

PROPOSED DECISION AND ORDER

On July 5, 2018, the American Federation of State, County, and Municipal Employees District Council 87 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Luzerne County Flood Protection Authority (Authority or Employer), alleging that the Authority violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA or Act) by refusing to strike names from a panel list of arbitrators and proceed to arbitration.

On August 27, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on December 10, 2018, if necessary. The Authority filed an Answer to the Complaint on September 24, 2018, essentially denying all material averments contained in the specification of charges.

The hearing ensued on December 10, 2018, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.¹ The Authority filed a post-hearing brief on March 8, 2019. AFSCME filed a post-hearing brief on March 11, 2019.

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 Authority is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6)
2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)
3. AFSCME is the certified bargaining agent for a unit of nonprofessional employes at the Authority. (Union Exhibit 11)

¹ The Authority did not appear for the December 10, 2018 hearing and did not request a continuance prior to that time, despite numerous efforts by the Board's staff to confirm the Authority's attendance or its potential need for a continuance. The Board eventually learned of a request to continue the hearing on behalf of the Authority approximately 30 minutes after the hearing was scheduled to begin, which was opposed by AFSCME. The request for continuance was denied. On or about December 21, 2018, the Authority filed a Motion for Scheduling of Date and Time for Additional Hearing, which was treated as a Motion to Reopen the Record pursuant to 34 Pa. Code § 95.98(f)(2). AFSCME filed an Answer thereto on January 3, 2019, which opposed the Authority's request. On January 8, 2019, the Authority's Motion to Reopen the Record was denied.

4. AFSCME and the Authority are parties to a collective bargaining agreement (CBA) which is effective from January 1, 2018 to December 31, 2022. The CBA contains a grievance procedure, culminating in arbitration. (Union Exhibit 11)

5. In March 2018, AFSCME filed three separate grievances on behalf of Raymond Howell, Kevin Baron, and Elio Denardi, alleging that the Authority violated various CBA provisions regarding out-of-class pay, uniform service, sick leave, overtime, and call time. (N.T. 8-11; Union Exhibit 6, 9)

6. AFSCME processed all three grievances to Step 3 of the grievance procedure, at which point the parties meet to attempt to resolve the outstanding issues. (N.T. 8-11)²

7. On April 26, 2018, AFSCME representatives met with the Authority's Executive Director Chris Belman, Executive Secretary Theresa Lacotta, and Attorney Chris Cullen. The Authority representatives were hostile to the presentation of the grievances and refused to take evidence from AFSCME on the grounds that the grievants were not present. (N.T. 8-11)

8. At the conclusion of the meeting, AFSCME advised the Authority representatives that AFSCME would move all three grievances to arbitration. (N.T. 8-11)

9. The Authority did not respond to the grievances in writing following the meeting. Consequently, AFSCME sent a letter demanding arbitration on May 2, 2018. (N.T. 10-11)

10. By letters dated May 4, 2018, for each of the individual grievances, the parties received a panel list of arbitrators from the Pennsylvania Bureau of Mediation. (N.T. 11-12; Union Exhibits 1-3)

11. By email dated May 4, 2018, AFSCME representative Melissa Matoushek asked Belman when he might be available by phone to strike arbitrators for the three grievances. (N.T. 12; Union Exhibit 4)

12. By letter dated May 15, 2018, Cullen replied to Matoushek and indicated, in relevant part, the following:

Please accept this correspondence as a notice of the entry of my appearance on behalf of the [Authority] in regards (sic) to each of the above-listed Grievances.

Please address all communications regarding the Grievances to my attention at my law office address. Please refrain from directly contacting my client.

Please find enclosed true and correct copies of the correspondence and enclosures sent on behalf of the [Authority] to the Pennsylvania Department of Labor and Industry, Bureau of Mediation. Please review.

² Step 3 is also the final step prior to the arbitration stage of the process. (Union Exhibit 11).

Please be advised that if the Grievances go to hearing before an arbitrator, it will be necessary for the [Authority] to call you as a fact witness, along with each of the named Grievants.

