

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 47 LOCAL 2187, AFL-CIO :
:
:
v. : CASE NO. PERA-C-20-115-E
:
:
CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

On June 10, 2020, AFSCME District Council 47, Local 2187 (Union or AFSCME) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Philadelphia (City) violated Section 1201(a) (1) and (5) of the Public Employee Relations Act (Act or PERA). The Union specifically alleged that the City violated a grievance settlement to unconditionally transfer Jonathan Bagelman by subsequently making the transfer conditioned upon "the extent circumstances permit."

On July 31, 2020, the Secretary of the Board issued a letter informing the Union that no complaint would be issued on the charge because it was untimely filed. On August 20, 2020, the Union filed exceptions to the Secretary's decision not to issue a complaint. On October 23, 2020, the Board issued an Order Directing Remand to the Secretary for Further Proceedings based on additional allegations sufficient to raise a factual question regarding the timeliness of the charge. On November 20, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of February 16, 2021, via video technology, in which the parties voluntarily participated. During the hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On April 12, 2021, the Union filed its post-hearing brief. On May 19, 2021, the City filed its post-hearing brief.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)
3. David Mora is the Vice President of the Union. Formerly, Mr. Mora was the Union Treasurer and a full-time staff representative. (N.T. 15-16)
4. Jonathan Bagelman is a Programmer Analyst III in the Office of Innovation and Technology (OIT), which is a Department that assigns employes to various other City departments. Mr. Bagelman is assigned to the Police Department. (N.T. 18, 21-22; Union Exhibit 1)
5. On April 3, 2018, Mr. Mora filed Grievance No. 87-04-18-02 on behalf of Mr. Bagelman. In the Grievance, Mr. Mora complained that Mr.

Bagelman reported to him that he was subject to "ongoing discrimination at work that has created a hostile work environment for him" in violation of the parties' collective bargaining agreement (CBA). (N.T. 19-20, 52-53; Union Exhibit 1)

6. The Grievance was denied at steps 1-4. The Union delayed the Grievance hearing at Step 4 by requesting more time. The Step 4 Grievance hearing did not occur until February 1, 2019. (N.T. 30, 35, 37, 51-55; Respondent Exhibit 2)

7. Wayne Garris is a Labor Relations Specialist in the City's Department of Labor. Mr. Garris conducted the February 1, 2019, Step 4 Grievance hearing in the Mayor's Office of Labor Relations, as the presiding officer. Also in attendance at the hearing were Mr. Mora, Carlos Jones, Mr. Bagelman's OIT Director and Unit Manager and Concetta Lilly-Pearson, the Director of Human Resources for OIT. (N.T. 20-21, 30-31, 48, 52-53, 67; Respondent Exhibit 1)

8. At the Grievance hearing, Mr. Jones stated that "he was willing to transfer Mr. Bagelman out of his unit," or that "he would assist in transferring Mr. Bagelman." Based on this statement, Mr. Mora believed there was a Grievance settlement to unconditionally transfer Mr. Bagelman out of his unit. The City made no other representation about transferring Mr. Bagelman from the Police Department. Mr. Jones did not represent that Mr. Bagelman would be moved to a particular department and no written draft of the alleged settlement exists. (N.T. 21, 30-31, 52-53)

9. After the February 1, 2019, Step 4 Grievance hearing, Mr. Mora spoke with Mr. Garris and Ms. Lilly-Pearson several times each. At no time did either Mr. Garris or Ms. Lilly-Pearson represent that Mr. Bagelman would be automatically or immediately transferred. (N.T. 32)

10. On March 5, 2019, Mr. Mora emailed Ms. Lilly-Pearson stating: "We could settle Jonathan's grievance with his transfer from Police to another unit. Has there been any movement on this?" The same day, Ms. Lilly-Pearson responded: "I put Jonathan on the Citywide transfer list. I am also still looking for an internal transfer for him." (Respondent Exhibit 1)

11. On September 2, 2019, Mr. Garris sent a letter to David Wilson, an Executive Board Member at the Union and copied Mr. Mora, Ms. Pearson and Bob Coyle, Union President. In that letter, Mr. Garris stated the following:

I have reviewed the grievance filed by AFSMCE District Council 47, Local 2187, regarding Programmer Analyst III Jonathan Bagelman. After carefully reviewing all facts, documents, and testimonies I have found that there was no violation of the collective bargaining agreement, and this grievance is denied. However, the department will work with Mr. Bagelman for his request for a transfer.

