COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE COUNTY AND MUNICIPAL EMPLOYES, DISTRICT COUNCIL 89	:	
	:	Case No. PERA-C-10-368-E
v.	:	
LANCASTER COUNTY	:	

FINAL ORDER

Lancaster County (County) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on January 9, 2012,[1] to a Proposed Decision and Order (PDO) issued on December 19, 2011.[2] In its exceptions, the County challenges the Hearing Examiner's conclusion that the County violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) in terminating the employment of Adam Medina and Tommy Epps. The American Federation of State, County and Municipal Employees, District Council 89 (AFSCME) filed a response to the exceptions on January 27, 2012, and following an extension of time granted by the Secretary of the Board, filed a brief in opposition to the exceptions on February 28, 2012. The Findings of Fact (FF) to support the Hearing Examiner's conclusion appear in the PDO, and for purposes of the exceptions, are summarized as follows.

The County operates a Youth Intervention Center (YIC) with a detention side for juveniles who have been adjudicated by the courts and a shelter side for other juveniles. (FF 3). The adjudicated juvenile residents on the detention side have been placed there by the court for committing a variety of offenses, including theft, burglary, robbery, drugs, assault, aggravated assault and motor vehicle theft. (FF 4).

In the spring of 2010, AFSCME conducted an organizing drive among the workers on the detention side of the YIC, which included Adam Medina and Tommy Epps. (FF 5). During the organizing drive, Medina attended meetings held by AFSCME, reported back to third shift staff members and encouraged other employes to go to meetings and vote in favor of AFSCME. Medina spoke with his supervisor, Fred Arnold, about his support for AFSCME in May 2010, sharing with him what he thought about AFSCME and what he was doing with respect to AFSCME's efforts. (FF 39). Epps also talked to staff about AFSCME's organizing drive, in particular how AFSCME could benefit them. He talked with his supervisor, William Delgado, about AFSCME, stating that the union was coming, and that he had talked with AFSCME representatives. (FF 40).

On June 10, 2010, AFSCME filed a Petition for Representation with the Board, docketed at Case No. PERA-R-10-207-E, to accrete the detention and security officer employes at the YIC into AFSCME's existing certified prison guard bargaining unit. (FF 5 and 6).

On Sunday, June 20, 2010, Evette Sepulveda, a youth care worker on the shelter side, complained to her supervisor, Christina Delgado, that someone was taking snacks from her open mailbox. (FF 7 and 8).[3] Christina Delgado asked Sepulveda when the items went missing, and Sepulveda said that it was happening for the last month, but that the most recent time was "like Thursday [June 17, 2010] or Friday [June 18, 2010]." (FF 12).

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[1] The County also requests oral argument. The County's request for oral argument is denied, as the exceptions present no novel question of law and the arguments have been thoroughly addressed in the briefs.

[2] The County's exceptions are timely because January 8, 2012, the twentieth day following issuance of the PDO was a Sunday and is therefore excluded from the computation of the twenty-day period for filing exceptions. 34 Pa. Code §95.100(b).

[3] The snack items had been left in Sepulveda's mailbox by a coworker, Leroy Kirkland, who often left small bags of snacks for her and other employes. (N.T. 135, 159).

Christina Delgado asked Fred Arnold (Medina's immediate supervisor) to assist her in looking at a surveillance videotape of the area. The tape showed three employes taking something from Sepulveda's mailbox on Wednesday, June 16 and Thursday, June 17.[4] (FF 13). Christina Delgado then reported the incident to Drew Fredericks, the YIC Director. (FF 15).

On Monday, June 21, Fredericks called Sepulveda and asked her if she had given permission to anyone to take snacks from her mailbox. Sepulveda said she had only given permission to two other employes on the shelter side. Fredericks directed her to write an Unusual Incident Report. Sepulveda's report stated that she had been missing snacks "for a couple of weeks" and that she had only given permission to Lavon Jackson and Damaris Veley to take snacks from her open mailbox. (FF 15 and 16).

