

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 773 :
 :
 : CASE NO. PERA-C-12-148-E
 v. :
 :
 NORTHWESTERN LEHIGH SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On May 25, 2012, the Teamsters Local Union No. 773 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Northwestern Lehigh School District (District) violated Section 1201(a) (3) of the Public Employee Relations Act (PERA). The Union specifically alleged that, on or about May 14, 2012, the District demoted William Fritzingler because of his Union activities.

On June 20, 2012, the Secretary of the Board issued a complaint and notice of hearing designating a hearing date of January 22, 2013, in Harrisburg. Due to the illness of the District's attorney, I rescheduled the hearing for March 15, 2013. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. After the District rested its case, it moved for dismissal of the charge. I granted the motion at the hearing obviating the need for post-hearing submissions by either party.

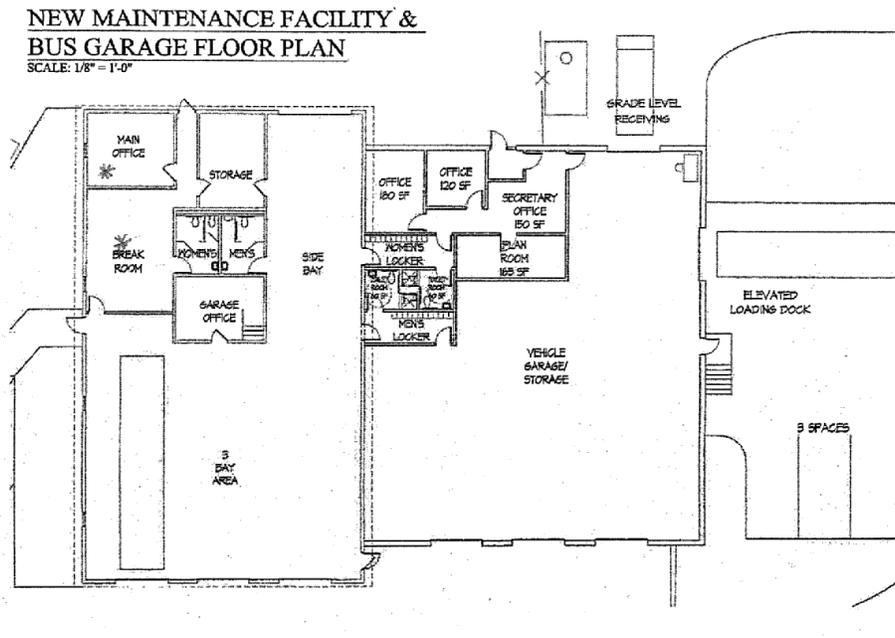
The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7-8).
3. Mr. Fritzingler was hired as a Class-F substitute van driver for the District in May, 2011, at the hourly rate of \$15.23/hr. On January 11, 2012, the District approved Mr. Fritzingler for the classification as a Class-E part-time van driver, effective December 21, 2011, at the hour rate of pay of \$15.69/hr, in addition to his Class-F substitute driver classification. With the dual classification, he was a daily van driver with a regular schedule and run assignment. (N.T. 119-120, 147-148, 155; Complainant Exhibit 6; Respondent Exhibit 4).
4. Richard Bowman is a substitute bus driver at the District. (N.T. 11, 95).
5. Cassandra Graver is the District's Transportation Coordinator in charge of the Busing Department. Ms. Graver oversees bus transportation for over twenty-five school districts. (N.T. 31, 145, 162).
6. Robert Kripplebauer is the District's Director of Operations. (N.T. 138).
7. Luann Matika is the Human Resources Director at the District. (N.T. 116).
8. Kay Bertha develops the schedules for the bus and van drivers at the District. Ms. Graver is her direct supervisor. Ms. Graver is not involved with the scheduling. (N.T. 177-178).
9. Mr. Fritzingler and Mr. Bowman met with representatives from the Union to organize the District's bus drivers. They met with Union Vice President Dennis

Hower and Union Trustee/Representative Mark Laubach. (N.T. 12-14, 97-99; Complainant Exhibit 1).

10. Mr. Fritzingler and Mr. Bowman held a second Union meeting at the Germansville Fire Company on April 10, 2012, with approximately fifteen other bus drivers. At this meeting cards were handed out to the drivers in attendance and Mr. Fritzingler took cards for other drivers. He also spoke to the drivers about supporting the Union. Mr. Hower and Mr. Laubach were also in attendance. (N.T. 15-18, 20-21, 30, 97-100; Complainant Exhibit 1).
11. On April 12, 2012, a local newspaper published an article indicating that there was a campaign to organize the bus drivers at the District. The article does not identify Mr. Fritzingler as one of the bus drivers involved in the organizing activities. Ms. Graver was unaware of the newspaper article until the end of 2012, as the original hearing date of January 22, 2013, was approaching. She was generally aware of the Union organizing campaign in April, 2012, because it was public knowledge. (N.T. 23-24, 180; Complainant Exhibit 1).
12. Busing runs begin at the bus garage. The bus garage has a break room. Ms. Graver's office is next to the break room. The wall between the break room and Ms. Graver's office is a thick, floor-to-ceiling concrete wall. Ms. Graver's office door is open unless she needs privacy. When the door is open, the employees cannot see Ms. Graver in her office and she cannot see the employees. Ms. Graver cannot understand the conversations in the break room, but she can hear voices. (N.T. 31, 34-36, 61, 66-67, 112, 163, 178; Respondent Exhibit 1).



13. The day after the newspaper article was published, there was a discussion among employees in the break room. Mr. Fritzingler and Mr. Bowman were in the break room with Donna Snyder, Kim Boardman and several other drivers. Donna Snyder

stated in a loud voice, while looking and pointing at Mr. Fritzingler and Mr. Bowman, that they had better back off with the Union or the District will privatize. Ms. Snyder did not use anyone's name when she made the statement. (N.T. 34-36, 101-103, 107-108).

14. Ms. Graver did not hear the conversation in the break room on the day in question. She did not understand what was said and she could not see what was happening. She was in her office behind her desk at the far end of her office opposite the door. (N.T. 164).
15. On May 14, 2012, Mr. Kripplebauer wrote a letter to Mr. Fritzingler stating as follows:

This letter is to serve notice that you need to get your CDL permit by the 21st of May. Failure to do so will mean that the van run to which you are assigned will [be] placed on open assignment. You have been reminded through the entire school year about getting your permit as well as recently by Kay and Cass. Kay in fact reminded you on April 23, while Cass mention[ed] this requirement in March. Additionally, if you fail to obtain your permit by the 21st, you will be required by the Department of Transportation to take the 14-hour school bus classroom time again.

Effective May 21st, if you do not have your school bus permit, your van run will be opened for reassignment and your status will be changed from Class E to class F driver.

(Complainant Exhibit 3).

16. Every Thursday, drivers receive their schedules for the following week in their mailbox. On Thursday May 17, 2012, approximately five weeks after Ms. Snyder's break room statement, Mr. Fritzingler received a schedule which contained no assignment for him for the following week. On the schedule Ms. Graver had written the following note: "Bill- if you do not have your permit-I will call as needed to sub if you are available." (N.T. 37-40, 158-159, 177; Complainant Exhibit 2).
17. A CDL, with school bus endorsements, is required to be a school bus driver. The school bus endorsements require additional training. (N.T. 147)
18. As of May 17, 2012, Mr. Fritzingler did not have a CDL. A CDL is required for his job. The District hired Mr. Fritzingler without a CDL as a Class F substitute van driver under the expectation that he would obtain his CDL. Mr. Fritzingler was aware when he was hired in May, 2011, that he was required to obtain a CDL. (N.T. 40-42, 147-148).
19. All drivers hired without a CDL are hired as substitute van drivers, and they are informed that they have one year to obtain a CDL to become a bus driver. (N.T. 121-122).
20. When drivers are hired, they are required to take a 14-hour class provided by the District. Upon the completion of that class, drivers have one year to obtain their CDL permits which requires the passing of computer tests at Penn DOT. This gives them a permit that enables them to drive in the presence of another properly licensed driver. Mr. Fritzingler completed his 14-hour class on May 21, 2011. (N.T. 149-152; Respondent Exhibit 6(2)).
21. Mr. Fritzingler was not scheduled to drive during the week of May 21, 2012 to May 25, 2012. Mr. Fritzingler was scheduled most weeks throughout the school year but missed weeks on prior occasions because he did not have his CDL. (N.T. 43, 50).

22. On May 18, 2012, Mr. Fritzingler obtained one part of his learner's permit. He did not take any of the required tests. The left side of Mr. Fritzingler's permit shows that he did not take and pass any of the Penn DOT tests required to validate the permit. As of May 21, 2012, Mr. Fritzingler did not have a valid CDL permit, and as a result, the District changed his status to that of a substitute driver again without a regular van run. (N.T. 46-47, 152-156; Complainant Exhibit 4).
23. Other drivers who failed to meet the requirements and procedures and failed to obtain proper licenses also lost their daily van runs. (N.T. 156).
24. Ms. Graver advised Mr. Fritzingler several times prior to May 21, 2012, that he needed to obtain his CDL and warned him several times that he would only be used as need without it. (N.T. 68-69, 154).
25. On June 13, 2012, the school board approved Mr. Fritzingler for summer bus cleaning from July 2, 2012 to August 24, 2012. (N.T. 128; Respondent Exhibits 9, ¶ 9 & 10).
26. On July 18, 2012, the school board approved Mr. Fritzingler for employment as a temporary summer van driver at the rate of pay of \$16.08/hr. (Respondent Exhibits 11 & 12).
27. On November 14, 2012, the school board approved Mr. Fritzingler for a position performing snow removal in the Transportation Department, at the rate of pay of \$17.05/hr. (Respondent Exhibits 13 & 14).

DISCUSSION

The Union claims that the District discriminated against Mr. Fritzingler by reducing his hourly rate of pay and by reducing his hours of work because he was one of the Union organizers of the District's bus drivers. (N.T. 54-55; Specification of Charges). At the end of the hearing, the District moved to dismiss the charge. (N.T. 188). In support of its motion, the District argued that the Union failed to meet its burden of proving with substantial evidence that the District knew that Mr. Fritzingler was engaged in protected activity. (N.T. 188-1954). I granted the District's motion at the hearing. (N.T. 194).

In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employee engaged in activity protected by PERA; (2) that the employer knew that the employee engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employee's involvement in protected activity. *St. Joseph's Hospital v. PLRB*, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. *PLRB v. Stairways, Inc.*, 425 A.2d 1172 (Pa. Cmwlth. 1981). In this case, the Union predicated its entire case of employer knowledge on the incident in the break room and the newspaper article. The District objected to the hearsay in the newspaper article, and I admitted it for the limited purpose of establishing notice to the District and the general public of organizing activity. However, the article makes no reference to Mr. Fritzingler.

The uncontradicted evidence from both Union and District witnesses was that Ms. Snyder did not mention anyone's name when she directed Mr. Fritzingler and Mr. Bowman to back off the Union because the District may privatize the busing. Both Union and District witnesses also testified that no one can see in or out of Ms. Graver's office and that Ms. Graver could not see to whom Ms. Snyder was directing her statements. Finally, Ms. Graver credibly testified that she did not hear or understand the conversation in the break room in April 2012, although she did hear raised voices. She did not see or hear that Ms. Snyder was directing her statements toward Mr. Fritzingler and Mr. Bowman. Accordingly, although Ms. Graver testified that she was generally aware of a Union organizing campaign, there is no substantial competent evidence on this record to establish that Ms. Graver or any other District administrator had knowledge that Mr.

Fritzinger was engaged in protected activity. Therefore, the charge is dismissed because the Union failed to establish that the District had knowledge of Mr. Fritzinger's protected activities, which is the second necessary conjunctive element for establishing a **prima facie** case of discrimination under **St. Joseph's**.

The Union did not argue small plant doctrine in opposing the District's motion at the hearing. However, I have applied that analysis to the facts of record and conclude that the small plant doctrine does not yield an inference of employer knowledge on this record. In **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 (Final Order, 1992), the Board stated the following:

The small plant doctrine allows the Board to infer knowledge to a small employer when the facts establish that employes' protected activities were "carried out in such a manner, or at such times that in the normal course of events, [the employer] must have noticed [the activity]." However, the mere fact that an employer's plant is of a small size standing alone is an insufficient basis upon which to apply this small plant doctrine.

Temple, 23 PPER at 64. The Board further stated that small plant doctrine is inapplicable absent close supervision. **Id.** "The very foundation of the small plant doctrine is that in a **physically limited setting** containing few individuals little goes unnoticed." **Id.** (emphasis added).

In **AFSCME, Council 13 v. Bensalem Township**, 19 PPER ¶ 19010 (Final Order, 1987), the Board listed several factors that supported an inference of employer knowledge of the discriminatee's union activities. The Board's factors require a nexus between the employe's union activities and the physical location where non-unit eligible supervisors or managers regularly work and supervise employes. It was in reference to this connection that the Pennsylvania Supreme Court affirmed the Board's conclusion "that any knowledgeable administrator would necessarily have known which of the people on a staff of this size were engaged in union organizing activities." **St. Joseph's**, 373 A.2d at 1072. Accordingly, the Union must present facts to establish the following: (1) an employer operation with a small (albeit unspecified) number of employes; (2) a defined work space; **and** (3) supervisor(s) who regularly interact(s) with employes within the same defined work space where the alleged discriminatee engaged in protected activity, i.e., the nexus.

The record in this case does not establish that Mr. Fritzinger engaged in protected activities in the same defined work space as Ms. Graver or other District administrators. Those administrators, therefore, had no opportunity to learn or discover which employes were engaged in organizing activities. The only evidence that there was any open discussion of organizing within the work environment was the break-room incident where no names were mentioned, and the conversation was not heard, seen or understood by any District administrator.

Moreover, the factual predicate for part of the Union's claim is simply unsupported by the record. The Union has alleged that the District reduced Mr. Fritzinger's hourly wage. However, the record establishes that Mr. Fritzinger's hourly rate of pay was not ever reduced.

Absent knowledge, there can be no unlawful motive, as a matter of law. However, for purposes of Board review, I conclude that the Union did not establish that the District reduced Mr. Fritzinger's work schedule because of his organizing activities. The Board will give weight to several factors upon which an inference of unlawful motive may be drawn. In **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether anti-union animus was a factor in the [adverse action against] the Complainant." **Id.** at 380. These factors include the entire background of the case, including 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 employe, the effect of the employer's

adverse action on other employees and protected activities, and whether the action complained of was "inherently destructive" of important employee rights. **Centre County**, 9 PPER at 380.

There is no evidence to support an inference of unlawful motive by any District administrator. There is no nexus between the District's changing Mr. Fritzingler from a regular van driver with an assigned run to a substitute van driver on the one hand and his Union organizing efforts on the other. In this regard, the record is devoid of any anti-union statements or activities from any District administrators. The record also lacks any pretextual or shifting explanations. The record, however, does demonstrate that District administrators clearly emphasized to Mr. Fritzingler that he was required to take all the required Penn DOT tests and obtain a valid CDL permit within one year from completing the 14-hour class that he took at the District. Ms. Graver credibly testified that she repeatedly reminded Mr. Fritzingler that he needed to meet his Penn DOT requirements by May 21, 2012, which was the one-year date from his completion of the 14-hour class. The week prior to Mr. Fritzingler's removal from the regular schedule, Mr. Kripplebauer sent Mr. Fritzingler a letter outlining all the notifications and warnings he had received from Ms. Graver and Ms. Bertha about obtaining a valid CDL and warning him that he would be placed on open assignment.

Mr. Fritzingler's work schedule was changed because he left the District with no alternative but to remove him from his assigned van run and use him on an as-needed basis. Penn DOT and the District have licensing requirements of which he knew and with which he deliberately failed to attempt to comply. District personnel repeatedly reminded him during the course of one year to comply with permit and license requirements, and he failed to do so. Although the Union attempted to present evidence that the District would not give him time off to take his tests, Ms. Graver credibly testified that there are local testing sites where testing could be done on weekends and that she certainly would have given him time off if Mr. Fritzingler had informed her that he needed time off to take his Penn DOT tests. Ms. Matika also credibly testified that there is no discipline for taking time off for taking licensing exams at Penn DOT. (N.T. 126-127). Discipline would only be a possibility if a driver failed to show for a scheduled run without approval for the day off; not if a driver notified the District in advance that he/she needed a day off for licensing or permit requirements and was approved. If the schedule was too busy, the District would work with the driver to give him/her different day off. (139-141).

Moreover, after the charge was filed, the school board on several occasions approved the selection of Mr. Fritzingler, among others, for extra summer and winter work for additional pay. On June 13, 2012, the school board approved Mr. Fritzingler for summer bus cleaning from July 2, 2012 to August 24, 2012. On July 18, 2012, the school board approved Mr. Fritzingler for employment as a temporary summer van driver at the rate of pay of \$16.08/hr, which was more than his previous hourly rate of pay. Also, on November 14, 2012, the school board approved Mr. Fritzingler for a position performing snow removal in the Transportation Department at \$17.05 per hour, which also was more than his Class-E regular van run pay. Accordingly, the record simply does not support a finding that the District in any way discriminated against Mr. Fritzingler.

CONCLUSIONS

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

1. The District is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has **not** committed unfair practices within the meaning of Section 1201(a)(3).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fifth day of June 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner