

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

AMALGAMATED TRANSIT UNION LOCAL 1279 :  
:  
: CASE NO. PERA-C-17-93-W  
v. :  
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:  
CAMBRIA COUNTY TRANSIT AUTHORITY :  
:

**FINAL ORDER**

The Amalgamated Transit Union, Local 1279 (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on May 10, 2018, from a Proposed Decision and Order issued on April 20, 2018, in which the Hearing Examiner found that the Cambria County Transit Authority (CamTran) did not violate Section 1201(a)(1), (2), (3) or (4) of the Public Employee Relations Act (PERA) in terminating the employment of Eileen Zibura. CamTran filed a response to the exceptions and a brief in opposition to the exceptions on May 22, 2018.

On April 6, 2017, the Union filed a Charge of Unfair Practices alleging that CamTran violated Section 1201(a)(1), (2), (3) and (4) of PERA by terminating the employment of Ms. Zibura, the Union financial secretary, in December 2016. A hearing was held on November 2, 2017, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Based on the evidence presented by the parties, the Hearing Examiner made necessary Findings of Fact, which are adopted herein and summarized as follows.

Ms. Zibura was a bus operator for CamTran since April 1989, and had been an officer of the Union for over 20 years. (FF 3). On Friday December 9, 2016, Jennifer Gojmerac, a Human Resources Assistant was in the drivers' breakroom at the Transit Center to hang a workers' compensation posting on the bulletin board. Ms. Zibura entered the breakroom and asked Ms. Gojmerac, "why do you come out of your cubby hole once a year." During this conversation, Ms. Zibura picked up and put down an eight-inch kitchen knife. (FF 8).

Also in the break room were Mike Walters, Union President, and Jon Walls, bus driver, who were having a separate conversation among themselves. Mr. Walters and Mr. Walls stated that when Ms. Gojmerac left the break room, she did not appear visibly distressed or upset. (FF 8).

Later that day, Ms. Gojmerac filled out an incident report stating as follows:

12/09/2016 - Transit Center/Drivers Room

At approximately 1:10 pm I was at the Transit Center ... to hang the new workers comp physician panels and the 2017 pay schedule.... I walked

into the driver's room. Mike Walters was sitting at the table and John Walls was sitting on the couch. I had my back turned to the room as I was hanging the papers and removing old ones on the bulletin board besides the fridge. While I was hanging papers, Eileen walked in. She asked what I was doing there and I told her that I was hanging new notices for workers comp so they knew where to go in case someone got hurt. She said to get out that it was their room. She then asked if I wanted to play a game and when I turned towards her she picked up a long knife on top of the microwave and pointed it towards me a few inches from me. I told her I didn't want to play any game and to put the knife down. She then said "here catch" and motioned like she was going to throw it at me. She continued to hold the knife upwards towards me and I asked her to put the knife down again. She held the knife toward me until I finished hanging the papers and walked out of the room.

(FF 9).

On Monday December 12, 2016, Ms. Zibura was relieved while on her regularly scheduled shift and was told to go to the main office. In the main office, she was informed that she was under investigation for the incident that occurred on the previous Friday, December 9, 2016. (FF 10).

Tabatha McCormick, Human Resources Manager for CamTran, along with Don Gibson, Director of Facilities, Safety, Security and Risk Management, conducted the investigation into the December 9, 2016 incident. (FF 11). In investigating the incident, Ms. McCormick and Mr. Gibson did not consider Ms. Zibura's Union affiliation or activities on behalf of the Union. (FF 12). Ms. McCormick and Mr. Gibson submitted the information from their investigation to Rose Lucey-Noll, the Executive Director of CamTran, and recommended that Ms. Zibura be terminated for violating the weapons provision in the employee handbook.<sup>1</sup> (FF 11, 12 and 13). Ms. Lucey-Noll conducted some additional investigation, and approved the recommendation of Ms. McCormick and Mr. Gibson. Ms. Lucey-Noll did not consider Ms. Zibura's activities on behalf of the Union when she made the decision to terminate Ms. Zibura's employment. (FF 15).

