

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TRANSPORT WORKERS UNION :
OF AMERICA, LOCAL 282 :
 :
v. : Case No. PERA-C-13-236-E
 :
 :
BRISTOL TOWNSHIP :

PROPOSED DECISION AND ORDER

On September 23, 2013, the Transport Workers Union of America, Local 282, (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Bristol Township (Township), alleging that the Township violated sections 1201(a)(1), (2) and (5) of the Public Employe Relations Act (PERA).

On October 31, 2013, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the dispute through the mutual agreement of the parties and February 24, 2014, in Harrisburg was assigned as the time and place of hearing if necessary.

A hearing was necessary, but was continued to March 28, 2014, at the request of the Township without objection from the Union.

The hearing was held on the rescheduled day, at which time all parties in interest 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. Bristol Township is a public employer within the meaning of section 301(1) of PERA. (N.T. 6)
2. The Transport Workers Union of America, Local 282, is an employe organization within the meaning of section 301(3) of PERA. (N.T. 6)
3. The Union is the exclusive representative of a unit of Township's treatment plant employes. The Union and the Township have been parties to several collective bargaining agreements for the wages, hours and terms and conditions of employment of the employes. (N.T. 7, Joint Exhibit 1)
4. On March 1, 2013, the Township and Union entered into a settlement agreement related to the Township's February, 2012 random drug testing of Union members. The agreement included, *inter alia*, the Township's promise to follow and adopt the Commonwealth of Pennsylvania's Administrative Manual for Commercial Driver License (CDL) Drug and Alcohol Testing and Licensing Requirements (Administrative Manual) as the Township's mandated policy and procedure for drug and alcohol testing of bargaining unit members. (N.T. 7, Joint Exhibit 2).
5. The Administrative Manual sets forth the required procedures for drug and alcohol testing, including testing based on reasonable suspicion. The parties agreed that reasonable suspicion testing was to be done in a detailed manner, including the finding of reasonable suspicion by a supervisor or a manager who is trained in alcohol misuse and controlled substances. (N.T. 7, Joint Exhibit 2)
6. The Administrative Manual further stated that reasonable suspicion alcohol testing "is authorized only if the observations are made during, immediately before, or

immediately after the period(s) on the workday the employee is required to operate a commercial motor vehicle or perform safety sensitive functions. A written record of these observations must be prepared and signed by the supervisor/manager within 24 hours whether or not the employee tests positive." (N.T. 7, Joint Exhibit 2)

7. The Administrative Manual further stated that the supervisor should "[d]etermine **in-person** if an employee 'appears' to be under the influence of an alcohol beverage, drugs, including controlled substances and prescriptions, or both." (N.T. 7, Joint Exhibit 2, Emphasis in original)

8. The Administrative Manual further stated that the supervisor should follow a Reasonable Suspicion Checklist and a Visual Observation Checklist. (N.T. 7, Joint Exhibit 2)

9. On Thursday, June 6, 2013, John Cichonke, a bargaining unit member and a lift station mechanic in the Township's sewer department, called in sick due to a flare-up of his diagnosed condition of Trigeminal Neuralgia, which causes severe pain in his jaw. (N.T. 59)

10. On that same day, Cichonke left his house to pick up medicine from a local CVS drugstore. While at the CVS, Cichonke received a phone call from the president of his local Veterans of Foreign Wars (VFW) chapter, requesting assistance with paperwork in the VFW office. Cichonke, a past president of the VFW, stopped by the office on his way home from the CVS to assist. (N.T. 60)

11. Cichonke spent about thirty (30) minutes to an hour at the VFW assisting the president. (N.T. 67)

12. William McCauley III is the Township Manager. He has held that position since January 4, 2012. (N.T. 11)

13. McCauley was the Township's signatory to the March 1, 2013 grievance settlement agreement on the procedures for alcohol and drug testing. (N.T. 11)

14. On June 6, 2013, McCauley directed Project Manager/Operations Analyst Scott Swichar to investigate a phone call McCauley received that Cichonke was drinking alcohol at the VFW while out sick that day. (N.T. 24)

15. The Township did not create or maintain a record of that phone call to McCauley, contrary to the March 1, 2013 settlement agreement. (N.T. 24)

16. Swichar went to the VFW and called the Township's Human Resources Officer, Paula Kearns, to meet him at the VFW, which she did at approximately 1:15 pm. (N.T. 47-48)

17. Swichar gained entrance to the VFW, a private club, by stating that he was from the Township and wanted to use the club. That was not his true reason for entering the VFW. (N.T. 49-51)

18. During their tour of the VFW, neither Swichar nor Kearns observed Cichonke drinking. (N.T. 52)

19. Upon leaving the VFW, Swichar and Kearns encountered Cichonke in the VFW parking lot. Swichar believed Cichonke was under the influence of alcohol based on his observation that his face was flushed and red, and that his eyes were glassy. (N.T. 44)

20. Swichar made no written record of these physical observations of Cichonke's behavior. (N.T. 43)

21. Swichar is not trained in the physical, behavioral, speech and performance indicators of probable alcohol misuse required for supervisors to make reasonable suspicion determinations of alcohol misuse under the settlement agreement. (N.T. 46)

22. Swichar did not follow the procedures identified for reasonable suspicion testing in the Administrative Manual, nor did he utilize the reasonable suspicion observation checklist. (N.T. 26-27)

23. Following the encounter, Cichonke, fearing that he would be accused of drinking on his sick day, contacted his physician and requested a blood test for alcohol content. The test was performed on June 6, 2013 at 3:211 pm and did not detect the presence of alcohol. (N.T. 44, Union Exhibit 1)

24. On Friday, June 7, 2013, Cichonke was also on sick leave. (N.T. 30, Township Exhibit 1)

25. On Monday, June 10, 2013, upon the direction of Township Manager McCauley, Swichar contacted Cichonke via telephone and directed Cichonke to meet him that morning at a sewer pump station, where Swichar directed Cichonke into his vehicle, informed him that he was to take a Breathalyzer test, and drove him to the site where the Breathalyzer test was to be performed. (N.T. 38)

26. Cichonke objected to the test, but the Breathalyzer alcohol test was performed on June 10, 2013 at 8:04 am, and produced a negative result. The reason for the test identified on the Alcohol Testing Form is Reasonable Suspicion. (N.T. 7, 8, Joint Exhibits 3 and 4, p. 9)

27. On June 11, 2013, Cichonke filed a grievance against the Township, alleging that Swichar had "no just cause" to order Cichonke "to go to the Health Works to have a breathalyzer test given." (N.T. 9, Joint Exhibit 6)

28. On June 13, 2013, Swichar denied the grievance. (N.T. 9, Joint Exhibit 6).

29. On or about June 13, 2013, the Union, through its attorney, requested the reason for the Township's Breathalyzer testing of Cichonke on June 10, 2013; all documents related to the testing; and copies of forms completed by the Township as required by the drug testing protocol approved by both the Union and the Township under the settlement agreement. (N.T. 9, Joint Exhibit 5, p. 3)

30. The Township failed to respond to the Union's June 13, 2013 email, and produced no documents. The Union then sent a second request by email to the Township and its counsel on June 18, 2013. The Township failed (N.T. 9, Joint Exhibit 5, p. 1)

31. In response to the Township's refusal to respond to the first two requests, the Union sent a third request by email on September 13, 2013. In this third request, the Union reminded the Township of its first two requests. The third request also included an additional request for all personnel files maintained on Cichonke. The Township did not respond or produce any documents. (N.T. 9, Joint Exhibit 5, p. 1)

32. On June 18, 2013, Cichonke reported to work for the last time. (N.T. 8, Joint Exhibit 4 (a), p. 6)

33. On October 28, 2013, and January 10, 2014, Cichonke, with the assistance of his Union attorney, appeared in an adversarial hearing as a claimant for unemployment benefits before a Pennsylvania Unemployment Compensation Board of Review Referee. (N.T. 8, Joint Exhibits 4(a) and 4(b))

34. Cichonke's claim for unemployment compensation was based on his argument that he left employment for necessitous and compelling reasons due a combination of his health being at risk, the Township's unlawful drug and alcohol testing of him and the Township's failure to follow its owns rules on family and medical leave. (N.T. 8, Joint Exhibit 4(b), p. 25)

DISCUSSION

The Union's charge of unfair practices against the Township has three parts. They will be discussed separately.

Violation of Settlement Agreement

The first part of the charge is that the Township engaged in alcohol testing of John Cichonke in violation of the Township's recently adopted drug and alcohol testing policy. The policy was adopted as the settlement of the Union's grievance over random drug testing the Township did in February, 2012. In that settlement, the Township agreed that future drug and alcohol testing would only be done by trained supervisors who followed detailed procedures set forth in the Administrative Manual of the Commonwealth of Pennsylvania. The testing would only be done after a determination of probable suspicion by a supervisor trained in drug and alcohol misuse and detection of that misuse.

The Board has found that a public employer who repudiates a settlement agreement commits an unfair practice in violation of section 1201(a)(1) and (5) of PERA.

Pennsylvania State Troopers Ass'n. v Pennsylvania Labor Relations Board, 761 A.2d 645, 649 (Pa. Cmwlth 2000), citing **Millcreek Township School District**, 22 PPER 22185 (Final Order, 1991), *aff'd* 631 A.2d 734 (Pa. Cmwlth. 1993), appeal denied, 537 Pa. 626, 641 A.2d 590 (1994).

It is clear that the Township's actions on June 10, 2013 violated the settlement agreement. The clearest example of a violation was directing Scott Swichar to do the testing. Swichar was not trained in the physical, behavioral, speech and performance indicators of probable alcohol misuse required for supervisors to make reasonable suspicion determinations of alcohol misuse under the settlement agreement. From this violation of the policy flowed other violations, such as failing to follow the reasonable suspicion checklist.

The Township does not dispute that its managers failed to follow the procedures outlined in the alcohol and drug testing policy. The Township argues that it simply acted in a manner that was necessary to ensure that a Township employee did not pose a threat to the public as a result of possible intoxication. When Cichonke returned to work from sick leave on June 10, 2013, he was returning to his position of a safety lift mechanic, a position that required him to have the ability to safely operate Township vehicles and equipment. The Township argues that if it strictly adhered to the alcohol testing policy that it would have run the risk of jeopardizing public safety.

Workplace safety is a legitimate management prerogative. However, the Township's argument must be evaluated in the context of the parties' bargaining history. Before this recent incident, the Union and the Township went to great lengths to devise a mutually accepted alcohol and drug testing policy that would strike the right balance between management's interest in providing a safe workplace and an employee's interests in being free from unreasonable drug and alcohol testing. In their agreement, the parties devised a detailed policy to fulfill those goals.

In its post-hearing brief, the Township argued that it was unable to schedule the training for its supervisors between the March 1, 2013 settlement agreement and the June 10 testing of Cichonke. The Township points to the settlement agreement Appendix A which said the training was offered "on a quarterly basis." However, in the unfair practice hearing Township Manager McCauley merely testified that in those three months between March 1 and June 10, that "we just haven't gotten around to it yet." He did not offer an explanation of the dates the training was available, why the supervisors could not attend training on those dates or what efforts the Township made to schedule training for the supervisors.

Given the facts of record, it is necessary to conclude that the Township's actions on June 10 violated PERA. They were more than a *de minimis* variation from the new policy. Rather, as set forth above, the Township acted contrary to the policy in several

different ways that constituted a repudiation of the detailed protocol set forth in the agreement. As such, the Township's actions violated section 1201(a)(1) and (5) of PERA.

Remedy

The Union has proposed several remedies for the Township's repudiation of the settlement agreement for the drug and alcohol testing. Some of the remedies go beyond the Board's customary cease and desist orders. For example, the Union seeks a sixty (60) day posting of the proposed decision and order, well beyond the ten (10) day customary posting; a mailing of the Township's drug and alcohol testing policies and procedures to the Township's employees and carrying out several requirements in relation to the training of the supervisors.

Two principles guide us in establishing a remedy of an unfair practice violation. First, the Board has long held that the purpose of remedies under PERA is remedial and not punitive. **Pennsylvania Department of Education**, 15 PPER 15206 (Final Order, 1984). Second, the Board should be faithful to the terms of the agreement that has been violated. In this case, it is the March 1, 2013 settlement agreement.

Some of the remedies proposed by the Union do relate directly to the settlement agreement and do address a central problem in this case, namely the failure of the Township to train supervisors in drug and alcohol testing. This failure then led to the Township directing a supervisor, Scott Swichar, who was not trained in drug and alcohol testing, to investigate Cichonke first on his sick day and then on his return to work and not to follow the testing protocol.

Accordingly, in light of the facts of this case, the appropriate remedy here is one which will address the failure of the Township to train supervisors in drug and alcohol testing in a manner consistent with the drug and alcohol testing set forth in the Appendix "A" in the settlement agreement. This will include the Township immediately scheduling supervisors for training by a trainer approved by the Commonwealth of Pennsylvania. The other training related remedies proposed by the Union, such as the length of time of the training, are not set forth in Appendix A of the settlement agreement and are therefore not something that the Board can order if it is to be faithful to the terms of the agreement.

The Refusal to Produce Documents

The second part of the charge is that the Township has failed to produce information that the Union requested in connection with the Township's June 10, 2013 alcohol test of John Cichonke.

A public employer has a duty to provide a bargaining representative with information that is relevant to performing its functioning as the exclusive representative of the employees, including information necessary to assist in the processing of a grievance. **Commonwealth v. Commonwealth of Pennsylvania, PLRB**, 527 A. 2d 1097 (Pa. Cmwlth 1987); citing **NLRB v. Acme Industries Co.**, 385 U.S. 432, 436 (1967). The relevancy of the information is judged under a liberal, discovery-type standard. Whether particular information is relevant, "the Board need only find: (1) that the union is advancing a grievance which on its face is governed by the parties' agreement, and (2) that the information will be useful to the union." **Id**, citing **Acme Industries Co.**, at 43.

In the present case, the Union has satisfied the liberal discovery type standard of relevancy of **Commonwealth of Pennsylvania**, *supra* for the requested documents. The documents are all related to the Township's June 10, 2013 alcohol test of John Cichonke, a union member who has filed a grievance over being subjected to the alcohol test. The Union has also requested Cichonke's personnel files. The Township has refused to produce the documents, despite the Union's repeated requests.

The Township argues that even if the Board finds that the documents are relevant for a grievance, the charge is now moot because Cichonke has left the Township's employment. However, the grievance challenged the just cause for the June 10 testing. The

alleged unlawful drug and alcohol testing remained a live issue after Cinconke left employment because he, with the help of his Union, was seeking unemployment compensation benefits on the basis that he was forced to quit his job for several reasons, including the unlawful testing.

Based on these facts, the Union has shown the documents it has sought are still relevant to its duty as the collective bargaining representative . The failure to produce the documents is a violation of section 1201(a) (1) and (5) of PERA.

Section 1201(a) (2) Allegation

The third part of the charge is that the Township's actions violated section 1201(a) (2) of PERA, which prohibits a public employer from "[d]ominating or interfering with the formation, existence or administration of any employe organization." 43 P.S. 1101.1201(a) (2).

The Board has held that a public employer violates section 1201(a) (2) when it provides financial or administrative support to one employee organization and not to others. **Montgomery County Intermediate Unit**, 17 PPER ¶ 17124 (Final Order, 1986). In the present case, such facts are not present. Accordingly, this part of the charge charge will be dismissed.

CONCLUSIONS

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

1. Bristol Township is a public employer under section 301(1) of PERA.
2. Transport Workers Union of America, Local 282, (Union) is an employe organization under 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) and (5) of PERA.
5. The Township has not committed unfair practices in violation of Section 1201(a) (2) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA the Examiner

HEREBY ORDERS AND DIRECTS

that the Township shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in PERA.
2. Cease and desist from refusing to bargain collectively in good faith with an employe representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.
3. Take the following affirmative action:
 - (a) Deliver to the Union all documents related to Cichonke's alcohol testing; copies of forms completed by the Township as required by the alcohol testing protocol and all personnel files maintained on Cichonke;

(b) Immediately schedule supervisors for training for drug and alcohol testing by trainers approved by the Commonwealth of Pennsylvania;

(c) Produce certified proof of the supervisors' completion of the training for drug and alcohol testing;

(d) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employees and have the same remain so posted for a period of ten (10) consecutive days; and

(e) 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eleventh day of February, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner