

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 47, Local	:	
2187	:	
	:	Case No. PERA-C-09-398-E
v.	:	
	:	
CITY OF PHILADELPHIA, STREETS	:	
DEPARTMENT <sup>1</sup>	:	

**PROPOSED DECISION AND ORDER**

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) by the American Federation of State County and Municipal Employees District Council 47, Local 2187 (AFSCME) on October 5, 2009, alleging that the City of Philadelphia (City) violated Section 1201(a)(1), (3) and (5) of the Public Employee Relations Act (PERA). On November 2, 2009, AFSCME filed an amended charge.

On December 3, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on March 8, 2010, in Philadelphia, Pennsylvania. A series of continuance requests resulted in a hearing being held on September 10, 2010, and a second day of hearing on November 16, 2010. On both dates, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Neither party filed a post-hearing brief.

The hearing examiner, on the basis of the testimony and exhibits presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer.
2. AFSCME is an employee organization.

3. In 2009, Marguerite Morgan was the AFSCME Executive Board Liaison for both the Streets Department and the Municipal Services Building. She was also chief steward for the Streets Department, and supervised all other chief stewards. Morgan was the steward for the department in which she worked. (N.T. 11-14, 38).

4. In June of 2009, the City initiated a series of layoffs. The Streets Department Commissioner, Clarena Tolson, "determined that employees in the following classes will be laid-off due to lack of funds." In the Administrative Section of the Streets Department three classes were included in that layoff: clerk 2, departmental accounting system specialist, and contract coordinator. Morgan held the position of departmental accounting system specialist. (N.T. 202-203, 251; City Exhibit 3A, 3B, AFSCME Exhibit 2).

5. There were only two departmental accounting system specialists; Morgan and Rosemary Ray. Ray was also a shop steward, but for another department. (N.T. 37, 39-40, 204-205, 255-256; City Exhibit 1, AFSCME Exhibit 2).

6. The parties' collective bargaining agreement provides for "super seniority for shop stewards and elected union officials." More specifically, "shop stewards and elected union officials shall be credited with total layoff score points equal to one more than the highest total points of any other employee in their appropriate layoff units and classes." This rule applied to "layoffs under the system established by Civil Service Regulation 16 - LAYOFFS." (AFSCME Exhibit 4, 5).

7. When the City calculated the layoff score points for Ray and Morgan, it did not give Morgan the highest layoff score by one point as described in the parties' collective

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<sup>1</sup> The caption appears as amended by the Hearing Examiner.

bargaining agreement. That's because, according to the City, both Ray and Morgan were stewards. (N.T. 193-202; AFSCME Exhibit 2, City Exhibit 1, 2).

8. Referencing the parties' collective bargaining agreement, the City's Layoff Policies and Procedures 2008, sets forth instructions on what to do "[w]hen more than one shop steward is on the same layoff register...all stewards are assigned the same numerical layoff score - one point more than the highest score of any other employee on the layoff register." Further, "[t]he rank order of the shop stewards is determined by the tie breaking procedure described above." (City Exhibit 4).

9. The "tie breaking procedure described above" is the method, on the exhibit's previous page, for breaking ties when two employees have the same layoff score, as prescribed by the Civil Service regulations. The list enumerates four tie-breakers in their order of importance. They are; performance reports, seniority, total City service, and eligibility list ranking. An employee who has the highest performance points gets the higher score. If both employees have equal performance points, then seniority is the tie breaker, and so forth down the list. (AFSCME Exhibit 5, City Exhibit 4).

10. Considering both Ray and Morgan as shop stewards, neither was given the super seniority point calculation, and the City simply calculated the layoff point score of each according to the tie breaking procedure set for the in the City's Layoff Policies and Procedures 2008 document. That tie breaking procedure was modeled under the applicable sections of Civil Service Regulation 16 - LAYOFFS. (N.T. 193-202, 218-219, 247-249; AFSCME Exhibit 2, 5, City Exhibit 1, 2).

11. Using the tie breaker provisions, Ray had a total layoff score of 48.57, and Morgan had a total layoff score of 37. Ray's score resulted from 28.57 performance points and 20 seniority points. Morgan's score resulted from 25 performance points and 12 seniority points. As a result, Morgan was the laid-off employee, and Ray retained her position. (AFSCME Exhibit 1, City Exhibit 1, 2).

12. There were disagreements between the City and AFSCME before this charge was filed over how much time Morgan devoted to her AFSCME activities. Those disagreements, in AFSCME's opinion, were sufficient for it to file an unfair labor practice charge against the City over the disagreement. That charge was withdrawn, however, by AFSCME, pursuant to a settlement agreement in which the City agreed to abide by PERA, but admitted no wrongdoing. (N.T. 265-274; AFSCME Exhibit 1A, 1B, 1E).

#### DISCUSSION

In its charge of unfair practices, AFSCME alleges that the City violated Section 13201(a)(1), (3), and (5) of PERA when it eliminated Morgan's position through a layoff. AFSCME argues that the City did so because of Morgan's "activities as a union steward and Executive Board member."

More specifically, according to AFSCME, "one of the reasons for the elimination of Morgan's position was that she spent a considerable amount of time in her capacity as a union steward and Executive Board member representing members, filing grievances, and otherwise carrying out functions under the collective bargaining agreement."

The City parries these allegations by asserting that it merely followed the requisite procedures for lay-offs, and in doing so, Morgan ended up being the person laid-off from her department.

Because I cannot determine with reasonable certainty that the City has not properly followed the requisite procedures when it laid-off Morgan, I must dismiss this charge. Essentially, the City has proved a sound arguable basis-like defense.<sup>2</sup> Some further explanation is necessary.

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<sup>2</sup> In Jersey Area School District, 18 PPER ¶ 18117 (Final Order, 1987) the Board adopted the Federal proposition that where an employer has a sound arguable basis for its meaning of a contract provision, and acts accordingly, the Board will not enter the fray to serve as an arbitrator to determine whether the employer or the union is correctly interpreting the contract. While the documents to be interpreted here are more than just the contract, the logic holds.

A material part of AFSCME's proofs is that the City skewed the lay-off process to get rid of Morgan. The record shows that in a class of two employees, one was to be laid-off. The rub is that both the employees in the class were union stewards; a situation the parties have not encountered before.

According to the parties' contract, the applicable Civil Service regulations, and the City's Layoff Policies and Procedures, union stewards and elected union officials receive "super seniority" in lay-off situations. What that means is that stewards and elected union officials, when layoff scores are computed, "shall be credited with total layoff score points equal to one more than the highest total points of any other employee in their appropriate layoff units and classes." (AFSCME Exhibit 4).

Acknowledging the super seniority clause in the parties' collective bargaining agreement, the City's Layoff Policy and Procedures, sets forth instructions on what to do "[w]hen more than one shop steward is on the same layoff register...all stewards are assigned the same numerical layoff score - one point more than the highest score of any other employee on the layoff register." Further, "[t]he rank order of the shop stewards is determined by the tie breaking procedure described above." (City Exhibit 4).

The "tie breaking procedure described above" is the method, on the exhibit's previous page, for breaking ties when two employees have the same layoff score, as prescribed by the Civil Service regulations. The list enumerates four tie-breakers in their order of importance.

There is no dispute that, as calculated by the City, Ray has a higher layoff score than does Morgan.<sup>3</sup> AFSCME argues that Morgan should have been given one more point than Ray, because she is the steward in the department, and Ray, while a steward, is a steward in *another* department. The problem for AFSCME is that the established procedures do not make that differentiation. In point of fact, it is simply impossible for the City to give both Ray and Morgan one more point than the other.

Absent my ability to ascertain that the City did not follow the proper method of calculating the layoff scores of both Ray and Morgan, there is little left to AFSCME's discrimination case. AFSCME has not shown that absent Morgan's protected activity she would have been treated differently. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

Moreover, because AFSCME has not shown that the City failed to comply with the super seniority provisions in the parties collective bargaining agreement which incorporated the certain Civil Service Regulations, there is no violation of Section 1201(a)(5) of PERA.

Albeit, some of the City's witnesses were the models of obfuscation. I am not convinced that the Commissioner of the Department of Streets for the City was as ignorant as she professed to be about either Morgan's duties, or the City's contention that Morgan spent too much time on union business. Her attempt to distance herself from knowledge of Morgan's zealous union activities, however, does not establish animus. Likewise, the Deputy Director in the Mayor's Office of Labor Relations was diplomatically vague in his answers to AFSCME's questions, so as to offend no one. But, his recalcitrance does not prove animus, either.

The failure of the parties' procedures to describe with more specificity how to handle the situation where one of two shop stewards must be laid-off, and one of those stewards represents employees in another department, leaves room for the City's interpretation.

I cannot say with certainty that the City incorrectly applied the rules when it laid-off Morgan. AFSCME has not proved that the City violated any procedures when it instituted the layoff procedure and calculated the layoff scores as it did. Therefore, I must dismiss this charge.

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<sup>3</sup> Ray had the most performance points and the most seniority points. (AFSCME Exhibit 2, City Exhibit 1).

CONCLUSION

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

1. The City is a public employer within the meaning of Section 301(1) of PERA.
2. AFSCME is an employee organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties.
4. The City has not committed unfair practices within the meaning of Section 1201(a)(1), (3), and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint 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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eleventh day of January, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, Hearing Examiner