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<sup>1</sup> CamTran's "Personnel Policies and Procedures", Policy No. EMPL-20, provides, in part, as follows:

Possession of Any Weapon While on Authority Property:  
A weapon is defined as any instrument that is not used for its intended purpose or an implement of crime that could result in serious bodily injury or endangers the safety of employees or the public.  
First Offense- Discharge.

(CamTran Exhibit 2).

On December 20, 2016, Ms. Zibura was informed via letter that she was terminated due to the December 9, 2016, incident. The letter states in relevant part:

Dear Ms. Zibura:

Tabatha McCormick, HR manager, Denny Fuge, Operations Director, and I met with you and Mike Walters, ATU President, Local 1279, this morning to discuss the outcome of the investigation, with regard to the serious incident that occurred on December 9<sup>th</sup> in the driver's room between you and Jennifer Gojmerac, HR Assistant. I gave you the opportunity to add additional information to your statement given during the course of the investigation. You did not have anything to add to the answers.

After you gave your response, Tabatha, Denny and I left the board room. I took approximately 30 minutes to review the information that you stated in our meeting and reflected on the information that was provided to as part of the investigation. When we returned to the board room I stated that the totality of the circumstances did not support your version of the facts as to what happened on December 9<sup>th</sup> in the Driver's lounge, and as a result, I stated that you were being terminated, effective immediately, do the following serious behavior and egregious misconduct:

1. You directed verbal hostility toward a management employee by entering the room and asking what she was doing in "their" room and why she came out of her "cubby hole," creating an unwelcome atmosphere.
2. You were in possession of a knife on Authority Property, endangering the safety of all employees. You intimidated and threatened an employee of CamTran, Jennifer Gojmerac, by asking if she wanted to "play a game," picking up the knife and holding the point towards her, motioning to throw the knife at her at one point, and not putting the knife down after asked.
3. You disregarded Jennifer's attempts to de-escalate the situation by continuing to hold the knife and moved your arm toward her as to throw/toss the knife at her. Even though you did not throw/toss the knife, it created a

significantly unsafe and intimidating work environment.

The knife is considered a weapon, as it is not used for its intended purpose, which could have resulted in serious bodily injury. In today's climate of threats and violence in the workplace, there is no justifiable reason for this behavior.

Under Employee Responsibilities Section -EMPL-20 of the Employee Handbook, it states:

7. Possession of Any Weapon While on Authority Property: A weapon is defined as any instrument that is not used for its intended purpose or an implement of crime that could result in serious bodily injury or endangers the safety of employees or the public. First Offense-Discharge....

Sincerely,

Rose M. Lucey-Noll  
Executive Director

(FF 14).

A grievance to challenge the just cause for Ms. Zibura's termination was submitted to arbitration in accordance with the collective bargaining agreement. On July 31, 2017, Arbitrator Bernard Fabian issued an award setting aside Ms. Zibura's discharge, but finding that Ms. Zibura's behavior on December 9, 2016 rose to the level where discipline was proper, and directed that Ms. Zibura be reinstated without back pay. (FF 16).

Upon review of the evidence of record, and the credibility of the witnesses, the Hearing Examiner determined that the Union failed to sustain its burden of establishing a discriminatory or anti-union motive for CamTran's decision to terminate the employment of Ms. Zibura, and thus dismissed the Union's claim under Section 1201(a)(3) of PERA. For similar reasons, the Hearing Examiner dismissed the Union's claims of retaliation under Section 1201(a)(4) of PERA. The Hearing Examiner also found that the Union failed to establish a violation of Section 1201(a)(2), or coercion or interference with employees' protected activity in violation of Section 1201(a)(1) of PERA. Accordingly, in the April 20, 2018 PDO, the Hearing Examiner dismissed the Union's Charge of Unfair Practices.

The Union filed timely exceptions, arguing that the Hearing Examiner erred in failing to find discrimination or anti-union motivation in violation of Section 1201(a)(3) of PERA. For a finding of discrimination under Section 1201(a)(3) of PERA, the complainant must establish 1) 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 employee. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). A finding of an

unlawful motive on the part of the employer creates the offense under Section 1201(a) (3) of PERA. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969).

