

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING :  
ENGINEERS LOCAL 66 :  
 :  
 : CASE NO. PERA-C-12-98-W  
v. :  
 :  
ROCHESTER TOWNSHIP :

**PROPOSED DECISION AND ORDER**

On April 9, 2012, the International Union of Operating Engineers, Local 66 (Union), filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Rochester Township (Township) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA).<sup>1</sup> The Union specifically alleged that the Township unlawfully terminated Deanne Eshbaugh in retaliation for her choosing to have the Union file a grievance on her behalf, which lead to an arbitration hearing on November 17, 2011.

On April 24, 2012, the Secretary of the Board issued a complaint and notice of hearing designating a hearing date of December 12, 2012, in Pittsburgh. On May 11, 2012, the Township filed an answer. At the hearing on the designated date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties filed post-hearing briefs.

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

**FINDINGS OF FACT**

1. The Township 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).
3. Deanne Eshbaugh was employed by the Township as the Township Clerk between March 3, 2003, and December 31, 2011. She was notified of her last day of employment on or about November 17, 2011. Ms. Eshbaugh earned \$14.71 per hour. She was out of work from January 1, 2012, until March 19, 2012, when she began working another job. (N.T. 12-13, 50, 77, 79, 98).
4. Laura Hill held the position of Township Assistant Secretary. She resigned from that position the first week of May 2011. Ms. Hill earned \$18.12 per hour. (N.T. 14, 79, 98).
5. Carolyn Verszyla is the Township Manager. (N.T. 62, 87; Union Exhibits 6 & 7; Township Exhibit 1).
6. Ron Cord is the business agent for the Union. (N.T. 69, Union Exhib8; Township Exhibit 2).
7. Shannon Steele is the Solicitor for the Township. (N.T. 93).
8. Thomas Summers is the Commissioner in charge of the police department. Before he retired, he was the road foreman for the Township for fourteen years. Before his employment with the Township, Mr. Summers worked for the Dravo Corporation where he was a Union Steward with the same Union. (N.T. 48-49, 117-118; Union Exhibits 6 & 7; Township Exhibit 1).

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<sup>1</sup> The Union did not set forth any allegations in the specification of charges that would support a violation of Section 1201(a)(5). Also, during the hearing, the Union did not produce evidence of acts that occurred within four months of the filing of the charge that could support a bargaining violation.

9. The job description for the Clerk position expressly provides that the Clerk "serves as the Township's Wage Tax Clerk, as clerical support staff for the Municipal Office and all Township Boards and as clerk for the Rochester Township Sewer Authority." (Union Exhibit 5).
10. As the wage tax collector, the Clerk gathered information for yearly returns; prepared returns and notifications to residents; stuffed envelopes with and mailed returns for approximately 1600 residents; verified completed returns and payments; processed returns and payments; processed business quarterly mercantile tax payments; requested reimbursement from other municipalities; researched non-filing residents and pursued collection; and filed collection proceedings with the district magistrate for non-paying residents. (N.T. 53-55).
11. As part of Ms. Eshbaugh's duties as Clerk, she attended public meetings of the Board of Commissioners and kept meeting minutes. She also performed bank reconciliation for the Sewer Authority. (N.T. 18-19, 55-56).
12. Early in 2011, Ms. Eshbaugh became aware of the Local Earned Income Tax Act ("Act 32"). Act 32 required municipalities to relinquish their wage tax collection function to their county, which would eliminate many of Ms. Eshbaugh's job duties. (N.T. 42-44, 47-48, 52, 94).
13. Ms. Eshbaugh was aware of discussions during the year that the Township planned to reduce her hours due to the reduction of her job duties as a result of Act 32. (N.T. 63).
14. Several months before the resignation of Assistant Secretary Hill, the Township hired an outside accounting firm by the name of Cottrill and Arbutina to perform some of the duties of the Assistant Secretary. The Township auditor found problems with the Township's bookkeeping and management of accounts. Cottrill and Arbutina performed accounting and payroll work for the Township to help Ms. Hill with the handling of accounts and funds. The Township also sent Ms. Hill for education and training to help with her job duties. (N.T. 18, 57, 70, 81, 96-97, 99-100).
15. Business Agent Ron Cord filed Grievance No. 1-5-11 on May 12, 2011, on behalf of Ms. Eshbaugh complaining that the "vacant Assistant Secretary Position [has] not [been] posted for bid as per Article Eight sections 3A and 4 of the CBA and to include Article Twenty-two," and seeking to post and fill the position. (N.T. 15, 69, 100; Union Exhibit 1).
16. Ms. Eshbaugh wanted to bid on the Assistant Secretary position. The position pays more than the Clerk position. (N.T. 16).
17. Also on May 12, 2012, Business Agent Ron Cord filed Grievance No. 2-5-11 on behalf of the bargaining unit complaining that "non-bargaining unit workers [were] performing bargaining unit work, i.e., Asst. Secretary duties, in violation of Articles one and Twenty-two." The relief requested was to cease and desist from removing the work. (N.T. 16-17; Union Exhibit 2).
18. In May and June 2011, after Assistant Secretary Hill resigned, Township Solicitor Steele engaged in conversations with Union Business Agent Cord about the proposal to create a hybrid position for Ms. Eshbaugh. She would perform the clerical duties remaining from her Clerk position, sans the tax collection duties eliminated by Act 32, and also perform the remaining duties of the Assistant Secretary sans the financial work performed by Cottrill and Arbutina. (N.T. 70, 78-79, 85, 95).
19. Solicitor Steele and Business Agent Cord had several meetings after the grievances were filed. The Township did not want to post the position for