The [Authority] is in receipt of each of AFSCME's "amended" Grievances for Howell, Baran (sic) and Denardi. Each of the said "amended (sic) Grievances are opposed and denied by the [Authority] for the reasons set forth in the [Authority's] letter addressed to the Bureau of Mediation. Not one of the "amended" Grievances was subject to the three (3) Step process set forth in Article XII of the CBA. Not one of the "amended" Grievances is signed (sic) by a Grievant.

Finally, please be advised that neither any one of the named Grievants, nor AFSCME provided any statement, or evidence in support of the alleged Grievances to the [Authority] during the conducted STEP 1, STEP 2 and STEP 3 Grievance Arbitration process as set forth in Article XII of the CBA. No evidence was presented to the [Authority] in support of any one of the "amended" Grievances dated May 2, 2018, impermissibly submitted outside the CBA to the [Authority]...

(N.T. 12-13; Union Exhibit 5)

13. By letter dated May 15, 2018, Cullen contacted the Pennsylvania Bureau of Mediation and indicated, in relevant part, the following:

Please accept this correspondence as my notice of entry of appearance in each of the above-captioned Grievances on behalf of the [Authority]. I serve as solicitor to the [Authority].

For the purpose of the record, please find enclosed true and correct copies of the [Authority's] 1st stage (dated 03/27/18) and 2nd stage (dated April 12, 2018) responses to each of the submitted Grievances (Howell, Baran (sic) and Denardi), and a copy of the [CBA] by and between the [Authority] and AFSCME, effective January 1, 2018 to December 31, 2022.

In addition, please find enclosed (sic) a true and correct copy of each of the "amended grievances" submitted to the [Authority] by AFSCME, dated "May 2, 2018." Article XXII of the CBA entitled "Grievance Arbitration" does not include a provision which would either allow or permit "amendment" of a previously submitted Grievance. Neither the Public Employee Relations Act, nor the Uniform Arbitration Act appears to provide for the amendment of a previously submitted grievance. The Baran (sic) and Denardi Grievance are each dated "3/14/2018." The Howell Grievance is dated "3/8/18." Each of the "Amended" Grievances are only signed by an AFSCME representative. Each of the originally submitted Grievance (sic) is signed only by an AFSCME representative and (sic) not by the actual grievant. This practice serves to violate the provision set forth in Section 2 (STEP 1) of Article XII of the CBA which reads, in pertinent part, as follows: "The employee, either alone or accompanied by a Union representative, shall present the grievance in writing to the Authority's Executive Director within ten (10) working days of the date of the occurrence of the event giving rise to the grievance." The

[Authority] interprets this sentence, especially the phrase the "employee...shall present the grievance in writing," to require the grievant, at the very initiation fo (sic) the grievance process, to sign and present the grievance. Only in STEP 2 and STEP 3 does the phrase "employee or Union" appear.

The [Authority] opposes each of the "amended" Grievance (sic), and requests that each of the "amended" Grievances be struck and denied as well as each originally submitted Grievances (sic)...

As to the "Panel or (sic) Arbitrators" provided by the Bureau of Mediation to the [Authority] for each of the original Grievances, the [Authority] respectfully requests that the Bureau provide some information regarding each of the proposed Arbitrators so that the [Authority] may be able to make an informed decision regarding the selection of an arbitrator for each of the Grievances.

Out of the 7 Arbitrators proposed to hear and decide the Howell Grievance, 4 are located outside of the Commonwealth; out of the 7 Arbitrators proposed to hear and decide the Baran (sic) Grievance, 3 are located outside the Commonwealth; out of the 7 Arbitrators proposed to hear and decide the Denardi Grievance, 1 is located outside the Commonwealth. Out of the 21 Arbitrators proposed to hear and decide the Grievances, more than 1/3 (8) are located outside the Commonwealth. Of the remaining 13 proposed Arbitrators, only 2 appear to be from the immediate Luzerne County area.

The [Authority] respectfully requests that a second set of proposed panels of arbitrators be provided, with emphasis placed on potential arbitrators, located not only in the Commonwealth but also from the immediate Luzerne County area. Perhaps, this effort would result in lessening the fees and expenses to be paid equally by the parties.

Finally, the 3 Grievances constitute the first set of grievances filed by AFSCME against the [Authority] since the [Authority] was incorporated on June 28, 1996. The [Authority] employs 6 unionized full-time employees represented by AFSCME.

(N.T. 12-13; Union Exhibit 6) (Emphasis in original)

14. By letter dated May 30, 2018, Matoushek requested that Cullen strike arbitrators and indicated, in relevant part, the following:

The above-referenced grievances were moved to arbitration on May 2, 2018 and both parties have received the panels. At this time the Union is requesting a mutually agreeable time and date as per the [CBA].³

³ The CBA provides that "[t]he arbitrator is to be selected by the parties jointly within ten (10) working days upon receipt of the list from the Bureau of Mediation. The parties shall, meet for the purpose of selecting the arbitrator by alternately striking one name from the list until one name remains. The Authority shall strike the first name." (N.T. 13; Union Exhibit 11).

Please contact me at my office...within five (5) days of receipt of this letter so we can get a time scheduled to continue with the process.

(N.T. 13; Union Exhibit 7)

15. By letter dated June 5, 2018, Cullen replied to Matoushek and stated the following, in relevant part:

Please be advised that [the Authority] is in receipt as of June 1, 2018 of AFSCME's May 30, 2018 letter, a copy of which is attached hereto.

Also attached hereto, please find true and correct copies (without enclosures) of the [Authority's] May 15, 2018 letters addressed to AFSCME and the Pennsylvania Department of Labor and Industry, Bureau of Mediation, Mr. William Gross, Director ("Department"). Please review each of the said letters.

The [Authority] has yet to receive a response to the issues raised in its letter to the Department. The [Authority] will await the receipt of a response from the Department before proceeding forward, as the issues raised pertain directly to the sum and substance of the grievance and arbitration process.

Please be advised that the issues raised in the [Authority's] May 15th letter to AFSCME, namely your anticipated appearance as a "fact witness" at hearing, the "amended grievances" and the lack of evidentiary support for the "grievances" and "amended grievances" were not addressed in AFSCME's May 30th letter.

Kindly respond to the [Authority's] May 15th letter at your earliest convenience.

Once the [Authority] is in receipt of a response to its May 15th letter from both the Department and AFSCME, the [Authority] will be in a better position to move forward on the arbitration process and the resolution of the filed grievances...

(N.T. 14; Union Exhibit 8)

16. Following AFSCME's receipt of Cullen's June 5, 2018 letter, AFSCME representatives made another attempt to schedule an appointment with the Authority to strike arbitrators. However, there was no contact after that point, which lead to AFSCME filing the instant charge. (N.T. 14-15)

17. AFSCME placed telephone calls to the Authority on November 9, 15, and 16, 2019, requesting to strike arbitrators for the three outstanding grievances. The Authority did not respond. (N.T. 15; Union Exhibit 9)

18. By letter dated November 14, 2018, Cullen indicated the following, in relevant part, to AFSCME:

Please be advised as follows: (1) as to the Howell Grievance, the [Authority] respectfully selects Mr. Joel M. Weisblatt; (2) as to the Baran (sic) Grievance, the [Authority] respectfully selects

Christopher J. Perillo, Esq.; and (3) as to the Denardi Grievance, the [Authority] respectfully selects Ellis H. Katz, Esq.

Is it possible to have one arbitrator hear and decide all three Grievances? Please advise...