A finding of an unlawful motive may be based on inferences drawn from the facts of record. St. Joseph's Hospital, supra.; Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). In determining the motive for the employer's decision, the Hearing Examiner may look to several factors, including the timing of the adverse action in relation to protected activities, any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employee, and the effect of the employer's adverse action on other employees and protected activities. PLRB v. Berks County, 13 PPER ¶13277 (Final Order 1982); PLRB v. Child Development Council of Centre County, 9 PPER ¶9188 (Nisi Decision and Order, 1978).

Where there is conflicting testimony as to motive, it is the function of the Hearing Examiner to assess the weight of the testimony provided and to 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, the hearing examiner's credibility determinations will not be reversed on exceptions absent the most compelling of circumstances. Mt. Lebanon School District, supra.

Only if the complainant first establishes, through substantial evidence found credible by the hearing examiner, that employee protected activity motivated the employer's decision, does the burden shift to the employer to demonstrate that it would have taken similar action even in the absence of the protected activity. Teamsters Local 776 v. Perry County, 23 PPER ¶23201 (Final Order, 1992); Avonworth Education Association v. Avonworth School District, 35 PPER 136 (Final Order, 2004). Where the complainant fails to establish through substantial credible evidence that the true motive for the employer's action was unlawful union animus, no unfair practice under Section 1201(a) (3) of PERA may be found. Avonworth School District, supra.; Polizzi v. Lehigh Carbon Community College, 47 PPER 87 (Final Order, 2016).

There is no dispute that Ms. Zibura engaged in certain protected activity, of which CamTran was aware. The Union argues that the Hearing Examiner erred in finding that CamTran was not aware of Ms. Zibura's participation in the May 2016 protest over CamTran's removal of the employees' water cooler that involved a fifteen-foot inflatable camel. We have reviewed the record, and agree with the Hearing Examiner that there is a lack of substantial evidence to support a finding of fact that CamTran was actually aware of Ms. Zibura's involvement in the May 2016 protest. See Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). Nevertheless, the record does support the Hearing Examiner's finding that CamTran was aware that "[Ms.] Zibura was the most outspoken member of the Union with regard to the water cooler issue." (FF 5). Additionally, there is no dispute from CamTran that it was generally aware of Ms. Zibura's protected activities for the Union during her twenty-year tenure as a Union

officer. Accordingly, this case turns on the question of CamTran's motive for its decision to terminate the employment of Ms. Zibura.

On the issue of motive, the Hearing Examiner stated as follows:

I find that the following facts from the record weigh heavily against an inference of anti-union animus. First, the decision to terminate Zibura was not made in close temporal nexus to any known engagement in protected activity by Zibura. She testified in an arbitration hearing on September 26, 2016, and was not terminated until December 12, 2016. I find that, based on the record as a whole, this is a significant lapse in time and shows that the decision to terminate Zibura was not motivated by animus. Other known protected activity occurred even more remote in time: the committee meeting where Zibura advocated for a buy-back plan and complained about the removal of a water cooler happened in April 2016 and her victorious arbitration against CamTran occurred in 2015. Second, in this matter CamTran has adequately explained the termination of Zibura. Importantly, Lucey-Noll, McCormick and Gibson credibly testified that their decision to terminate Zibura was based on their crediting the account of events by Gojmerac and their interpretation of CamTran's weapon policy which calls for discharge on the first offense. Lucey-Noll, McCormick and Gibson all credibly testified that they did not consider Zibura's Union affiliation or engagement in protected activities at any relevant point in their investigation and discipline determination. Further, I do not find the fact that, based on the decision of the Arbitrator Fabian to rescind the termination, that CamTran may have made the wrong decision to be evidence of animus in this matter. An incorrect disciplinary decision, is not, by itself, a statutory violation. Third, there is no evidence in this record that the CamTran management involved in the discipline process (Lucey-Noll, McCormick, Gibson and Gojmerac) made any anti-union statements or statements which would tend to show their mind as harboring animus against Zibura's engagement in protected activities.

(PDO at 6-7).