On June 21, 2010, Fredericks also reviewed the videotape with Medina and Epps, and asked them to write reports about the incidents. (FF 16 and 17). Medina wrote an Unusual Incident Report in which he admitted that he removed a snack size bag of chips from Sepulveda's mailbox on June 16. In his report, he explained that Sepulveda had previously given him permission to take food items from her mailbox. (FF 18). Epps wrote an Unusual Incident Report in which he admitted that he took a snack bag of cookies from "Leroy G.'s" mailbox, referring to a co-worker named Leroy Kirkland, who he believed had given him permission to take snacks from his mailbox. (FF 19).

Shortly thereafter, Sepulveda filed a second Unusual Incident Report, stating in part, as follows:

> On Monday, June 21, 2010, at about maybe 2:00 pm, I received a call from my co-worker, Adam Medina. He asked me if I had said anything to my supervisor about missing food from my mailbox. I said, "Yes, why." Adam went on to tell me that he took chips from my mailbox and that he was sorry but he thought he could because of a conversation he said we had about 1 year ago. I told Adam I didn't remember but that he should have told me because I really wouldn't care if he wanted chips because I knew him and it wouldn't be a big deal. I told Adam this has been going on for a while, the missing food from my mailbox.

(FF 20).

On June 23, Fredericks issued notices to Medina, Epps and Boddy, that he was recommending that they be terminated immediately for taking items from Sepulveda's mailbox. (FF 22).

The YIC has a progressive discipline policy "to allow sufficient opportunity to correct a problem situation." The first step of the progressive discipline policy is corrective counseling. The second step is a verbal warning. The third step is a written warning. The fourth step is a 1-day suspension. The fifth step is a 3-day suspension. The sixth step is a 5-day suspension and final warning. The seventh step is termination. (FF 30). The progressive discipline policy also states, "[t]here are, however, violations of the rules or laws so severe as to render warning or progressive discipline futile. Immediate suspension or discharge is appropriate in these cases." (FF 31). Fredericks testified that he believed that the taking of the snacks was serious enough to justify immediate termination rather than progressive discipline because of the need for a youth care worker to be a "positive role model" for the juvenile residents of YIC. (FF 34).

Fredericks testified that he had heard of prior incidents of theft from the YIC, including one that involved an employe's cell phone, but that he had never investigated

[4] The employes were Adam Medina, Tommy Epps, and Latoya Boddy, a part-time employe.

or looked at surveillance videotape because no employe had filed a written incident report in those cases. (FF 26).

The County argues on exceptions that the Hearing Examiner's Findings of Fact 10, 11, 15, 21, 26, 29, 37, 38 and 39, are not supported by substantial evidence, and cites to testimony in the record which supports its version of the facts. However, the Hearing Examiner need not render findings on all of the evidence presented. Page's Department Store v. Velardi, 464 Pa. 76, 346 A.2d 556 (1975); Douglas Township Police Officers v. Douglas Township, 36 PPER ¶160 (Final Order, 2005). Instead, where there is conflicting evidence, it is the function of the Hearing Examiner to assess the weight of the testimony provided and determine the facts based on those credibility determinations. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER ¶98 (Final Order, 2004); SEIU, District 1199P v. Department of Public Welfare (Norristown State Hospital), 32 PPER ¶32117 (Proposed Decision and Order, 2001). Because the Hearing Examiner has the opportunity to view the witnesses' demeanor while testifying, credibility determinations will not be reversed on exceptions absent the most compelling of circumstances. Mt. Lebanon School District, *supra*. Further, the Hearing Examiner is permitted to make findings of fact based on inferences supported by the credible evidence and testimony of record. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The findings of fact made by the Hearing Examiner need only be supported by such relevant record evidence that a reasonable person would accept as adequate to support the conclusion or finding reached. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942); Lancaster County v. PLRB, 35 A.3d 83 (Pa. Cmwlth. 2011)*, petition for allowance of appeal pending*. We have reviewed the entire record, and Findings of Fact 10, 11, 15, 21, 26, 29, 37, 38 and 39, and the inferences upon which they may be based, are supported by credited testimony and evidence of record. Accordingly, the County's exceptions to the Findings of Fact are dismissed.

To establish a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must show 1) that the employe was engaged in a protected activity under PERA, 2) that the employer knew of the protected activity, and 3) that the employer was motivated by anti-union animus in taking action against the employe. St. Joseph Hospital, *supra*. There is no dispute that Medina and Epps were involved in protected activities during AFSCME's 2010 organizational drive.

The County argues, however, that AFSCME failed to establish that the County was aware that Medina and Epps engaged in protected activities. In this regard, the County argues that Fred Arnold and William Delgado, who Medina and Epps spoke to about the union, were only first level supervisors, and therefore their knowledge could not be imputed to the County. The County cites to Valley Township Police Benevolent Association v. Valley Township, 22 PPER 22130 (Final Order, 1991), to argue that knowledge of an employe's protected activities may only be imputed to the employer through a management level employe. While the facts in Valley Township involved a claim by the township that the chief of police, who had knowledge of the protected activity, was not a managerial employe, the chief's managerial status was not the dispositive factor. Instead, the Board recognized that the employer's knowledge of protected activity can be inferred based on the totality of the circumstances in a particular case. Valley Township*, supra.* Indeed, contrary to the County's argument, the Board has held that a supervisor's knowledge of protected activity may be imputed to the employer. Bensalem Township, 19 PPER 19010 (Final Order, 1987); PSSU, Local 668 v. Lancaster County, 24 PPER ¶24027 (Final Order, 1993). The fact that Arnold and William Delgado were not managers does not preclude the finding that the employer had knowledge of AFSCME's 2010 organizing drive and the protected activities of Medina and Epps.

Here, Arnold was Medina's supervisor and was aware of Medina's protected activities. Epps' supervisor, William Delgado, was aware of Epps' protected activities. Arnold and William Delgado's wife, Christina, were the ones that investigated Sepulveda's complaint. Accordingly, the record supports the employer's knowledge of the protected activities for purposes of Section 1201(a)(3) of PERA.

In the alternative, the County argues that AFSCME failed to establish that the County was motivated by anti-union animus, as it alleged a non-discriminatory reason for terminating the employment of Medina and Epps. For a claim of discrimination under Section 1201(a)(3) of PERA, the employer's motive is what creates the offense. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969); Stacey Denine Sanders v. Philadelphia Housing Authority, 36 PPER 66 (Final Order, 2005). Motive is not always easily discernible, and thus may be based on inferences drawn from the record. *E.g.* St Joseph's Hospital, *supra*.; PLRB v. Child Development Council of Centre County, 9 PPER 9188 (Nisi Decision and Order, 1978); David Braymer, Mary Jane Braymer v. Beaver Valley Intermediate Unit, 21 PPER ¶21006 (Final Order, 1989). In this regard, the Board has recognized as follows:

> [C]ourts and other triers of facts, in a multitude of cases, must rely upon such evidence, i.e., inferences from testimony as to attitudes, acts and deeds; where such matters as purpose, plans, designs, motives, intent, or similar matters, are involved, the use of such inferences is often indispensable. Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labeled, "Use me", like the cake, bearing the words "Eat me", which Alice found helpful in *Wonderland*.

Philadelphia Housing Authority, 36 PPER at 183 (*quoting* F.W. Woolworth Co. v. National Labor Relations Board, 121 F.2d 658, 660 (2nd Cir. 1941)).

As the Hearing Examiner noted, the timing of the County's firing of Medina and Epps is suggestive of anti-union animus. A Petition for Representation was filed by AFSCME on June 10, 2010, and less than two weeks later, on June 23, 2010, Medina and Epps were terminated from employment.

However, timing alone may not support an inference of anti-union animus. Nevertheless, timing coupled with pretextual reasons for the employer's action will support the finding of a discriminatory motive. International Union of Operating Engineers, Local 66 v. Connoquenessing Township, 41 PPER 47 (Final Order, 2010); Somerset Area Education Association v. Somerset Area School District, 37 PPER 1 (Final Order, 2005). Pretext arises where the Hearing Examiner finds, based on the credible evidence and testimony of record, that the employer would not have taken the same action against the employe in the absence of protected activity. Lehighton Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996); IAFF, Local 3536 v. Pottstown Borough, 28 PPER ¶28162 (Final Order, 1997); Keystone Education Center Charter School Education Association v. Keystone Education Center, Inc, 30 PPEER ¶30067 (Final Order, 1997); Joan F. Smith, Gabriel H. Petorak, John F. Larkin, and Ellen E. Kozlosky v. Lakeland School District, 39 PPER 148 (Final Order, 2008); Wyoming Area Educational Support Personnel Association v. Wyoming Area School District, 40 PPER 105 (Final Order, 2009).

The Hearing Examiner expressly found that "[a]bsent the protected activity of Medina and Epps, the County would not have terminated their employment." (PDO at 11). Upon review of the record, there are no compelling reasons warranting reversal of the Hearing Examiner's credibility determination. *See* Mt. Lebanon School District, *supra*.

The Hearing Examiner adequately explained his reasons for rejecting the County's claim that it would have terminated the employment of Medina and Epps regardless of their protected activity. For example, the Hearing Examiner noted that despite Sepulveda's claim that items have been missing from her mailbox for weeks or months, the County limited its review of the videotape to only two days. Further, the Hearing Examiner noted that the County disregarded Sepulveda's subsequent incident report indicating that she did not care if Medina took snacks from her mailbox. The Hearing Examiner also noted that the County did not investigate other incidents of alleged thefts, including one involving a missing cell phone. Nor did the County explore lesser discipline under its progressive disciple policy for Medina and Epps.[5]

[5] The employer's failure to follow its progressive discipline policy may be an indication of pretext. Lehighton Area School District, *supra.;* Keystone Education Center, *supra*.

Moreover, in addition to those reasons set forth by the Hearing Examiner, we note that other record evidence also supports the rejection of the County's claim that it would have terminated the employment of Medina and Epps in the absence of protected activity. First, Christina Delgado, Sepulveda's supervisor, emailed Fredericks about the incident and indicated that she was unsure whether any discipline was even warranted. (County Exhibit 1). Thus, the record evidence indicates that at least one supervisor at the YIC did not believe termination of employment was the only discipline that could be meted out for the actions of Medina and Epps. Further, the County here dismissed out-of-hand Medina's assertion that he had permission from Sepulveda to take snacks from her mailbox, and would not even consider an email from a co-worker independently corroborating Medina's claim. (Union Exhibit 7). In addition, the County asserts that in the absence of an employe wanting to pursue the matter, the County will not investigate an alleged theft. However, if taking a small bag of chips that had been left for another co-worker is such egregious conduct warranting immediate dismissal, then, if YIC employes are to be held to the high standards of role models for delinquent youth, why did the County fail to investigate when it became aware of the theft of an employe's cell phone? Furthermore, if an investigation of a theft is contingent on the victim's desire to pursue the matter, then why did the County not at least follow up with Sepulveda after her subsequent incident report suggesting that she would not have reported the missing snacks if she had known it was Medina? On this record, there are no compelling reasons warranting reversal of the Hearing Examiner's finding that the County would not have terminated Medina and Epps' employment in the absence of protected activity.

After a thorough review of the exceptions and all matters of record, the timing of the firing of Medina and Epps, coupled with the County's failure to establish that Medina and Epps would have been terminated from employment even in the absence of protected activity, supports the Hearing Examiner's finding of an unlawful discriminatory motive. As such, the Hearing Examiner did not err in concluding that the County violated Section 1201(a)(1) and (3) of PERA.[6] Accordingly, the County's exceptions shall be dismissed, and the PDO made final.

[6] Because there is a derivative violation of Section 1201(a)(1), we need not address the Hearing Examiner's finding of an independent violation for interference and coercion of protected rights under Section 1201(a)(1) of PERA.

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 Lancaster County are hereby dismissed, and the December 19, 2011 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr., Member, this fifteenth day of May, 2012. 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.

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

The County hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and (3) of the Public Employe Relations Act; that it has offered unconditional reinstatement to Adam Medina and Tommy Epps to their former positions without prejudice to any right or privilege enjoyed by them and paid them a sum equal to the amount they would have earned as wages had they been retained as employes, along with interest; that it has posted the final order and proposed decision and order as directed; and that it has served an executed copy of this affidavit on AFSCME, District Council 89.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public