(N.T. 15-16; Union Exhibit 10)

19. AFSCME replied to Cullen's November 14, 2018 letter by phone call, indicating that the Authority is not permitted to unilaterally select the arbitrators under the CBA and that, instead, there is a process for striking arbitrators. AFSCME continued to leave messages after that, but the Authority has not started the process to strike the lists in any way. (N.T. 15-17)

DISCUSSION

AFSCME has alleged that the Authority violated Section 1201(a)(1) and (5) of the Act⁴ by refusing to process the three grievances and strike arbitrators from the panel list. The Authority argues that it has not committed unfair practices in violation of the Act because the Authority is not required to accept or process grievances which do not comply with the CBA's signature and presentation requirements. In essence, the Authority contends that the grievances are not arbitrable.

However, it has been repeatedly held for decades that the question of the scope of the grievance arbitration procedure is for the arbitrator, at least in the first instance; meaning that an arbitrator has sole and exclusive jurisdiction to hear disputes related to collective bargaining agreements, including disputes of whether a matter is arbitrable. PLRB v. Bald Eagle Area School District, 451 A.2d 671 (Pa. 1982); Abington Heights School District v. PLRB, 709 A.2d 990 (Pa. Cmwlth. 1998); Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995). Even frivolous grievances must be submitted to the arbitrator. Palmerton Area Education Ass'n, PSEA/NEA v. Palmerton Area School District, 41 PPER ¶ 153 (Proposed Decision and Order, 2010) *citing* Pittsburgh Joint Collective Bargaining Committee v. City of Pittsburgh, 391 A.2d 1318 (Pa. Cmwlth. 1978). Refusal to submit a grievance to arbitration constitutes a per se bargaining violation. Indiana Area Education Ass'n, PSEA/NEA v. Indiana Area School District, 35 PPER ¶ 56 (Final Order, 2004). To permit the employer to unilaterally refuse to submit a dispute to arbitration would in effect allow the employer's interpretation to control. East Pennsboro Area School District v. PLRB, 467 A.2d 1356 (Pa. Cmwlth. 1983).

On this record, AFSCME has sustained its burden of proving that the Authority violated Section 1201(a)(1) and (5) of PERA. Indeed, the record clearly shows that the Authority has refused to process all three grievances, which AFSCME filed on behalf of its members, and refused to strike

⁴ 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.

arbitrators from the panel lists involving all three cases. Although the Authority maintains that these grievances are deficient because they were not signed by the individual employes and because they were impermissibly amended under the CBA, it is well settled and beyond dispute that the Authority must present those arguments to the arbitrator in the first instance. The Authority cannot refuse to proceed to arbitration and expect this Board to delve into the reasons and/or merits for its refusal. The determination of whether the individual grievances comport with the CBA's requirements and are capable of arbitration is for an arbitrator to decide, and not the Authority.⁵ Accordingly, the Authority has committed unfair practices in contravention of Section 1201(a) (1) and (5) of PERA.

CONCLUSIONS

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

1. The Authority 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 Authority 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 Authority 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:

⁵ Nor is it a defense for the Authority to rely on its November 14, 2018 letter to AFSCME, in which the Authority attempted to unilaterally select an arbitrator from the panel in all three matters. Section 903(1) of PERA requires the parties to alternately strike names from the panel list until the final remaining name becomes the arbitrator. 43 P.S. § 1101.903(1). The CBA also requires the same. AFSCME clearly did not mutually agree to the Authority's selection for any of the panels, as evidenced by AFSCME's response to the November 14, 2018 letter.

(a) Immediately process the Howell, Baron, and Denardi grievances to arbitration in accordance with the process contained in the parties' collective bargaining agreement by striking names from the list of arbitrators provided by the Pennsylvania Bureau of Mediation until an arbitrator is selected to hear each of the disputes;

(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 employees 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 1st day of May, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 87 :
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AFFIDAVIT OF COMPLIANCE

Luzerne County Flood Protection Authority 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 complied with the Proposed Decision and Order as directed therein by immediately processing the Howell, Baron, Denardi grievances to arbitration in accordance with the process contained in the parties' collective bargaining agreement by striking names from the list of arbitrators provided by the Pennsylvania Bureau of Mediation until an arbitrator is selected to hear each of the disputes; 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