On exceptions, the Union argues that the Hearing Examiner erred in distinguishing Lancaster County v. PLRB, 124 A.3d 1269 (Pa. 2015), to find that CamTran was not unlawfully motivated in terminating the employment of Ms. Zibura. Contrary to the Union's argument, Lancaster County, *supra*, is significantly different from this case.

First, the timing of events in this case is distinguishable from the circumstances in Lancaster County. Here, unlike in Lancaster County, there was not a contemporaneous ongoing organizing drive. Instead, on this record, there was a span of time between Ms. Zibura's protected activity and CamTran's decision to terminate her employment that was appropriate for the Hearing Examiner to weigh in examining the circumstances from which to infer motive. It is well established that the timing of the employer's actions, even in close proximity to

protected activity, while a factor, does not mandate a finding of an unlawful discriminatory motive, especially in light of intervening circumstances. See Shive, *supra*. Based on the record evidence in this case, the Hearing Examiner did not err in inferring that on these facts, including the intervening events on December 9, 2016, there was not a close temporal nexus between employee protected activity and CamTran's decision to terminate Ms. Zibura's employment. It was within the purview of the Hearing Examiner to find, based on credibility determinations and inferences from the record as a whole, that the lapse in time between Ms. Zibura's protected activity and CamTran's decision to terminate her employment did not support a finding of an unlawful discriminatory motive.

Second, in Lancaster County, there was substantial evidence of disparate treatment. Whereas here, the record evidence establishes that no other employee, other than Ms. Zibura, had ever been alleged to have violated CamTran's weapons policy. Third, in Lancaster County, the employer's disciplinary policy was progressive and expressly allowed for a lesser discipline for the offense committed. In contrast, here CamTran's weapons policy expressly provides for termination of employment for a first offense.

Fourth, and most importantly, in Lancaster County, the Hearing Examiner rejected, as not credible, the employer's assertion that it would have fired the employees even in the absence of the union organizing drive. Here, to the contrary, the Hearing Examiner found that CamTran's witnesses credibly testified that they decided to terminate Ms. Zibura's employment because of CamTran's weapons policy, and did not consider Ms. Zibura's protected activities when investigating the incidents on December 9, 2016, and determining that Ms. Zibura violated the weapons policy.

Indeed, because the Hearing Examiner found as fact that CamTran's motivation for terminating the employment of Ms. Zibura was not union animus or retaliation for protected activity, the Union failed to sustain its burden of proving an unfair practice under Section 1201(a)(3) of PERA. Thus, the burden never shifted to CamTran to establish that it would have taken the same action in the absence of Ms. Zibura's protected activity. Avonworth School District, *supra*.; Lehigh Carbon Community College, *supra*.

Even if the burden had shifted to CamTran to establish a non-discriminatory reason for terminating Ms. Zibura's employment, the record contains substantial evidence, credited by the Hearing Examiner, that Ms. Zibura was discharged based on CamTran's belief that she had violated its weapons policy. See Wadas v. Bucks County Community College, 36 PPER 84 (Final Order, 2005). Indeed, as expressly found by the Hearing Examiner, "[Ms.] Lucey-Noll, [Ms.] McCormick and [Mr.] Gibson credibly testified that their decision to terminate [Ms.] Zibura was based on their crediting the account of events by [Ms.] Gojmerac and their interpretation of CamTran's weapon policy which calls for discharge on the first offense." (PDO at 7).

Accordingly, on this record, the Hearing Examiner did not err in finding that CamTran did not have an unlawful motive in deciding to terminate the employment of Ms. Zibura. Thus, the Hearing Examiner did

not err in concluding that the Union failed to establish that CamTran violated Section 1201(a)(3) of PERA.

The elements of proof needed to establish discrimination in violation of Section 1201(a)(4) of PERA, are similar to those required to demonstrate discrimination under Section 1201(a)(3) for engaging in protected activities. The activities protected by Section 1201(a)(4) include the signing or filing of an affidavit, petition or complaint with the Board or providing information or testimony to the Board. 43 P.S. §1101.1201(a)(4); Luzerne County Community College Association of Higher Education v. Luzerne County Community College, 37 PPER 123 (Final Order, 2006). Upon review of the record, we agree with the Hearing Examiner that the record does not contain substantial evidence that Ms. Zibura signed or filed the charge of unfair practices concerning the removal of the water cooler that was filed by the Union on October 5, 2015 at Case No. PERA-C-15-286-E. Moreover, under Section 1201(a)(4) of PERA, the complainant must establish an unlawful motive or union animus on the part of the employer as the impetus for the alleged retaliation or discrimination. Teamsters Local #429 v. Lebanon County, 32 PPER ¶32006 (Final Order, 2000). As discussed above, the Hearing Examiner found that CamTran did not harbor union animus, and did not have an unlawful discriminatory motive in deciding to terminate the employment of Ms. Zibura for violating the weapons policy. Accordingly, the Hearing Examiner did not err in dismissing the Union's claim of an alleged violation of Section 1201(a)(4) of PERA.

The Union also argues on exceptions that the termination of employment of a long-term and outspoken officer of the Union would have a tendency to coerce employees in violation of Section 1201(a)(1) of PERA. Section 1201(a)(1) of PERA prohibits an employer from "interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this Act." 43 P.S. §1101.1201(a)(1). An independent violation of Section 1201(a)(1) arises even in absence of an unlawful motive, "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). However, the Board has held that an employer's disciplinary action taken against an employee that is directly related to acts of insubordination or in defiance of the employer's instructions, does not have a tendency to coerce the exercise of protected employee rights. Lebanon County, supra.; Pittston Area Federation of Teachers, Local 1590 v. Pittston Area School District, 27 PPER ¶27066 (Final Order, 1996). Here, CamTran's decision to terminate the employment of Ms. Zibura was directly related to its investigation of the incident on December 9, 2016 involving a knife in the breakroom, and its belief that Ms. Zibura violated CamTran's weapons policy. Under the totality of the circumstances, CamTran's decision to terminate Ms. Zibura's employment for violating CamTran's weapons policy would not have a tendency to interfere with or coerce employees from engaging in lawful protected activities.

Finally, the Union argues that the Hearing Examiner erred in failing to find a violation of Section 1201(a)(2) of PERA. In this regard, the Union contends that CamTran interfered with the administration of the Union by terminating the employment of Ms. Zibura so that it did not have to negotiate with her as the representative of



the Union in collective bargaining. However, the Board has determined that Section 1201(a)(2) is limited to preventing an employee organization from becoming so controlled or assisted by the employer that the employee organization is indistinguishable from the employer. *E.g. International Brotherhood of Painters and Allied Trades, Local 1968 v. Girard School District*, 38 PPER 124 (Final Order, 2007). Claims that an employer terminated an employee because of the employee's involvement in collective bargaining fall within the umbrella of discrimination under Section 1201(a)(3) of PERA. 43 P.S. §1101.1201(a)(3). Likewise, assertions that the employer is refusing to bargain with the employee representative's chosen negotiator would fall under the allegations of a failure to bargain in good faith in violation of Section 1201(a)(5) of PERA.<sup>2</sup> *E.g. City of Pittston*, 26 PPER ¶26016 (Final Order, 1994). Neither a claim of discrimination under Section 1201(a)(3), nor an allegation of a failure to bargain under Section 1201(a)(5), are subsumed under Section 1201(a)(2)'s prohibition of company unions. See *Pennsylvania Department of Education*, 14 PPER ¶14069 (Proposed Decision and Order, 1983), *affirmed*, 14 PPER ¶14135 (Final Order, 1983). Accordingly, the Hearing Examiner did not err in dismissing the Union's claims under Section 1201(a)(2) of PERA.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in finding that the Union failed to establish that CamTran violated Section 1201(a)(1), (2), (3) or (4) of PERA when it terminated the employment of Ms. Zibura. Accordingly, the exceptions filed by the Union shall be dismissed, and the PDO made absolute and 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 the Amalgamated Transit Union Local 1279 are hereby dismissed, and the April 20, 2018 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, James M. Darby, Chairman, and Albert Mezzaroba, Member this seventeenth day of July, 2018. 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.

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<sup>2</sup> The Union did not allege a violation of Section 1201(a)(5) in its Charge of Unfair Practices.