COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ANDRAY MCNAIR	:	
	:	
	:	
v.	:	CASE NO. PERA-C-14-14-E
	:	
	:	
SOUTHEASTERN PENNSYLVANIA TRANSPORTATION AUTHORITY	:	

PROPOSED DECISION AND ORDER

On January 15, 2014, Andray McNair (McNair or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Southeastern Pennsylvania Transportation Authority (SEPTA or Employer), alleging that SEPTA violated Section 1201(a)(1) through (5) of the Public Employe Relations Act (PERA or Act). Specifically, McNair alleged that SEPTA violated the Act by unilaterally modifying the collective bargaining agreement with regard to sick benefits, interfering with and dominating the Reform Party efforts to unite the local union, and discriminating and/or retaliating against him for engaging in protected activities.

On January 31, 2014, the Secretary issued a complaint and notice of hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating May 28, 2014, in Harrisburg as the time and place of hearing, if necessary. On April 23, 2014, SEPTA filed a Motion to Dismiss the unfair practices charge, alleging that each of Complainant's allegations fails as a matter of law. Complainant filed a response on April 28, 2014, opposing the Motion to Dismiss. On May 23, 2014, I deferred any ruling on the pending Motion to Dismiss until the time of the hearing.

The hearing was necessary and was held on May 28, 2014, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence. The Complainant is not an attorney and appeared unrepresented by counsel for the hearing. The parties filed post-hearing briefs in support of their respective positions on or about July 14, 2014.

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. SEPTA is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5-6)

2. Andray McNair was a public employe employed by SEPTA within the meaning of Section 301(2) of PERA. (N.T. 6)

3. SEPTA operates a mass transit system which provides transportation services to the public. (N.T. 110)

4. The Transport Workers Union of America, AFL-CIO, Local 234 (Union or Local 234) is the exclusive collective bargaining representative of the city transit employes of SEPTA. (N.T. 112, Complainant Exhibit 1)

5. McNair was a rail operator of SEPTA's Callow Hill District whose job duties required him to provide safe and courteous service to the public. He was also a member of Local 234. (N.T. 113)

6. McNair took medical leave at least three times during his employment with SEPTA. In August 2011, SEPTA's Assistant Director of Transportation Stephan Walters

issued McNair a medical directive to verify an illness in accordance with SEPTA's standard practice due to the amount of time McNair had been out of work. McNair reported to SEPTA's medical department for evaluation at that time, as directed. McNair did not raise any concerns at that time regarding SEPTA's authority to send him for a medical evaluation, nor did he or Local 234 file a grievance. McNair returned to work following the medical evaluation in 2011. (N.T. 114-115; Respondent Exhibit 1)

7. McNair went out on sick leave again in August 2013. On October 28, 2013, SEPTA's Director of Transportation Thomas Marcucci issued McNair another medical directive to report for an appointment on November 8, 2013 to assess his status. (N.T. 115; Complainant Exhibit 8)

8. Section 502(g) of the Collective Bargaining Agreement (CBA), which covers sick benefits, provides as follows: "[w]henever doubt or uncertainty shall arise concerning the nature or extent of an employee's disability, the Authority reserves the right to conduct such independent investigation or physical examination as it may deem necessary." (Complainant Exhibit 1, Section 502(g))

9. McNair did not report for the November 8, 2013 appointment. There was a discrepancy regarding the date because November 8, 2013 was not a Monday, as indicated on the medical directive. As a result, Marcucci subsequently issued a November 11, 2013 medical directive, which contained a new appointment date of November 20, 2013. (N.T. 57, 116-117; Complainant Exhibit 10)

10. The November 11, 2013 medical directive provides, in pertinent part, as follows:

> Dear Mr. McNair:
>
> According to our records, you have not been available for work due to an illness. It is necessary to assess your status; therefore you are hereby directed to report to the Medical Department for evaluation on the date and time listed below.
>
> ****
>
> **Please note: This appointment and all follow up appointments constitute a *DIRECTIVE* and you *must comply*. Failure to report and bring the proper documentation will result in the discontinuation of your sick leave and/or benefits and you will be dropped from the rolls of the Authority. You are responsible for any cost in obtaining this information.**
>
> If you have any questions about this matter or if you cannot come in person, please call (215) 580-7021...

The language contained in the November 11, 2013 medical directive is nearly identical to that contained in the initial directive dated October 28, 2013. (Complainant Exhibits 8 & 10)(Emphasis in original)

11. McNair did not report for the November 20, 2013 appointment. Instead, in response to Marcucci's original notice dated October 28, 2013, McNair sent an October 30, 2013 letter to Marcucci, which indicated in pertinent part as follows:

> Dear Mr. Marcucci:
>
> I received your letter by regular mail, and it contains requests, requirements, threats of benefit discontinuation, and termination if the letter is not followed.
>
> My position is that your office has over-stepped its contractual boundaries.

> The application for sick-benefits has four (4) sections, and Part III is completed by the Health Care Provider. All pertinent information is provided on the Authority's standard form.
>
> My health status is not the concern of the office of Director of Transportation. It is a contract violation and inappropriate to write an employee and command him out of his 'sick-bed' for unknown reasons.
>
> My sick benefits are outlined in Article V, Section 501 & 502, - within the contract. If necessary, we shall pursue this as an Unfair Labor Practice.
>
> I do not understand, nor agree, and will not be forced to follow terms outside of our contract...

(N.T. 57, 116-117; Complainant's Exhibit 9)

12. When McNair did not report for the November 20, 2013 appointment, he was subsequently dropped from the rolls for failing to follow a directive and abandoning his job. Marcucci directed McNair to report to the medical department while he was out sick as part of SEPTA's prior practice. Although McNair had a sick benefit application, it contained a general, unspecified condition of back pain which SEPTA wanted to verify. (N.T. 117-118; Complainant Exhibit 4; Respondent Exhibit 4)

13. In September 2013, McNair was running for Union office on a platform associated with what he called the Reform Party. However, he and the Reform Party were unsuccessful in the Union's election. Marcucci was aware that McNair was running for Union office. (N.T. 13-14, 20, 56-57, 118)

14. Marcucci did not direct McNair to report to the medical department for evaluation because he was running for election in the Union, nor did Marcucci take any action against McNair because of his Union activities. The campaign and election were over well before Marcucci sent the November 2013 directive. Over the years, SEPTA has directed numerous other employes to report to the medical department while the employe was out on sick leave. (N.T. 118-119; Respondent Exhibit 2)

15. McNair is not the only employe to be dropped from the rolls as a result of his failure to follow the medical directive. At least two other SEPTA employes have been similarly dropped from the rolls for the same reason. They were the only other employes who did not comply. (N.T. 120; Respondent Exhibit 3)

16. Local 234 filed a grievance on McNair's behalf protesting his separation from employment and alleging a violation of the CBA. The parties settled the grievance with the essential terms being that McNair would be subject to a medical examination, as well as a drug and alcohol test, before being reinstated to his position as a rail operator. McNair would be able to use any remaining sick benefit time for the period during which he was out of work. However, if McNair did not appear for the medical examination, he would remain dropped from the rolls. (N.T. 145-148; Respondent's Exhibits 6 & 10)

17. McNair also filed a grievance individually on or about November 24, 2013, protesting his separation from employment and alleging a violation of the CBA. Chad Cuneo, SEPTA's Labor Relations Manager, forwarded it to the Union and advised McNair of the same. The CBA contains a distinction between contractual grievances, which are governed by Section 201(a), and disciplinary grievances, which are governed by Section 201(b). In this case, the grievance fell under the contractual grievance procedure because it alleged a violation of the CBA. The CBA does not contain any provisions authorizing an individual to file a contractual grievance. However, Cuneo wanted to be responsive to McNair and felt like the issue could be resolved. (N.T. 145-149; Complainant Exhibit 2)

18. In response, McNair sent Cuneo a letter dated December 7, 2013, indicating that he would be representing himself and that Local 234 had purportedly not taken an interest in SEPTA's alleged CBA violation. (N.T. 149; Respondent Exhibit 11)

19. Cuneo subsequently responded to McNair and tried to set up an informal meeting where McNair could discuss his grievance with a senior director in an attempt to resolve it. Cuneo did not offer McNair a Labor Relations Step hearing because the CBA did not authorize an individual to file a contractual grievance. Likewise, Cuneo did not offer a Labor Relations Step hearing because an informal meeting had to occur first according to the terms of the CBA. Cuneo offered McNair several opportunities to meet for the informal hearing, but McNair refused and ultimately placed a number of conditions on such a meeting taking place, including an apology from Marcucci and that he be reinstated first. Cuneo advised that those terms were not acceptable, but he was still willing to facilitate an informal meeting with McNair and the senior director. (N.T. 150-155; Respondent Exhibits 7-9, 11-12; Complainant Exhibit 1)

