

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 47, LOCAL 2187 :
v. : Case No. PERA-C-17-187-E
CITY OF PHILADELPHIA¹ :

FINAL ORDER

On July 12, 2017, the American Federation of State, County and Municipal Employees, District Council 47, Local 2187 (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 (PERA) by allegedly changing a past practice of permitting AFSCME to select the peer member for disciplinary board hearings involving employees of the Philadelphia Prison System (PPS), and prohibiting a union steward (Na'im Ali) from participating as the disciplinary board peer member. On July 24, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing. After several continuances, a hearing was held before the Board's Hearing Examiner on May 30, 2018, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

On December 7, 2018, the Hearing Examiner issued a Proposed Decision and Order, concluding that AFSCME's Charge was untimely under Section 1505 of PERA stating, in relevant part, as follows:

In this case, the record shows that the charge was untimely as a matter of law. Indeed, [PPS Deputy Commissioner] Tomaszewski informed the Union on March 22, 2016 that he would not permit the Union to select a peer for formal disciplinary board hearings in the future. Likewise, the record shows that the City selected the peer for all disciplinary board hearings after April 12, 2016, which included May 12, 2016, June 16, 2016, July 7, 2016, December 15, 2016, January 12, 2017, September 7, 2017, and September 21, 2017. (N.T. 39; Exhibit C-1). As a result, the Union should have known of the alleged unfair practice by May 12, 2016 at the latest. However, the Union did not file the instant charge until July 12, 2017, well beyond the four-month limitations period contained in the Act.

(PDO at 3).² Therefore, the Hearing Examiner rescinded the complaint and dismissed AFSCME's Charge.

¹ The caption appears as amended by the Board.

² The Hearing Examiner further concluded that, even if the Charge were timely, the City did not violate Section 1201(a)(1) and (5) of PERA because AFSCME

On December 20, 2018, AFSCME filed timely exceptions with the Board, challenging the Hearing Examiner's PDO. Pursuant to an extension of time granted by the Secretary, AFSCME filed a brief in support of its exceptions on January 22, 2019. The City filed a response and brief in opposition to the exceptions on January 3 and February 14, 2019, respectively.

The facts of this case are summarized as follows. AFSCME represents a unit of administrative, professional and technical employees who work for the City in its prison system. AFSCME and the City are parties to a collective bargaining agreement (CBA) governing the terms and conditions of employment for the employees in the unit. The City also has written disciplinary procedures that apply to employees working in its prison system. Under these procedures, employees are subject to a formal disciplinary board hearing on charges of an infraction that potentially carries more than a nine-day suspension. The disciplinary board hearing is a preliminary step in the disciplinary process.

The disciplinary board is comprised of two management level employees and a peer member. The disciplinary board hears the charges against the employee, along with any evidence supporting those charges. The board then determines whether the charges will be sustained as well as what, if any, penalty will be recommended. The employee charged with misconduct may have a union advocate present during the disciplinary board hearing, which is a separate position from the peer board member. The employee may appeal the decision of the disciplinary board to the PPS Commissioner and challenge any discipline imposed through the grievance procedure set forth in the CBA. The CBA does not provide AFSCME the right to designate the peer member for disciplinary board hearings.

On October 29, 2015 and February 18, 2016, the City permitted AFSCME to designate the peer member for the disciplinary board hearings held on those dates. There have been at least 13 other disciplinary board hearings for employees in the AFSCME unit between 2013 and 2017.

On March 22, 2016, the parties met to discuss a grievance involving the City's discipline of Cherone Hall. During the meeting, PPS Deputy Commissioner Robert Tomaszewski learned that Union Steward Na'im Ali, who served as the peer member at Ms. Hall's disciplinary board hearing, had allegedly revealed to AFSCME the content of the disciplinary board's deliberations. Mr. Tomaszewski became irate, began criticizing Mr. Ali, and stated that AFSCME would not be permitted to select the peer member for disciplinary board panels in the future. By email dated April 12, 2016, Mr. Tomaszewski confirmed to AFSCME that he was denying its grievance over the discipline imposed on Ms. Hall. Mr. Tomaszewski also made a series of allegations regarding Mr. Ali. Since April 12, 2016, AFSCME has not selected the peer member for formal disciplinary board hearings, and the City has not permitted Mr. Ali to sit as a disciplinary board peer member.

Section 1505 of PERA provides that no 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 charge. 43 P.S. § 1101.1505. A charge will be considered timely if it is filed within four months of when the

failed to prove that a past practice existed concerning the selection of the peer member for disciplinary board panels.

charging party knew or should have known that an unfair practice was committed. Community College of Beaver County Society of Faculty, PSEA/NEA v. Beaver County Community College, 35 PPER 24 (Final Order, 2004). The complainant has the burden to show that the charge was timely filed. PLRB v. Commonwealth of Pennsylvania (Bureau of Employment Security), 9 PPER ¶ 9171 (Nisi Decision and Order, 1978); PLRB v. Allegheny County Prison Employees Independent Union, 11 PPER ¶ 11282 (Proposed Decision and Order, 1980). The failure to file a charge of unfair practices within the statutorily-prescribed limitations period is not a mere procedural defect or affirmative defense, but deprives the Board of jurisdiction over the subject matter of the charge. Thomas v. PLRB, 483 A.2d 1016 (Pa. Cmwlth. 1984); South Fayette Township Police Wage and Policy Unit v. South Fayette Township, 29 PPER ¶ 29035 (Final Order, 1998); Eisenhart v. Eastern Lancaster County School District, 40 PPER 11 (Final Order, 2009).

In its exceptions, AFSCME challenges the Hearing Examiner's dismissal of its Charge as untimely and the finding that it has not been permitted to designate the peer member for disciplinary board hearings since April 12, 2016. AFSCME stated in its Charge that the alleged unfair practice occurred when the City refused to permit AFSCME to designate the peer member for disciplinary board hearings and prohibited Union Steward Ali from attending those hearings as the peer member. A review of the record shows that at the March 22, 2016 grievance meeting, PPS Deputy Commissioner Tomaszewski indicated to AFSCME staff representative Catherine Scott that AFSCME would not be permitted to select the peer member for future disciplinary board hearings. (N.T. 26-27). Mr. Tomaszewski also criticized Mr. Ali for allegedly sharing information with AFSCME concerning the disciplinary board deliberations in which he sat as the peer member. Mr. Tomaszewski reiterated his allegations against Mr. Ali in an email dated April 12, 2016, which denied Ms. Hall's grievance. Further, Ms. Scott testified that AFSCME has not selected the peer member for any disciplinary board hearings after the March 22, 2016 grievance meeting with Mr. Tomaszewski. (N.T. 39). Additionally, the list of disciplinary board hearings submitted by AFSCME shows that Mr. Ali has not served as the peer member for any of the disciplinary board hearings from May 12, 2016 through September 7, 2017. (Complainant Exhibit 1). Therefore, AFSCME became aware of the alleged unfair practice no later than May 12, 2016, which is more than four months prior to the filing of its Charge on July 12, 2017.³

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in rescinding the complaint and dismissing AFSCME's Charge as untimely.⁴ Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

³ Moreover, as found by the Hearing Examiner, and supported by Complainant Exhibit 1, the last disciplinary board proceeding immediately preceding the Charge was held on January 12, 2017, which was more than four months prior to the filing of the Charge on July 12, 2017.

⁴ Because the Board lacks jurisdiction over AFSCME's Charge, the Board will not address AFSCME's exceptions concerning the Hearing Examiner's conclusion that it failed to prove the existence of a past practice.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the American Federation of State, County and Municipal Employees, District Council 47, Local 2187 are hereby dismissed, and the December 7, 2018 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman and Albert Mezzaroba, Member, this sixteenth day of April, 2019. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

MEMBER ROBERT H. SHOOP, JR. DID NOT PARTICIPATE IN THE CONSIDERATION OR DECISION OF THIS CASE.