Assistant Secretary until the Board of Commissioners decided on whether to combine the two positions of Assistant Secretary and Clerk for Ms. Eshbaugh. (N.T. 69-70, 98-99, 112).

20. On one occasion, Business Agent Cord, Township Manager Verszyla and Solicitor Steele met at a restaurant to review notes and job duties regarding the combining of the two positions. Mr. Cord wanted a one-dollar-per-hour wage increase for Ms. Eshbaugh. Solicitor Steele and Manager Verszyla agreed to present the proposal of combining the positions with a wage increase to the Board of Commissioners. There was never any discussion of reducing Ms. Eshbaugh's wages. (N.T. 70, 78-79, 86, 98-99, 104, 112).
21. The Board of Commissioners considered and rejected the wage increase because they believed that 70-80% of Ms. Eshbaugh's job duties involved tax collection which would no longer exist after January 1, 2012. (N.T. 70-71, 98-99, 104, 113-114).
22. At this time the Board of Commissioners believed that Ms. Eshbaugh would accept the hybrid position so that she and her husband could maintain all of their health benefits and her employment status in the hybrid position. They also believed that she would not accept the new hybrid position at the same rate of pay as her Clerk position with her current Union representation. (N.T. 112-114).
23. After almost two months of negotiations, the parties failed to agree to combine the two positions of Clerk and Assistant Secretary with a wage increase. At the July 7, 2011 public meeting, the Board of Commissioners voted to post the position of Assistant Secretary with the attached job description and to deny the posting grievance and grievance regarding the removal of bargaining unit work. (N.T. 20-24; Union Exhibit 3).
24. The Assistant Secretary position was in fact posted between July 12, 2011 and July 18, 2011. In the posting, the Township required the applicant to have the following: a Bachelor of Science degree in accounting; five years of work-related experience; and a solid understanding of government bookkeeping. The posting also made essential a familiarity with **Quick Books Accounting** principles. Former Assistant Secretary Hill did not hold a Bachelor of Science degree in accounting. Ms. Eshbaugh holds an Associate's Degree in accounting, but she does not hold a Bachelor of Science degree in accounting. (N.T. 23-27; Union Exhibit 4).
25. The job posting also provides that the wage rate for the newly hired employe in the position of Assistant Secretary is \$18.12 per hour; the same hourly rate paid to Ms. Hill. (Union Exhibit 4).
26. Ms. Eshbaugh did not apply for the position because she did not hold a Bachelor of Science degree. Melissa, the current Assistant Secretary, does not have a Bachelor of Science degree. (N.T. 26-27, 73, 99, 101).
27. On November 17, 2011, an arbitration hearing was scheduled at the Township Building for Grievance No. 2-5-11 regarding the alleged removal of bargaining unit work. Ms. Eshbaugh appeared for that hearing. The case was settled before the arbitrator. On that same evening, at a public meeting, the Board of Commissioners notified Ms. Eshbaugh that, due to Act 32, she would be laid off because her entire Clerk position was being eliminated. (N.T. 35-36, 41-42, 84-85, 100-101; Union Exhibit 7).
28. Assistant Secretary Melissa was hired on or about November 7, 2011. Between November 18, 2011 and December 31, 2011, Ms. Eshbaugh trained Melissa to perform the non-wage-tax duties of the Clerk position that she had been performing, including the Sewer Authority duties. The arbitration settlement

allowed Cottrill and Arbutina to continue performing the accounting work instead of the Assistant Secretary. (N.T. 48, 101).

29. The day after that Board meeting, Commissioner Summers was in Ms. Eshbaugh's office and made a comment about the grievances. He said that he felt that Ms. Eshbaugh was misrepresented and indicated that he disliked Ms. Eshbaugh's Union representation. He was upset with the way the Union negotiated Ms. Eshbaugh's employment retention and grievance settlement. He made statements indicating that the Union mishandled the grievances. He felt that Ms. Eshbaugh lost her job because of the grievances, which he felt were wrong. (N.T. 48-50, 119-125).

#### DISCUSSION

The Union argues that the Township violated Section 1201(a) (3) and independently violated Section 1201(a) (1) because Ms. Eshbaugh exercised her protected right to engage her Union to do the following: file grievances; advocate on her behalf; and negotiate an alternative to the elimination of her job or the reduction of her job duties and hours of work, due to Act 32.

##### 1. Section 1201(a) (3)

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). The record shows that Ms. Eshbaugh engaged her Union to file Grievance No. 1-5-11 on her behalf (complaining that the Township failed to post the Assistant Secretary vacancy) so that she could apply for the job. Also, the record shows that Ms. Eshbaugh engaged her Union representative, Mr. Cord, to negotiate on her behalf, with the Township Manager and Township Solicitor, the proposed consolidation of the Clerk and the Assistant Secretary positions so that she could remain at the Township in full-time status. Ms. Eshbaugh also appeared for the arbitration hearing of Grievance No. 2-5-11 on behalf of the Union, which settled at the hearing. Accordingly, Ms. Eshbaugh was engaged in protected activity.

Moreover, the Township was aware of Ms. Eshbaugh's protected activity because the Township Manager and Township Solicitor attended meetings with Union representative Cord concerning Ms. Eshbaugh's proposed future position and wages with the Township. Also, the members of the Township Board of Commissioners were aware of Ms. Eshbaugh's protected activity because Solicitor Steele testified that she discussed the grievances and the negotiations concerning the hybrid position and wage increase with them. Also, the minutes from the July 2011 Township Board of Commissioners public meeting show that the Commissioners voted to post the job description and "to deny grievances 1-5-11 and 2-5-11 filed by Deanne Eshbaugh and manager [Verszyla] was directed to send letter to Mr. Cord." Accordingly, the Township knew of Ms. Eshbaugh's protected activity.

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 employee, 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.

The close timing of an employer's adverse action alone is not enough to infer animus, but when combined with other factors can give rise to the inference of anti-union animus. **Teamsters Local No. 764 v. Montour County**, 35 PPER 12 (Final Order, 2004); **AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry**, 16 PPER ¶ 16020 (Final Order, 1984). Adverse employer action closely following an employer display of union animus, further combined with an employer's failure to adequately explain its adverse actions or its shifting reasons for an adverse action, can support an inference of anti-union animus and may be part of the union's **prima facie** case. **Stairways, supra; Teamsters Local 312 v. Upland Borough**, 25 PPER ¶ 25195 (Final Order, 1994). Mere suspicion or conjecture is insufficient to sustain a discrimination charge. **Shive v. Bellefonte Area Board of School Directors**, 317 A.2d 311, 314 (Pa. Cmwlth. 1974).

In **Teamsters, Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order 1992), the Board stated that, under **Wright Line**, "once a **prima facie** showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity." **Perry County**, 23 PPER at 514. Upon the employer's offering of such evidence, "the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual." **Teamsters Local #429 v. Lebanon County**, 32 PPER ¶ 32006 at 23 (Final Order, 2000). "The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct." **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 at 64 (Final Order, 1992).

I conclude that the entire background of this case yields an inference of unlawful motive and that the Township failed to prove a legitimate business reason establishing that it would have taken such action against Ms. Eshbaugh even in the absence of her protected activity.

Early in 2011, Ms. Eshbaugh learned that Act 32 would effectuate a reduction in her job duties in 2012 and that the Township was considering reducing her to a part-time employe. Also early in 2011, the Township's auditor discovered discrepancies and errors in the accounting and record keeping of the Assistant Secretary. As a result of those errors, the Township sent Assistant Secretary Hill to training and hired an outside accounting firm to remedy the errors and perform the accounting duties. Then, in early May 2011, Assistant Secretary Hill resigned leaving a vacancy in the Assistant Secretary position. This was good news for Township Clerk Eshbaugh who was already concerned that she may have part-time or no work with the Township in seven months. Anxious to remain in full-time employment with the Township with benefits, Ms. Eshbaugh wanted to immediately secure the position of Assistant Secretary for herself. To that end, she caused a grievance to be filed on May 12, 2011, seeking to have the Township post and fill the position so she could apply for it.

Thereafter, during May and June 2011, Union Business Agent Ron Cord, on behalf of Ms. Eshbaugh, met with Solicitor Steele several times. Manager Verszyla attended at least one of these meetings because she knew the daily duties of both the Assistant Secretary and the Clerk positions. During these meetings, the parties discussed consolidating the duties of both positions and creating one hybrid position to be filled by Ms. Eshbaugh. The Assistant Secretary position had lost the accounting duties to the accounting firm Cottrill and Arbutina. The Clerk position lost earned income tax duties to Act 32's shifting of those responsibilities to the County. However, during the two months of negotiations, Ms. Eshbaugh's Union representative, Mr. Cord, consistently pressed the Township's representatives for a wage increase of approximately one dollar per hour.

At this time the Board of Commissioners believed that Ms. Eshbaugh would accept the hybrid position so that she and her husband could maintain their health benefits and her full-time employment status. In other words, the Commissioners felt that Ms. Eshbaugh should be grateful to keep her job and her benefits at the same rate of pay. However, after two months of pressing for a wage increase, the Commissioners also believed that, with her current Union representation, she would not accept the new hybrid position at the same rate of pay as her Clerk position. Accordingly, at the July public meeting, the

Board of Commissioners voted unanimously to post the Assistant Secretary position and deny both grievances.

Upset with Ms. Eshbaugh and her Union representative, Mr. Cord, the Township posted the Assistant Secretary position in a manner that ensured that she would not apply for it and, if she did, that she could not qualify for it. In the posting, the Township required that the candidate hold a Bachelor of Science degree in accounting. The Township knew that Ms. Eshbaugh does not hold such a degree. It is important to note that prior Assistant Secretary Hill did not hold such a degree, and she had trouble performing her job duties. Consequently, the Township has the managerial prerogative to establish qualifications for the position. However, the Township Manager, Solicitor and Commissioners never once indicated that Ms. Eshbaugh lacked the qualifications or competence to perform the duties of the Assistant Secretary sans the financial and accounting duties already performed by Cottrill and Arbutina. Rather, the Township discriminatorily structured the qualifications to exclude the application of Ms. Eshbaugh, as evidence by the fact that Melissa does not have a Bachelor of Science degree in accounting. Obviously the Township was willing to consider experience in lieu of a Bachelor of Science degree for everyone but Ms. Eshbaugh. The job posting should have included a clause indicating that experience in lieu of the degree would be considered, if they were not deliberately excluding Ms. Eshbaugh.

Moreover, since the Township eliminated the Clerk position and Ms. Eshbaugh, Melissa has been performing the remaining duties of the Clerk and the remaining duties of the Assistant Secretary, as proposed and negotiated for Ms. Eshbaugh by Mr. Cord. According to the job posting, the new Assistant Secretary, Melissa, is earning \$18.12 per hour. Ms. Eshbaugh was earning \$14.71 per hour as the Clerk and that was the pay at which the Commissioners wanted her to remain while performing the consolidated remaining duties of both positions. Melissa, therefore, is earning, and the Township is willing to pay her \$3.41 more than it was willing to pay Ms. Eshbaugh for performing the same consolidated duties. Ms. Eshbaugh and Mr. Cord were merely asking for \$15.71, still \$2.41 less than Melissa is receiving. And Melissa receives this higher wage instead of Ms. Eshbaugh even though Ms. Eshbaugh trained Melissa. Rather than communicate to Ms. Eshbaugh, through her Union representative, that they would give her the position at the same rate, they said nothing, rejected the entire proposal and ensured that someone else received the position. Although the position name did not change, the Assistant Secretary became the hybrid position proposed for Ms. Eshbaugh at an even higher rate of pay. And this is how the Township treated an eight-and-one-half-year employe.

In addition to the aforementioned evidence of anti-union animus, Commissioner Summers made anti-union statements. Commissioner Summers' testimony demonstrates that he was angry with the way Mr. Cord represented Ms. Eshbaugh in negotiating her employment status and grievance settlement. When pressed on cross-examination, Commissioner Summers admitted that he was upset with the way Local 66 handled the grievance negotiations and that Ms. Eshbaugh lost her job because of the way the Union handled the grievances. He also corroborated Ms. Eshbaugh's testimony that he indicated to her that she lost her job because of the grievances by stating: "that was my feeling that's what was going to happen. . . . Because I felt it was wrong." (F.F. 29; N.T. 124). Accordingly, Mr. Summers admitted on cross-examination that Ms. Eshbaugh lost her job because of the way her elected Union representative pursued and negotiated grievances and job security on her behalf. Adverse action against an employe because of the way that employe's Union representative handles negotiations for job protection constitutes discrimination against the employe. Therefore, the Township discriminated against Ms. Eshbaugh in violation of Section 1201(a) (3).

## 2. Inherently Destructive Conduct

Furthermore, I conclude that the Township's conduct in this matter was inherently destructive of employe rights. This Board has adopted the test set forth in **NLRB v. Great Dane Trailers, Inc.**, 388 U.S. 26, 87 S.Ct 1792 (1967). **AFSCME Council 13 v. Bensalem Township**, 19 PPER ¶ 19034 (Order Denying Application for Stay, 1988); **Chester County Deputy Sheriffs Ass'n v. Chester County**, 28 PPER ¶ 28045 (Final Order, 1997). In **Great**

**Dane**, the United States Supreme Court held that "[s]ome conduct, however, is so 'inherently destructive of employee interests' that it may be deemed proscribed without need for proof of an underlying improper motive." **Great Dane**, 388 U.S. at 33, 87 S.Ct. at 1797. If the conduct is inherently destructive, the employer has the burden of proving a legitimate business justification or of explaining its "actions as something different than they appear on their face." *Id.* **"And even if the employer does come forward with counter explanations for his conduct in this situation, the Board may nevertheless draw an inference of improper motive from the conduct itself and exercise its duty to strike the proper balance between the asserted business justifications and the invasion of employee rights in light of the Act and its policy."** *Id.* (emphasis added).

Although the record clearly supports an inference of improper motive in this case, the Township's conduct was inherently destructive of Ms. Eshbaugh's protected rights. Ms. Eshbaugh sought the aid, protection and expertise of her chosen, exclusive collective bargaining representative to protect and preserve the ultimate in terms and conditions of employment, i.e., employment itself. When she exercised those rights and her representative requested a wage increase for holding a hybrid position where about half the job duties were of the Assistant Secretary position which paid more, the Board of Commissioners decided to hire someone else at an even higher rate than was requested for the same hybrid position. The record and the statements by Commissioner Summers prove that the Township eliminated Ms. Eshbaugh because it disapproved of the negotiation and arbitration tactics of the bargaining agent engaged on her behalf.

Moreover, under the collective bargaining laws of this Commonwealth, Ms. Eshbaugh was not permitted to directly deal with her employer on matters of wages, hours and other terms and conditions of employment. She had no choice but to go through her Union to protect her employment and negotiate for the hybrid position. Rather than reward an eight-plus year employe who wanted to stay loyal to the Township, the Commissioner's ire at the bargaining representative caused them to set their sights upon Ms. Eshbaugh. The nexus between Ms. Eshbaugh's protected activity and her separation from the Township, without adequate explanation and with admissions from Commissioner Summers, strongly supports the conclusion that the Township discriminated against Ms. Eshbaugh. The Township's actions were so inherently destructive of Ms. Eshbaugh's protected rights that they bear their own indicia of intent, regardless and independent of an actual showing of improper motive. *Id.*

### **3. Independent Section 1201(a) (1) Violation**

The Township's actions in this case were also coercive to a reasonable employe thereby restraining him/her from seeking the advocacy of his/her Union for job protection. In **International Union of Operating Engineers, Local 66 v. Franklin Township**, 43 PPER 139 (Final Order 2012), the Board provided the analysis for an independent 1201(a) (1) as follows:

An independent violation of Section 1201(a) (1) arises where, in light of the totality of the circumstances, the employer's actions would have a tendency to coerce a reasonable employe in the exercise of protected rights. **Fink v. Clarion County**, 32 PPER ¶ 32165 (Final Order, 2001). Under the totality of circumstances, the employer's credible, legitimate, non-discriminatory reason for taking the challenged action may militate against the finding of coercion. **Pennsylvania State Troopers Association v. Pennsylvania State Police**, PF-C-09-83-E (Final Order, May 17, 2011), *affirmed sub nom.*, **Pennsylvania State Troopers Association v. PLRB**, \_\_\_ A.3d \_\_\_, 1082 C.D. 2011 (Pa. Cmwlth. March 5, 2012) (disciplinary investigation for violation of work rules does not coerce employes from exercising protected rights); **Pennsylvania Social Services Union Local 668 v. Commonwealth, Office of Vocational Rehabilitation**, 31 PPER ¶ 31127 (Final Order, 2000) (disciplinary action related to acts in defiance of the employer's instructions does not have a tendency to coerce the exercise of protected employe rights).

However, because motive is not an element of an independent claim of interference or coercion, **E.B. Jermyn Lodge No. 2 v. City of Scranton**, 38 PPER 104 (Final Order, 2007), the existence of a stated business reason for the employer's actions is not a dispositive bar to the finding of an unfair practice under Section 1201(a)(1). **PLRB v. Commonwealth, Office of Employment Security**, 16 PPER ¶ 16091 (Final Order, 1985). . . Thus, the pertinent inquiry, for an independent violation of Section 1201(a)(1), is whether the employer's actions, when viewed within the totality of the circumstances, would tend to influence a reasonable employee in deciding whether to assist or seek assistance from the union, or to pursue some other statutorily-protected activity. **City of Scranton, supra; Northwestern Education Association v. Northwestern School District**, 24 PPER ¶ 24141 (Final Order, 1993).

**Franklin Township**, 43 PPER at 511.

Here, the Union negotiated with the Township on Ms. Eshbaugh's behalf so she could maintain full-time employment at the Township. The Township did not like that the Union insisted on her receiving a one-dollar per hour increase when they felt she should be grateful to keep a job and her benefits. So instead of offering her the job at the same rate of pay, they laid her off and hired an outsider at an even higher rate of pay. Under the totality of the circumstances presented on this record, the Township's behavior towards Ms. Eshbaugh would coerce a reasonable employee from exercising protected rights guaranteed under PERA and the supporting case-law prohibiting direct dealing. After the Township eliminated Ms. Eshbaugh for using the grievance procedure and her Union to protect her future employment with the Township, a reasonable employee in Ms. Eshbaugh's position would not want to exercise the very basic of rights (to file and discuss grievances) for fear of repercussions if the Township were to subjectively dislike the Union's tactics or demands to settle the grievances. Accordingly, the Township independently violated Section 1201(a)(1) of PERA.

Due to the fact that Ms. Eshbaugh has found new employment and is not seeking reinstatement, the make-whole remedy will be limited accordingly.

#### CONCLUSIONS

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

1. Rochester Township is a public employer within the meaning of Section 301(1) of PERA.
2. The International Union of Operating Engineers, Local 66 is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Township has committed unfair practices in violation of Section 1201(a)(1) of PERA independently.
5. The Township has committed unfair practices in violation of Section 1201(a)(3) of PERA.
6. The Township has **not** committed unfair practices in violation of Section 1201(a)(5) of PERA.

**ORDER**

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

**HEREBY ORDERS AND DIRECTS**

that Rochester Township shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
2. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization.
3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:
  - (a) Immediately pay Deanne Eshbaugh and make her whole for all wages and benefits that she would have earned from the last date of employment (December 31, 2011) to the date of starting new employment (March 19, 2012), including but not limited to wage increases received by the bargaining unit during the backpay period, out of pocket dental, medical and optical expenses for herself and responsible family members, holiday pay and accrued sick and vacation time;
  - (b) Pay interest at the simple rate of six percent per annum on any and all backpay due Deanne Eshbaugh from the last date of employment until the date of starting new employment;
  - (c) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the Township's employes and have the same remain so posted for a period of ten (10) consecutive days; and
  - (d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

**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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixteenth day of September 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING :  
ENGINEERS LOCAL 66 :  
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**AFFIDAVIT OF COMPLIANCE**

Rochester Township hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (3) of the Public Employe Relations Act; that it has that it has paid, and made Deanne Eshbaugh whole for, all wages and benefits that she would have earned from the last date of her employment with the Township on December 31, 2011 until the start of her new employment on March 19, 2012, including but not limited to wage increases received by the bargaining unit during the backpay period, out of pocket dental, medical and optical expenses for herself and responsible family members that would have been covered during her employment, holiday pay and accrued sick and vacation time; that it has paid interest at the simple rate of six percent per annum on any and all backpay due Deanne Eshbaugh; that it has posted a copy of the decision and order as directed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

\_\_\_\_\_  
Signature of Notary Public