20. On February 11, 2014, Cuneo forwarded the settlement agreement between Local 234 and SEPTA to McNair and advised that he wished to discuss a settlement of McNair's self-represented grievance with similar terms and conditions. McNair responded by email dated March 17, 2014 with terms that were different than the agreement between Local 234 and SEPTA, including a demand that SEPTA pay him a net amount of $3.5 million and be responsible for payment of all federal, state, and local taxes on the same. Cuneo informed McNair that this was neither acceptable, nor possible for SEPTA. (N.T. 155-157; Respondent Exhibits 10 & 13)

21. SEPTA followed the grievance process in McNair's case. Cuneo did not take any action against McNair because of his Union activities. SEPTA's policy and practice is to drop employes from the rolls due to any failure to report to the medical department during a sick leave, as it has done in the past. (N.T. 157-158)

DISCUSSION

In his charge, McNair alleged that SEPTA violated Section 1201(a)(1) through (5) of the Act by unilaterally modifying the CBA with regard to sick benefits, interfering with and dominating the Reform Party efforts to unite the local union, and discriminating and/or retaliating against him for engaging in protected activities. However, the refusal to bargain charge under Section 1201(a)(5) of the Act must be dismissed for lack of standing. As Hearing Examiner Lassi noted in **James A. Confer v. Bellefonte Area School District**, 36 PPER 135 (Proposed Decision and Order, 2005), SEPTA owes its duty to bargain to the Union, and not to individual employes such as McNair. Indeed, it is well settled that individual employes such as Complainant lack standing to prosecute a refusal to bargain charge. *Id.* citing **Towamencin Township**, 29 PPER ¶ 29059 (Final Order, 1998).

Similarly, the charge under Section 1201(a)(4) of the Act must also be dismissed because Complainant did not prove or allege that he signed an affidavit, petition, or complaint with the Board, or gave any information or testimony before the Board, prior to his termination by SEPTA. **Bellefonte Area School District**, **supra**. Once again, as Examiner Lassi noted, Section 1201(a)(4) only addresses discrimination against an employe for activity before the Board, and does not concern alleged discrimination against an employe for union activity that does not involve the Board's processes. *Id.*

Likewise, the charge under Section 1201(a)(2) of the Act fails as a matter of law. In his charge, Complainant alleged that SEPTA violated Section 1201(a)(2) in May 2013 when Marcucci bragged to employes that "[w]e (SEPTA) only do what the union allows us to do." The Board will find a violation of Section 1201(a)(2) where an employer creates a company union whose independence is subject to question because of managerial assistance to or involvement in it. **AFSCME District Council 88 v. Berks County Intermediate Unit**, 29 PPER ¶ 29098 (Proposed Decision and Order, 1998) citing **Montgomery County Intermediate Unit**, 17 PPER ¶ 17124 (Final Order, 1986). However, as SEPTA points out, PERA sets forth a four-month statute of limitations. 43 P.S. § 1101.1505; **Nyo v. PLRB**, 419 A.2d 244 (Pa. Cmwlth. 1980). Complainant did not file his charge until January 2014, which was at least

seven months after the alleged violation. Therefore, this portion of the charge is barred by the limitations period of the Act.

In any case, Complainant's Section 1201(a)(2) claim also fails for lack of proof. Indeed, Marcucci credibly denied making the alleged statement above. (N.T. 121). Further, the record contains absolutely no evidence whatsoever that SEPTA created a company union whose independence is subject to question because of managerial assistance to or involvement in it.

With regard to his Section 1201(a)(3) discrimination claim, the Complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. **Audie Davis v. Mercer County Regional Council of Government**, 45 PPER 108 (Proposed Decision and Order, 2014) citing **St. Joseph's Hospital v. PLRB**, 373 A.2d 1069 (Pa. 1977). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). 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. **Teamsters Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order, 1992). If the employer offers 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 (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. **Mercer County Regional COG, supra**, citing **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 (Final Order, 1992).

In this case, the Complainant has failed to sustain his burden of proving a prima facie case of discrimination. At the hearing, SEPTA stipulated that Complainant engaged in protected activity when he ran for Union office in the September 2013 election, which he lost. (N.T. 11-12). Likewise, Complainant established that Marcucci was aware of his protected activities in running for Union office. (N.T. 20-21). However, Complainant has not demonstrated that SEPTA engaged in conduct that was motivated by his involvement in protected activity. To be sure, the record is devoid of any substantial, competent evidence to support a finding that SEPTA was unlawfully motivated.

During the hearing, Complainant did not present any direct evidence of an unlawful motivation on behalf of SEPTA. The only evidence offered by Complainant to support his discrimination claim were alleged contractual violations relative to SEPTA's authority to issue a medical directive and the grievance procedure. However, the record shows that SEPTA did not repudiate the contract in any way whatsoever. To the contrary, Section 502(g) provides unequivocal support for SEPTA's right to issue a medical directive, as it states: "[w]henever doubt or uncertainty shall arise concerning the nature or extent of an employee's disability, the Authority reserves the right to conduct such independent or physical examination as it may deem necessary." (Complainant Exhibit 1). As such, it cannot be seriously disputed that, under the CBA, SEPTA has the right to order an employe on sick leave to report to the medical department to assess his medical status. In fact, Complainant readily conceded that he received a similar directive in 2011, which he did not dispute at that time. (N.T. 57-61; Respondent Exhibit 1). What is more, Complainant admitted that SEPTA has directed numerous other employes on sick leave to report to the medical department in the same fashion, including one employe who ran for Union office on the Reform Party ticket with Complainant and whose employment was not terminated. (N.T. 62-66; Respondent Exhibit 2). As a result, SEPTA treated Complainant consistently with respect to both his own prior sick leave and other employes who were on sick leave. Therefore, SEPTA's medical directive to Complainant does not support a finding of unlawful motivation.

Nor can it be said that SEPTA's conduct in dropping Complainant from the rolls after he failed to appear for the medical appointment was unlawfully motivated. The crux of Complainant's argument in this regard centers on the fact that there is no express

language in the CBA addressing SEPTA's authority to drop an employe from the rolls for failing to adhere to a medical directive. However, the Board has held that an employer's lack of just cause as an arbitrator might define the term will not support a finding of discriminatory motivation. **Utility Workers Union of America, AFL-CIO v. Hempfield Township Municipal Authority**, 41 PPER 11 (Proposed Decision and Order, 2010) citing **Bucks County Community College**, 36 PPER 84 (Final Order, 2005).

In the same vein, Complainant has not established that SEPTA was unlawfully motivated with regard to processing his grievance. Complainant alleged that SEPTA violated the CBA language surrounding the grievance procedure and testified to the same. However, I reject Complainant's testimony in this regard as not credible and not persuasive. Complainant maintained that SEPTA refused to meet with him to discuss his grievance, but on cross-examination he acknowledged that Cuneo contacted him several times in an effort to set up an informal meeting with the senior director. (N.T. 80-87; Respondent Exhibits 7-9). Complainant failed to respond to SEPTA's efforts to schedule a meeting and then refused to meet without conditions. Complainant admitted that the CBA only authorizes the Union to file a grievance, but still claimed he should have been able to skip steps in the contractual grievance process and proceed directly to a Labor Relations Step hearing. (N.T. 75). Despite Complainant's arguments, the record shows that SEPTA actually went out of its way to accommodate his complaints and meet with him at an informal meeting to resolve his grievance, even though SEPTA was under no obligation to do so. SEPTA even settled the Union's grievance with terms that would have reinstated Complainant to his job following a medical examination, as well as a drug and alcohol test, and offered the same terms to Complainant. (N.T. 87-91; Complainant Exhibit 3; Respondent Exhibit 10). On this record, it cannot be held that SEPTA was discriminatorily motivated in how it processed Complainant's grievance.

Finally, Complainant has alleged a violation of Section 1201(a)(1) of the Act. The Board has held that an independent violation of Section 1201(a)(1) will be found if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employes have been shown in fact to have been coerced. **Bellefonte Area School District, supra** citing **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985). In light of Complainant's refusal to follow SEPTA's medical directive, the authority for which is clearly and unequivocally set forth in the CBA, along with SEPTA's willingness to accommodate Complainant by attempting to arrange an informal meeting to resolve his grievance, despite the CBA language which only authorizes the Union to file a contractual grievance, his discharge would not tend to coerce other employes. Therefore, the Complainant's charge must be dismissed in its entirety.

CONCLUSIONS

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

1. SEPTA is a public employer within the meaning of Section 301(1) of PERA.

2. Andray McNair was a public employe within the meaning of Section 301(2) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. SEPTA has not committed unfair practices in violation of Section 1201(a)(1), (2), (3), (4), or (5) of PERA.

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 of unfair practices 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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this first day of August, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner