

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICES UNION, :
LOCAL 668, SERVICE EMPLOYEES :
INTERNATIONAL UNION :
: :
: Case No. PERA-C-11-50-E
v. :
: :
BERKS COUNTY, :
BERKS COUNTY PRISON BOARD :

FINAL ORDER

Berks County (County) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on April 17, 2012, to a Proposed Decision and Order (PDO) issued on March 30, 2012. The County excepts to the Hearing Examiner's conclusion that the County violated Section 1201(a)(1) of the Public Employee Relations Act (PERA). The Pennsylvania Social Services Union, Local 668, Service Employees International Union (Union) filed a response to the County's exceptions on May 7, 2012. Following an extension of time granted by the Secretary of the Board, the County filed a brief in support of its exceptions on May 17, 2012. The Union also obtained an extension of time, and filed a brief in response to the exceptions on July 6, 2012. The Hearing Examiner's Findings of Fact are not challenged in the exceptions, and may be summarized as follows.

The County and the Union are parties to a collective bargaining agreement that covers the wages, hours and terms and conditions of employment of employees at Berks County prison. (FF 4). On August 1, 2008, the County and the Union entered into a side agreement for an alternative work schedule that allows employees to choose to work a four days a week, ten hours a day schedule (also known as the 4-10 agreement). (FF 5). The 4-10 agreement also provides that "[t]he County has approved a compressed work week program on a trial basis and may revert back to the original 5 day work week at any time with a thirty (30) day notification to the [a]ffected employees." (FF 9).

Caseworkers at the prison are in charge of orienting and completing an intake assessment and classification of every inmate who enters the prison. (FF 7). Four caseworkers, including Karen Arms, requested to have off either Mondays or Fridays under the 4-10 schedule. (FF 10 and 11). Because caseworkers employed at the prison preferred to have three-day weekends, the 4-10 scheduling caused the work of processing prisoners to back up on Mondays and Tuesdays. (FF 12).

In April 2009, Arms took an extended leave of absence to work directly for the Union. (FF 13). While Arms was on leave, Kevin Neff, the chief shop steward for the Union, and the County met on May 11, 2010, and negotiated a modified 4-10 scheduling agreement to assist the County with the problems caused by employees taking off Fridays and Mondays.¹ (FF 14). The modified 4-10 agreement preserved the parties' contractual rights contained in the collective bargaining agreement and the original 4-10 agreement. (FF 15).

Later in 2010, Arms informed the prison that she would return from her extended leave. (FF 16). Initially, upon her return, Arms worked the five day schedule, eight hours a day. (FF 17). Arms was entitled under the contract to return to the schedule she was on when she took extended leave, and asked to return to the 4-10 schedule, which request the County granted. (FF 17 and 18).

¹ The modified agreement required that one caseworker, Verna Lynn Ragsdale, switch her day off from Friday to Thursday and required that an additional caseworker, either Tiffany Eye or Joanna Brown, "adjust their Monday off schedule as needed based on substantial operational needs, as it applies to the Work Release Coordinator position." (FF 14).

On or about October 20, 2010, Christina Parish, Arms' supervisor, informed Neff, the chief shop steward, that Arms would have to switch her day off to Tuesday, Wednesday or Thursday or the County will give the Union thirty days notice to end the 4-10 schedule for all bargaining unit employees. (FF 19). Parish admitted to Arms that she had made that statement to Neff. (FF 19). Arms decided to agree to return to the five day schedule out of fear that if she did not do so the 4-10 schedule would be taken from the rest of the bargaining unit. (FF 20).

The Hearing Examiner concluded that the County committed an unfair practice by threatening Arms that if she chose to work a contractually-provided alternative work schedule, the County would eliminate the program for the entire bargaining unit. The County argues that the Hearing Examiner erred in finding a violation of 1201(a)(1) of PERA where the County had stated business concerns for its desire to eliminate the 4-10 schedule, and had a contractual right to end the program on thirty days notice to the Union.²

However, an employer's stated business reason or contractual right is not a dispositive bar to a 1201(a)(1) violation for interference, restraint or coercion of employee protected rights. **International Union of Operating Engineers, Local 66 v. Franklin Township**, 43 PPER 139 (Final Order, 2012). Instead, the key inquiry for an independent violation of Section 1201(a)(1) is based on the totality of circumstances, including the employer's stated reasons, and what effect the employer's actions would have on a reasonable employee's exercise of protected rights. **Derry Borough Police Association v. Derry Borough**, 29 PPER ¶29237 (Final Order, 1998); **Clearfield County**, 27 PPER ¶27087 (Final Order, 1996); see also **NLRB v. Gissel Packing Co., Inc.**, 395 U.S. 575, 89 S. Ct. 1918 (1969) (noting that an employer may avoid unlawful coercive speech by avoiding overstatements that are misleading to employees). A violation of Section 1201(a)(1) of PERA may be found "where in light of the totality of the circumstances the employer's actions have a tendency to coerce a reasonable employee in the exercise of protected rights." **Fink v. Clarion County**, 32 PPER ¶ 32165 at 404 (Final Order, 2001).

Here, for over a year, Arms' caseworker position remained vacant as she did not work for the County, and thus did not work Mondays. Indeed, since Arms began her leave from the County in April, 2009 to work for the Union, which encompassed both before and after the May 11, 2010 modified 4-10 agreement, the County had four employees scheduled to work on Mondays. (County Exhibit 8). Notably, before going back to her 4-10 schedule with Mondays off, Arms asked Parish if there were any foreseeable scheduling problems. In response, Parish did not identify any potential issues. (N.T. 20-21). Arms and Parish continued to discuss Arms' return to her 4-10 schedule several times, and mutually agreed on a date for Arms to return to her schedule with Mondays off. (N.T. 32). After Arms returned to her previous 4-10 schedule with Mondays off, the County continued, as before, to have four caseworkers scheduled for Mondays. (County Exhibit 8).³

Moreover, Arms testified that since her return to the County in late 2010, she was assigned duties in the community reentry center (CRC), not as an intake caseworker, and that Mondays were not busy for her. (N.T. 28 - 29). It is undisputed that the County's

² The County argues on exceptions that the Hearing Examiner erred in finding a violation of Section 1201(a)(1) of PERA, because the Union failed to allege an independent violation of Section 1201(a)(1) in its Charge of Unfair Practices. In paragraph 21 of the Charge, the Union alleges as follows:

The employer's actions provide a chilling effect upon the employees engaging in their rights under Article IV of [PERA]. The union asserts that the employer coerced Karen Arms to change her hours of work established by the collective bargaining agreement under the threat of her coworkers losing their long established work schedules and thus violates [PERA].

Upon review of the Charge, the Union has sufficiently alleged a cause of action under Section 1201(a)(1). (N.T. 11). Accordingly, this exception is dismissed.

³ Furthermore, Parish indicated during her testimony that she is in the process of hiring an additional caseworker. (N.T. 76). Thus, with the additional caseworker, there could be five caseworkers scheduled for Mondays, even if Arms' continued to take Mondays off under her 4-10 schedule.

alleged concerns about the backlog are with the intake caseworkers, not counselors, such as Arms' assignment at the CRC. (N.T. 28-29).⁴

Despite numerous advance opportunities to discuss Arms' return to her 4-10 schedule and any corollary scheduling concerns, it was not until after Arms, then a counselor at CRC, exercised her contractual right to return to her 4-10 schedule with Mondays off that the County threatened to eliminate the 4-10 scheduling option for all bargaining unit employees because of alleged issues of staffing with intake caseworkers. To a reasonably objective employee, it would appear that the County's threat to eliminate the 4-10 scheduling was not out of a concern over staffing, but in response to Arms' exercise of her contractual right to return to her 4-10 schedule.⁵ The message sent to the employees by the County's actions is that exercise of contractual rights may result in similar threats or unilateral actions to eliminate those contractual rights.⁶ Under the totality of circumstances of this case, the Hearing Examiner did not err in finding that the County's threat to eliminate the 4-10 scheduling agreement had a tendency to coerce employees in the exercise of the protected act of asserting their contractual rights.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the County violated Section 1201(a)(1) of PERA. Accordingly, the County's exceptions shall be dismissed and the PDO made final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Berks County are hereby dismissed, and the March 30, 2012 Proposed Decision and Order is hereby 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 eighteenth day of September, 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.

⁴ Additionally, Parish testified that notwithstanding her alleged need to have five caseworkers scheduled for Mondays for prisoner intakes (N.T. 88), under the prison's leave policy she would allow up to two caseworkers to schedule a day off on a Monday. (N.T. 87).

⁵ Notably, the County's November 3, 2010 notice to discontinue the 4-10 schedule (N.T. 127) came on the heels of the filing of Arms' October 21, 2010 grievance that challenged the County's threat to eliminate the 4-10 schedule for all bargaining unit members. (Union Exhibit 6).

⁶ Indeed, Neff testified that the County had made a similar threat requiring Verna Lynn to switch her day off or the County would eliminate the 4-10 schedule, which resulted in the May 14, 2010 modification agreement. (N.T. 70). See **Association of Pennsylvania State College and University Faculties v. PLRB**, 607 Pa. 461, 8 A.3d 300 (2010) (noting that if the employer had used illegal practices to gain concessions in past negotiations, the Board should consider that fact in determining whether present charges should be deemed rendered moot by an agreement).

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AFFIDAVIT OF COMPLIANCE

Berks County, Berks County Prison Board, hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of the Public Employee Relations Act; that it has offered to return Karen Arms to the 4-10 schedule she was on prior to October 20, 2010; that it has posted the Final Order and Proposed Decision and Order as directed; and that it has served a copy of this affidavit on the Union.

Signature / Date

Title

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

Signature of Notary Public