(N.T. 39-41; Respondent Exhibit 2)

12. Mr. Garris credibly testified that Mr. Jones' statement, in context at the February 1, 2019, Step 4 Grievance hearing, indicated that he would not stop Mr. Bagelman from transferring out of the Police Department OIT Unit. Once a grievance gets to Step 4 of the grievance procedure, department heads, such as Mr. Jones, are without authority to settle the grievance. Even if Mr. Jones' statement could be viewed as an agreement, he

was without authority at that point to settle the Grievance. Only Mr. Garris has the authority to sustain or deny a grievance at the Step 4 grievance hearing stage. (N.T. 50-53, 71-72)

13. Any City employe can put in for a transfer. The department that the employe is working for can delay a transfer for manpower reasons. When Mr. Jones said that he would assist with Mr. Bagelman's transfer, he meant that he would not hold Mr. Bagelman in the Police Department unit or delay his transfer should a transfer opportunity arise. (N.T. 59-60)

14. If a grievance is sustained at the Step 4 hearing, a letter would be generated subject to the approval of the City Law Department. Then the written agreement is sent to the Union for the signature of the Union representative and the employe. Then the written agreement is sent back to Mr. Garris for his signature. If a grievance is denied, the Union must move it to the next step. After the September 2, 2019 Grievance denial, the Union did not withdraw or advance the Grievance. (N.T. 51-54)

15. During the Step 4 Grievance hearing in February 2019, Mr. Mora asked if the City could just transfer Mr. Bagelman, and Mr. Garris responded in the negative because it would violate other employes' rights to job openings. Mr. Garris does not have the authority to agree to unconditionally transfer anyone, outside of the City's civil service rules. (N.T. 54)

16. Mr. Garris credibly testified that he would not have sent the September 2, 2019 Grievance denial letter had he settled the grievance. Mr. Garris had also told Mr. Mora during a telephone conversation that there was never a settlement agreement, to which Mr. Mora responded that he would see Mr. Garris at arbitration. (N.T. 55-57, 61)

17. The normal procedure when the City transfers an employe is to place the employe's name on a Citywide transfer list. There needs to be a vacancy in a department before an employe can be transferred into that vacancy. Any employe can have their name placed on the Citywide transfer list if that employe is unhappy with his/her current assignment. The Citywide transfer list is supervised by the Office of Human Relations. (N.T. 68-70)

18. For budgetary reasons, there has to be a vacancy in another department for an employe to transfer into that department. Each department has its own budget, and the number of employes cannot be increased in a given department by a Step 4 settlement, although the City will do it to comply with an arbitration award. The City has a home-rule charter and civil service rules, under which the City cannot reassign employes to different departments affecting the civil service rights of employes who do not wish to be transferred or who sought a transfer before Mr. Bagelman. (N.T. 64-68)

19. Ms. Lilly-Pearson attended the February 1, 2019 Step 4 Grievance hearing. She credibly testified that the City did not settle the Grievance at that hearing by agreeing to transfer Mr. Bagelman. Neither Ms. Lilly-Pearson nor Department head Jones has the authority to settle a grievance to transfer an employe at a Step 4 grievance hearing. Ms. Lilly-Pearson corroborated the testimony of Mr. Garris that all settlements must be written and approved before there is an agreement. (N.T. 69-70, 74)

DISCUSSION

After the Union rested its case-in-chief, the City moved for the dismissal of the charge for failure to prove both that the charge was timely filed and that there was a grievance settlement agreement to unconditionally transfer Mr. Bagelman at the February 1, 2019, Step 4 Grievance hearing. I deferred my ruling at the time. In its brief, the City renewed its motion, and now grant the motion to dismiss on both grounds. Granting the Motion for Dismissal is based on the Union's case-in-chief only and findings of fact 1-11.¹ However, I have made additional findings of fact from the record as a whole in support of an alternative, supplemental discussion for purposes of possible Board review.

Section 1505 of PERA provides that "no petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge." 43 P.S. § 1101.1505. The Board has held that a public employer violates its duty to bargain under Section 1201(a)(1) and (5) of the Act when the charging union *knew or should have known* that the employer has refused to comply with a grievance settlement agreement. Radnor Township School District, 40 PPER 44 (Final Order 2009).

The record in this case clearly demonstrates that the Union had actual knowledge that the City was not automatically or unconditionally transferring Mr. Bagelman ahead of other City employes already on a transfer list by March 5, 2019. On that date, Ms. Lilly-Pearson emailed Mr. Mora stating that she put Mr. Bagelman on the Citywide transfer list. She did not represent that the City was definitely transferring him or that there was a concrete plan to do so. Also, during this time, Mr. Mora spoke with Mr. Garris and Ms. Lilly-Pearson several times each. At no time during these discussions did either Mr. Garris or Ms. Lilly-Pearson represent that Mr. Bagelman would be transferred ahead of other employes on a transfer list or without a City department willing to accept him. Ms. Lilly-Pearson's email is one year and three months before the filing of the charge, which is therefore untimely.

