

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE :
COUNTY AND MUNICIPAL EMPLOYEES :
DISTRICT COUNCIL 90 :
 :
v. : Case No. PERA-C-12-22-E
 :
 :
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF AGRICULTURE :

PROPOSED DECISION AND ORDER

On January 24, 2012, the American Federation of State County and Municipal Employees, District Council 90 (Complainant or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania, Department of Agriculture (Respondent or Commonwealth) alleging that the Commonwealth violated Sections 1201(a)(1) and (3) of the Public Employee Relations Act (PERA) when it suspended AFSCME Vice President Willie Sawyers for three days in retaliation for his exercise of protected activity and as an act of discrimination.

On February 15, 2012, the Secretary of the Board issued a Complaint and Notice of Hearing setting June 26, 2012 in Harrisburg as the time and place of hearing before Thomas P. Leonard, Esquire, a hearing examiner of the Board. On June 7, 2012, the examiner continued the hearing to September 19, 2012 on the request of the complainant without objection from the respondent.

On September 6, 2012, the Complainant filed an amended charge of unfair practices alleging that the Commonwealth had suspended Sawyers again for three days. On September 13, the Secretary of the Board issued an Amended Complaint.

The hearing was held on the charge and the amended charge¹ on the rescheduled day, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Commonwealth of Pennsylvania, Department of Agriculture is a public employer within the meaning of Section 301(1) of the Public Employee Relations Act. (N.T. 7)
2. The American Federation of State County and Municipal Employees, District Council 90 (AFSCME), is an employe organization within the meaning of Section 301(3) of the Public Employee Relations Act.
3. The Department of Agriculture (Department) operates the Pennsylvania Farm Show Complex in Harrisburg.
4. AFSCME District Council 90 is the exclusive representative of the employes at the Farm Show Complex
5. Willie Sawyers is employed by the Department as an equipment operator at the Farm Show Complex. He has worked there 18 years. (N.T. 15-16)

¹ The Respondent waived the requirement that it be given notice "not less than 5 days after the service of the complaint." Section 93.14(a) of the Board's Rules and Regulations, 34 Pa. Code §93.14(a).

6. Sawyers currently serves as the president of AFSCME Local 2162. He has held also other union positions in the past, including vice president and shop steward. (N.T. 17-18).
7. Sawyers is the only union official currently employed at the Farm Show Complex. (N.T. 18)
8. As an AFSCME official, Sawyers has represented the maintenance and trades employees before management. In the words of Michelle Jennings, the Department's Labor Relations Coordinator, Sawyers has brought issues to management's attention "on behalf of himself or others" and that "we've been able to resolve (issues) before grievances have been filed." (N.T. 18, 122)
9. As an equipment operator, Sawyers works with laborers in the set up and tear down for the various shows that are held at the Farm Show. (N.T. 16-17, 48)
10. As an equipment operator, Sawyers is supervised by and takes directions from any one of four labor foremen who may be on shift, including Wayne Fields. (N.T. 19-20, 46-47, 87-88; Union Exhibit 1)
11. The labor foremen are first-level supervisors who belong to a meet and discuss unit represented by AFSCME. (N.T. 48, 99)
12. Labor foremen work on the floor with the equipment operators to set up and take down exhibitions for shows at the Farm Show Complex. (N.T. 88-89)
13. The labor foremen, in turn, report to the building maintenance manager, Wayne Myers, who reports to Steve McGinley, the building maintenance supervisor. (N.T. 19; Union Exhibit 1)
14. On September 14, 2011 McGinley was told there were no foremen on the floor so he came onto the floor where he saw Sawyers talking to another employee. (N.T. 20-22, 102-03, 108, Union Exhibit 2)
15. McGinley asked Sawyers if he was doing anything and told him that tables needed to be moved and set up for an upcoming show. (N.T. 22, 103-04)
16. At some point when Sawyers was attempting to get the forklift under the tables, McGinley directed Sawyers to stop because the stack was unstable. McGinley directed Sawyers to come at the tables from the other side. Sawyers did as McGinley directed and when he approached the tables, he bumped into them. Sawyers then stopped and sat on the forklift with his arms crossed, refusing to acknowledge McGinley, who told Sawyers he needed to get back to work several times. (N.T. 20-25, 58-59, 104-05)
17. Sawyers instead turned to McGinley and asked for McGinley's radio, which McGinley gave him. Sawyers tried to contact the Farm Show director but got no response because he was not at work that day. At that point, Sawyers went back to moving the tables. (N.T. 103-05).
18. A pre-disciplinary conference (PDC) was later held with and by letter dated September 26, 2011, Michael L. Pechart, Executive Deputy Secretary to Department of Agriculture Secretary George D. Greig issued Sawyers a three-day suspension for being uncooperative with McGinley. As noted in the suspension letter, Sawyers had just received another three-day suspension on August 30, 2011 and also had been given a level one letter (the equivalent of a one-day suspension) on January 25, 2011 for similar behavior. (N.T. 20, 85, 105, Union Exhibit 2)