Moreover, on September 2, 2019, Mr. Garris sent a letter to David Wilson, an Executive Board Member at the Union and copied Mr. Mora, Ms. Lilly-Pearson and Bob Coyle, Union President, explicitly stating that he had denied the Grievance and that the department will work with Mr. Bagelman for his request for a transfer. Certainly, by September 2, 2019, the Union had actual knowledge that the City did not intend to unconditionally transfer Mr. Bagelman unless a vacancy opened in another department and then Mr. Jones would release him for transfer. Further evidence that Mr. Mora knew that there was no settlement agreement as of September 2, 2019, was his response to Mr. Garris that they would see each other at arbitration to resolve the Grievance. Following the September 2, 2019 letter, another ten months elapsed before the Union filed the instant charge, on June 10, 2020, and during which time the City did not transfer Mr. Bagelman. Accordingly, the Union had notice by March 5, 2019, that the City was not going to unconditionally transfer Mr. Bagelman, and the Union again received notice by September 2, 2019, that the City was not going to unconditionally transfer Mr. Bagelman

¹ Some of the findings of fact 1-11 have citations to the record beyond the Union's case-in-chief, which are limited to necessary background information and a fuller chronology of events, not to support the legal conclusions in determining the ruling on the Motion to Dismiss.

when Mr. Garris informed the Union that the Grievance was denied and, therefore, there was no agreement to do so.

Additionally, the Union did not establish a prima facie case, with substantial, competent evidence, that the City unequivocally entered into an agreement to settle the Bagelman Grievance at the Step 4 Grievance hearing. At the Grievance hearing, Mr. Jones stated that "he was willing to transfer Mr. Bagelman out of his unit," or that "he would assist in transferring Mr. Bagelman." The City made no other representation about transferring Mr. Bagelman. Mr. Jones' statement does not evidence an agreement that he would unconditionally transfer Mr. Bagelman. There is no signed, written agreement stating that the City would or could transfer Mr. Bagelman outside of normal civil service practices, pursuant to which Mr. Bagelman would have to wait for his turn for a transfer. Accordingly, the City's Motion to Dismiss is granted due to the untimeliness of the charge and the lack of a grievance settlement.

Also, and in the alternative, the City's witnesses credibly established that the City did not enter into a settlement agreement with the Union at the February 1, 2019 step 4 Grievance hearing. Mr. Garris and Ms. Lilly-Pearson both credibly testified that there can be no agreement to settle a grievance to unconditionally transfer an employe at the Step 4 hearing. Mr. Garris, Ms. Lilly-Pearson and Mr. Jones are without authority to offer such a settlement because it would violate the City's civil service and transfer rules and would harm other employes waiting for transfers. Also, for budget reasons, there has to be a vacancy in another department for an employe to transfer into that department, which may also depend on pay grades and classifications.

In this case, there is no evidence that Mr. Garris, Ms. Lilly-Pearson or Mr. Jones unequivocally offered or agreed to unconditionally transfer Mr. Bagelman. Also, there is no evidence that the necessary protocols were followed when there is a grievance settlement agreement, such as generating a written document that is approved by the City Law Department, signed by a Union representative and the employe, and also signed by Mr. Garris.

There is evidence, however, that there was no agreement. In his March 5, 2019 email to Ms. Lilly-Pearson, Mr. Mora revealed his own understanding that there was no settlement agreement at that time when he stated: "We could settle Jonathan's grievance with his transfer from Police to another unit." (F.F. 10) (emphasis added). Mr. Garris explicitly told Mr. Mora that there was no settlement agreement, and he sent the Union a letter on September 2, 2019, explicitly stating that the Grievance was denied. Understanding that the Grievance was denied, and not settled, Mr. Mora indicated that he would see Mr. Garris at arbitration. Therefore, the record as a whole lacks substantial, competent evidence to support the conclusion that the City entered into a Grievance settlement agreement with the Union to unconditionally transfer Mr. Bagelman.

Accordingly, the City has not engaged in unfair practices in violation of Section 1201(a) (1) or (5).

CONCLUSIONS

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

1. The City is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The City has not violated Section 1201(a)(1) or (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner:

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-first day of May 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

Jack E. Marino, Hearing Examiner