19. On October 6, 2011, Sawyers filed a grievance regarding the September 26, 2011 three-day suspension. On January 24, 2012, AFSCME filed this charge of unfair practices over the suspension. (N.T. 26; Union Exhibit 3)
20. By letter dated February 9, 2012, the Department and AFSCME settled Sawyers' October 6, 2011 grievance, along with a grievance filed over the August 30, 2011 suspension. The settlement agreed to reduce the three-day suspension to a level one letter for inappropriate conduct, which is to remain on file until February 3, 2013. The settlement also provided Sawyers, who had already served both suspensions, six days of compensatory time. The parties' settlement indicated that the settlement resolved "all issues with the above referenced grievances." (Union Exhibit 4)
21. The unfair practice charge remained in place. On February 15, 2012, the Secretary of the PLRB issued a complaint and notice of hearing scheduling the unfair practice hearing for June 26, 2012. On June 7, 2012, the examiner continued the hearing to September 19, 2012.
22. Prior to the unfair practice charge hearing date, the Department, by letter dated August 7, 2012, issued Sawyers a three-day suspension for his involvement in a May 31, 2012 incident with labor foreman Wayne Fields. (N.T. 29, 32, 90, Union Exhibit 6)
23. On May 31, 2012 Sawyers was moving manure with a Bobcat in order to clear a path for the laborers who were taking down horse stalls. Fields saw that the bobcat was stirring up dust and flies and he started yelling at Sawyers to stop. (N.T. 91)
24. Unbeknownst to Fields, another foreman, Dave Semerod, who was nearby, had given permission to Sawyers to move the manure. (N.T. 92-93, 96-98)
25. Sawyers shut off the bobcat and as Fields approached Sawyers told him several times to "shut up." (N.T. 32, 65, 91)
26. Fields told Sawyers not to speak to him that way but Sawyers insisted he would talk to Fields that way. (N.T. 33, 65, 114)
27. The exchange was heated and at one point, Fields and Sawyers bumped up against each other. (N.T. 90-93)
28. Fields walked away and apologized to Semerod because he was not aware that he had given Sawyers' permission to move the manure. (N.T. 92-93).
29. Sawyers then filed a workplace violence report. Fields also reported the incident. (N.T. 124, Union Exhibit 5)
30. The incident was investigated by Michelle Jennings from the Department's Human Resources Office, which determined that there was no workplace violence but both Sawyers and Fields had acted inappropriately. (N.T. 115)
31. Sawyers had a history of similar inappropriate behavior, including a prior level one letter for similar misconduct with the same foreman, Wayne Fields. For this reason, on August 7, 2012, Executive Deputy Secretary Pechart issued Sawyers a three-day suspension. The Department issued Fields a verbal reprimand for his behavior because he had no record of discipline. (N.T. 117-19, Union Exhibit 6)

DISCUSSION

The Union's charge and amended charge of unfair practices allege that the Commonwealth has engaged in two separate acts of interference and discrimination when it issued a three day suspension to its Local 2162 president, Willie Sawyers, on September

26, 2011 and a three day suspension on August 7, 2012. The Union alleges that the suspensions violated sections 1201(a)(1) and (3) of PERA because they were the Commonwealth's retaliation against Sawyers for his exercise of protected activity.

An employer commits an unfair practice under section 1201(a)(3) if it discriminates against an employe for having engaged in an activity protected by the PERA. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). In order to prevail on a charge under section 1201(a)(3), the charging party must show by substantial evidence during its case-in-chief that an employe engaged in protected activity, that the employer knew that the employe engaged in protected activity and that the employer took adverse action against the employe for having engaged in the protected activity. **Perry County**, 634 A.2d 808 (Pa. Cmwlth. 1994). Speculation is not substantial evidence. **Shive v. Bellefonte Area Bd. Of School Directors**, 317 a.2d 311 (Pa. Cmwlth. 1974). Substantial evidence is "more than a mere scintilla" of evidence and must do more than create suspicion. **PLRB v. Kaufmann Dep't Stores, Inc.** 345 Pa. 398, 400, 29 A. 2d 90, 92 (1942).

The Union has proven the first two elements of the test for discrimination. As for protected activity, the Union does not argue that the protected activity was Sawyer's conduct on September 14, 2011 and May 31, 2012. Rather, the protected activity was Sawyers' actions as the local union president in representing members before management in the months leading up to the disciplines. Representing an employe organization as a steward or an officer is a protected activity. **Commonwealth of Pennsylvania, Department of Corrections**, 36 PPER 114 (Final Order 2006). As for employer knowledge of Sawyers' representation of employes before management, there is no dispute that this fact was known to his supervisors.

The disputed issue in this case is the third part of the test for discrimination, employer motivation. The "motive creates the offense" under section 1201(a)(3). **PLRB v. Stairways, Inc.**, 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), quoting **PLRB v. Ficon**, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). An overt display of anti-union animus by an employer may support a finding that the employer was discriminatorily motivated. **City of Reading v. PLRB**, 568 A.2d 715 (Pa. Cmwlth. 1989). An employer does not violate section 1201(a)(3) if it takes an employment action for a nondiscriminatory reason. **Kennett Consolidated School District**, 37 PPER 89 (Final Order 2006).

Since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. **PLRB v. Montgomery County Geriatric and Rehabilitation Center**, 13 PPER ¶ 13242 (Final Order, 1982); **St. Joseph's Hospital, supra**. However, an inference of anti-union animus must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." **Shive, supra** at 313.

In **Child Development Council of Centre County (Small World Day Care Center)**, 9 PPER ¶ 9188 (Final Order, 1978), the Board stated:

There are a number of factors the Board considers in determining whether anti-union animus was a factor in the layoff of the Complainant: the entire background of the case, including any anti-union activities by the employer; statements by the discharging supervisor tending to show the supervisor's state of mind; the failure of the employer to adequately explain the discharge, or layoff, of the adversely affected employe, the effect of the discharge on unionization efforts-for example, whether leading organizers have been eliminated; the extent to which the discharged or laid-off employe engaged in union activities; and whether the action complained of was "inherently destructive" of important employe rights."

9 PPER 9188, at 380.

The Union argues that anti-union animus can be inferred from the entire background of the case, especially the sharp increase in discipline Sawyers received in the last two years. Sawyers was the only union official at the Farm Show Complex. Until 2011, he had a commendable work record. The Union argues that this is a case of more than managers having a different approach to managing personnel operations but instead is a case of managers targeting Sawyers because of his role as the local union president.

It is helpful to analyze these two disciplines individually.

September 26, 2011 Three Day Suspension

The Commonwealth's discipline to Sawyers stated it was for "your insubordinate behavior on September 14, 2011 when you were deliberately disrespectful and uncooperative with a superior and intentionally refused to acknowledge and respond to him when he spoke to you about a work-related activity." (Union Exhibit 2). The insubordinate behavior developed from an incident that occurred over a small task, moving tables with a forklift. As the supervisor tried to discuss the matter with Sawyers, Sawyers, just sat in his forklift and did not reply to the supervisor. Instead, Sawyers tried, without success, to contact Ray Kerwin, the director of the Farm Show Complex.

Approximately a year after the September 14 incident, the parties who were involved in the incident testified in this unfair practice hearing about what occurred that day. Having observed the witnesses who were the participants, I cannot say that McGinley, the building supervisor, was motivated by anti-union animus when he sought discipline against Sawyers. McGinley testified that he charged Sawyers because he perceived that Sawyers was acting as an insubordinate employee. McGinley testified credibly that he spoke to Sawyers in a way that was not hostile or threatening. He testified that he spoke to Sawyers in a way that reflected his sincere befuddlement at why Sawyers continued to sit in the forklift equipment and not respond to him. The Commonwealth's actions in this case were not in response to Sawyers' protected activity but rather in response to what the supervisors sincerely believed was Sawyers' insubordinate behavior.

It must be noted that the parties later, on February 9, 2012, mutually agreed to reduce this three day suspension to a one day suspension.

August 7, 2012 Three Day Suspension

This additional discipline led to AFSCME filing the amended charge. The three day suspension was discipline for a May 31, 2012 incident between Sawyers and labor foreman Fields. Fields had asked Sawyers to stop running a Bobcat moving manure so that he could discuss the manner in which Sawyers was running the equipment. A discussion never took place. Sawyers told Fields on several occasions to "shut up." It was for these remarks that the employer disciplined Sawyers for "inappropriate workplace conduct." (Union Exhibit 6). Fields testified in a credible fashion that he brought Sawyers' conduct into the realm of discipline because of Sawyers' repeated disrespectful statements toward him that day.

The Union argues that when all of the facts of the present case are considered as a whole, that it must be concluded that anti-union discrimination was the real reason for the Commonwealth's decision to issue a three day suspension. The Union argues that with this August 7, 2012 suspension, Sawyers, the only Union official at the Farm Show Complex, has now experienced another in a "series of occasions where minor misunderstandings have snowballed into excessive disciplinary actions." The Union argues that this is a pattern that reveals anti-union motivation.

The Commonwealth witnesses testified that the discipline was management's legitimate approach to an inappropriate workplace exchange between Sawyers and foreman Fields. Rather than discussing a disagreement with his supervisor, Sawyers repeatedly told Fields to "shut up", even after Fields asked Sawyers not to make such a remark. I am not unmindful that Fields' conduct on May 31 was also found by the Department to be inappropriate. However, his supervisors disciplined him for that. There is no evidence

that the Commonwealth engaged in disparate disciplinary treatment against Sawyers. No other employees were engaged in the same altercations. Wayne Fields received only a verbal warning because he had an otherwise good record before this incident.

The Union also argues that anti-union animus can be inferred from the timing of this discipline, since it occurred months after the incident. As for the allegation of suspicious timing, the commonwealth witnesses credibly explained the notice of suspension was delayed because it took time to collect information from May 31, talk to witnesses and hold a PDC with Sawyers.

Upon review of the record as a whole, the conclusion that must be reached is that the Commonwealth's decision to suspend Sawyers for three days was not in response to Sawyers' protected activity but rather in response to what the supervisors sincerely believed was an act of inappropriate behavior that came after prior incidents. The Union has not met its burden of proving that the Commonwealth acted with anti-union motivation in its August 7, 2012 discipline.

CONCLUSIONS

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

1. That the Commonwealth of Pennsylvania, Department of Agriculture, is a public employer within the meaning of Section 301(1) of PERA.
2. That the American Federation of State County and Municipal Employees, District Council 90 is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the Commonwealth has not committed unfair practices in violation of Sections 1201(a)(1) and (3) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair practices is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this twenty-seventh day of September, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner