COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DANIEL C. ANGELUCCI	:	
	:	
	:	
v.	:	CASE NO. PERA-C-15-104-E
	:	PERA-C-15-151-E
	:	PERA-C-15-292-E
COMMONWEALTH OF PENNSYLVANIA	:	
PENNSYLVANIA BOARD OF PROBATION AND PAROLE	:	

PROPOSED DECISION AND ORDER

On April 21, 2015, Daniel C. Angelucci (Angelucci or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania, Pennsylvania Board of Probation and Parole (Commonwealth or PBPP), alleging that the Commonwealth violated Section 1201(a)(1) through (4) of the Public Employe Relations Act (PERA or Act). Specifically, Angelucci alleged that the Commonwealth violated the Act by making him use his personal leave time and car to attend a Board hearing while permitting other Commonwealth employes to attend Board hearings on work time, which included travel time, reimbursement for tolls, and use of employer vehicles. The charge was docketed at PERA-C-15-104-E. On April 30, 2015, the Secretary of the Board (Secretary) issued a Complaint and Notice of Hearing, designating November 30, 2015, in Harrisburg, as the time and place of hearing, if necessary.

On May 29, 2015, Angelucci filed a second charge of unfair practices with the Board against the Commonwealth, alleging a violation of Section 1201(a)(1) through (4) of the Act for disparate treatment relative to his three-day suspension, a missed meeting, attempting to use a fax machine for personal reasons, and being required to provide a doctor's note in connection with his use of sick leave. The charge was docketed at PERA-C-15-151-E. On June 11, 2015, the Secretary issued a Complaint and Notice of Hearing, designating January 11, 2016, in Harrisburg, as the time and place of hearing, if necessary.

On October 16, 2015, Angelucci filed a third charge of unfair practices with the Board against the Commonwealth, alleging that the Commonwealth violated Section 1201(a)(1) through (4) of the Act by removing him from his position as a Parole Agent 2 in retaliation for his protected activity. The charge was docketed at PERA-C-15-292-E.[1] On November 10, 2015, the Secretary issued a Complaint and Notice of Hearing, designating December 21, 2015, in Harrisburg, as the time and place of hearing, if necessary.

The charges were subsequently consolidated, and the hearing was continued multiple times at the request of each party and over the objection of the opposing party. Hearings were ultimately held on February 23, 2016 and July 19, 2016, during which the parties were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence.[2] The Commonwealth filed a post-hearing brief on October 3, 2016, while the Complainant filed a post-hearing brief on October 6, 2016.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

[1] The charge was initially docketed at PERA-C-15-20823-E as a result of the Board's migration to a new electronic database system, but was amended shortly thereafter to reflect the number set forth above.

[2] The Commonwealth made a motion to quash two subpoenas at the hearing on February 23, 2016. By letter dated March 7, 2016, I denied the Commonwealth's motion to quash the subpoenas and directed the Complainant to immediately file with the Board a petition seeking enforcement of any subpoenas necessary to prosecute his unfair practice charges, consistent with Section 1604 of the Act. The Board did not receive any such petition seeking enforcement of subpoenas.

FINDINGS OF FACT

1. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4)

2. Daniel Angelucci was, at all relevant times, a public employe within the meaning of Section 301(2) of PERA. (N.T. 4)

3. Angelucci worked for the PBPP as a Parole Agent 2 for approximately 13 years before being terminated from his position on October 9, 2015. (N.T. 180-182; Exhibit C-11)

4. Parole agents are generally responsible for supervising offenders in the criminal justice system, who are on parole and serving their sentence, in essence, on the street. As part of that supervision, the parole agents must document their contacts with offenders using a system called J-Net where they enter the offender's full name, date and times of the contact, and a description of what was discussed. The note is then entered into a Commonwealth-wide system which all law enforcement can access. (N.T. 23)

5. There are three basic levels of supervision, which vary the contact requirements based on whether the offender is classified as maximum, medium, or minimum. The parole agents are also required to make collateral contacts, which also vary according to the offender's supervision grade and which consist of speaking with someone who can provide useful information, such as neighbors. The contact requirements increase as the level of supervision increases from minimum to medium, and ultimately to maximum. (N.T. 24-25)

6. Angelucci was one of several parole agents in 2015 assigned to the West 1 unit in Philadelphia, which was under the charge of Parole Supervisor Stanley Wilder. (N.T. 25, 104, 124)

7. On April 22, 2014, Wilder completed an Employee Performance Review (EPR) of Angelucci, which covered the period of May 1, 2013 through May 1, 2014. The EPR consisted of an analysis of six job factors, including job knowledge/skills, work results, communications, initiative/problem solving, interpersonal relationships/equal employment opportunity, and work habits. Wilder rated Angelucci as satisfactory or above for each of the job factors, except for work results and work habits, where he rated Angelucci as "needs improvement." In the work results section, Wilder commented as follows: "during this period you have had difficulty in meeting the expected quantity of offender field and collateral contacts to meet the agency standard." In the work habits section, Wilder commented that "further attention is needed in regards to planning of your work to meet or exceed the agency standard pertaining to supervision contact requirements." Wilder rated Angelucci overall as satisfactory, noting that "it is imperative that to maintain this overall rating further attention is required in addressing the job factors in this EPR that received less than satisfactory." (N.T. 173; Exhibit R-1)

8. On December 1, 2014, Angelucci received a counseling session from Wilder relative to the previous month of November, which indicated in relevant part the following:

> A counseling session was held this date to discuss your failure to adhere to PBPP Procedure 4.01.06, Supervision, Levels of Supervision.
>
> Specifically 2 medium and 17 minimum supervision cases were found to not be in compliance of the minimum supervision contact requirements set forth in the above procedure. You were instructed to review Procedure 4.01.06 and to maintain assigned cases within the guidelines of the minimum supervision contact requirements established within the procedure/policy.
>
> Failure to adhere to these instructions and [PBPP] policy can result in disciplinary action...

(N.T. 128-132; Exhibit C-7)

9. On February 17, 2015, Angelucci received another counseling session from Wilder, which provided in relevant part as follows:

> A counseling session was held this date to discuss your failure to adhere to PBPP Procedure 4.01.06, Supervision, Levels of Supervision.
>
> Specifically, upon review of the monthly detail report for the month of January-1 maximum, 7 medium and 8 minimum supervision cases were found to not be in compliance of the minimum supervision contact requirements set forth in the above procedure. You were instructed to review Procedure 4.01.06 and to maintain assigned cases within the guidelines of the minimum supervision contact requirements established within the procedure/policy.
>
> Failure to adhere to these instructions and [PBPP] policy can result in disciplinary action...

(N.T. 132-133; Exhibit C-8)

10. On April 16, 2015, Angelucci filed a Petition for Decertification with the Board alleging a thirty percent showing of interest among the employes that the certified bargaining representative is no longer their representative for purposes of collective bargaining.[3] [4] (N.T. 182; PERA-D-15-101-E)

11. On April 24, 2015, Wilder completed another EPR of Angelucci, which covered the period of May 1, 2014 through May 1, 2015. The EPR once again consisted of an analysis of six job factors, including job knowledge/skills, work results, communications, initiative/problem solving, interpersonal relationships/equal employment opportunity, and work habits. Wilder rated Angelucci as satisfactory or above for each of the job factors, except for work results and work habits, where he rated Angelucci as "needs improvement." In the work results section, Wilder commented as follows: "you have often had difficulty in meeting the expected quantity of offender field and collateral contacts to meet the agency standard." In the work habits section, Wilder commented that "improvement of organizational and/or time management skills is needed in order to meet or exceed the agency standard for supervision contact requirements." Wilder rated Angelucci overall as satisfactory, noting that "you have met the basic standards of your assignment in a very broad sense. Improvement and further attention is required in addressing the job factors in this EPR that received less than satisfactory." (N.T. 151-160; Exhibit C-10)

12. On May 12, 2015, Angelucci received a three-day suspension with a final warning for failing to attend a mandatory meeting scheduled for March 17, 2015 and failing to inform his supervisor that he would not be attending. He also received the discipline for using a Commonwealth fax machine on March 17, 2015 to send a fax to an insurance company, which identified himself as a public adjustor, representing the interests of an individual claiming water damages at a Philadelphia address. (Exhibit R-2)

13. On May 26, 2015, Angelucci received a third counseling session from Wilder, which provided in relevant part as follows:

> A counseling session was held on this date to discuss your failure to adhere to PBPP Procedure 4.01.06, Supervision, Levels of Supervision and 4.01.03, Supervision, Initial Supervision Requirements.
>
> Specifically, upon review of the monthly detail report for the month of March-2 maximum, and 6 minimum supervision cases were found to not be in

[3] The certified bargaining representative is the American Federation of State, County and Municipal Employees (AFSCME or Union). *See* PERA-R-777-C.

[4] Processing of the Decertification Petition has been held in abeyance pursuant to the Board's blocking charge policy, *see* Charley v. PLRB, 583 A.2d 65 (Pa. Cmwlth. 1990), pending disposition of the instant unfair practices charge docketed at PERA-C-15-292-E.

compliance of the minimum supervision contact requirements set forth in the above procedure. You were instructed to review Procedure 4.01.06 and to maintain assigned cases within the guidelines of the minimum supervision contact requirements established within the procedure/policy.

In addition, Offender Carey, M #004GL was released on 3/26/15 and you did not conduct a 10 day home visit in accordance with the procedure set forth above. You were instructed to review Procedure 4.01.03 and ensure the appropriate contact is made when the offender is newly released.

Failure to adhere to these instructions and [PBPP] policy can result in disciplinary action.

(N.T. 133-135; Exhibit C-9)

14. A grievance ensued over Angelucci's May 12, 2015 three-day suspension, which proceeded to a step 2 grievance meeting on August 6, 2015 before the Eastern Joint Area Committee (EJAC), which consists of three representatives from AFSCME and three representatives from the Commonwealth. The Accelerated Grievance Procedure form, which was signed by AFSCME and the Commonwealth, indicated the following: "The 3 day (sic) with final warning will be converted to an ADLS [Alternative Discipline In Lieu of Suspension] 2. The grievant will be made whole for 3 days. The ADLS 2 will be removed from the grievant's OPF (sic) on March 12, 2016 if there are no similar incidents of failure to follow instruction or direction." (N.T. 197-201; Exhibit C-13)

15. On August 6, 2015, Melvin McMinn, Chief of the PBPP's Division of Labor Relations, sent a letter to Angelucci, which indicated, in pertinent part, the following:

Dear Mr. Angelucci:

This letter is official notice of Alternative Discipline in Lieu of Suspension (ADLS), as provided for in Article 28, Section 7, of the AFSCME Agreement. This action is a Level 2 ADLS. While there will be no impact on your pay, seniority, or other benefits, this action is equivalent to a 3 day disciplinary suspension from your position of Parole Agent 2, Regular Civil Service status.

This action is being taken as a result of your violation of the following Pennsylvania Board of Probation and Parole (PBPP) policies and procedures:

i. Violation of the Pennsylvania Board of Probation and Parole (PBPP) Procedure 1.01.03, Code of Conduct, Section B, 3, and your Failure to Follow Instructions. Specifically, on March 9, 2015, you received an email from your supervisor, Mr. Stanley Wilder, informing you that a unit meeting was scheduled for 12 pm on March 17, 2015 and that your attendance at this meeting was mandatory. You did not attend this meeting nor did you inform Mr. Wilder that you would not be attending.

ii. Violation of the PBPP Code of Conduct, Section A, 6; Management Directive 515.18; and Management Directive 205.14, 5, A. Prohibition of Activities Not Specifically or Directly Connected with the Official Business of the Commonwealth on Commonwealth Property. Specifically on March 17, 2015 you used the Commonwealth fax machine located in the Philadelphia District Office, West Division, in an attempt to send a fax to insurance companies identifying yourself as the Public Adjuster representing the interests of an individual claiming water damages at 1740 E. Washington Lane, Philadelphia, PA.
Note that either infraction standing alone would warrant this level of discipline.

A Pre-disciplinary Conference was scheduled on April 23, 2015, and you did not attend.

> This is a **FINAL WARNING.** Repeated offenses of the same or similar nature that occur at any point after the date of your receipt of this letter will have the probable consequence of your removal from employment...

(N.T. 222; Exhibit R-2)(Emphasis in original)

16. During his employment as a parole agent, Angelucci was permitted to use a Commonwealth vehicle. In doing so, he was required to fill out a Monthly Automotive Report STD-554, wherein he had to record all of the miles associated with his use of the vehicle, including the mileage to and from home. (N.T. 188-197)

17. Angelucci was also required to fill out Daily Supervision Reports (PBPP-145) which detailed his daily activities as a parole agent. (N.T. 262; Exhibit R-10)

18. Angelucci logged a number of business miles driven on his Monthly Automotive Report for the dates of June 1, 2, 4, 8, 15, and 29, 2015, but indicated that he was in the office all day for each of those dates on his Daily Supervision Reports. (N.T. 262-265; Exhibits R-9, R-10)

19. On October 8, 2015, Angelucci had a meeting with the PBPP Philadelphia District Director, Ed Furlong, who advised Angelucci he was being removed from his position, handed him a letter, and escorted him out of the building. (N.T. 186-187)

20. The October 8, 2015 letter, which was signed by Richard M. Dash, Director, Office of Administrative Services, for Michael L. Green, Chairman of the PBPP, provided, in pertinent part, as follows:

> Dear Mr. Angelucci:
>
> This is to advise you that you are being removed from your position of Parole Agent 2, regular Civil Service status, effective at the close of business on October 9, 2015.
>
> This action is being taken as a result of your:
>
> 1. **Violation of the Pennsylvania Board of Probation and Parole (PBPP) Procedure 4.01.04, Supervision, Case Record Contents when you failed to enter offender contact notes (JNET259 – Record of Interview) within the three (3) business day requirements:** Specifically, there were nine (9) offender contacts documented on your PBPP-145s during the month of June 2015 that, as of October 7, 2015, have not had JNET entries submitted for them.
>
> **2. Violation of the PBPP Procedure 4.01.06, Levels of Supervision:** Specifically, there were 15 offender cases assigned to you during the month of June 2015 that lacked documented offender contacts made within the requirements of the level of supervision.
>
> **3. Violation of the PBPP Procedure 1.01.03, Code of Conduct:** Specifically, you falsified your June 2015 Daily Supervision Reports (PBPP-145s) and/or your June 2015 Monthly Automotive Report (STD-554). Specifically, there were six (6) instances where you recorded on your STD-554 that you had driven in your state assigned 2014 Chevy Impala, Unit #4023294, License Plate No. DNE-5515 between 12-33 business miles on dates where you recorded on your PBPP-145s that you were in the office during all Regular Time/Duty Hours.
>
> Additionally, on two (2) occasions you noted on your PBPP-145 "PM SERVICE VEHICLE," however, the Department of General Services has no record of any maintenance being needed, requested or performed on your state assigned 2014 Chevy Impala, Unit #4023294, License Plate No., DNE-5515 reported on July 1, 2015 as having only 4,764 miles since being assigned to you on October 9, 2014.

> Note that any of these infractions standing alone would warrant this level of discipline.
>
> A Pre-Disciplinary Conference was held with you on September 21, 2015 and the response you provided was not acceptable. Prior related discipline that was considered in establishing this level of penalty includes:
>
> -August 6, 2015 you were given an Alternative Discipline In-Lieu of Suspension (ADLS) Level 2 with Final Warning for Violation of the PBPP Code of Conduct, Management Directive 205.14, Management Directive 515.18 and your Failure to Follow Instructions.
>
> -November 4, 2004 you were given a 3 Day Suspension for violation of the PBPP Code of Conduct and PBPP Operations and Procedures Manual via falsification of a Delinquency Request Form for an offender and for failing to properly supervise an offender...

(Exhibit C-11)(emphasis in original)

DISCUSSION

In all three of his charges, Angelucci alleged that the Commonwealth violated Section 1201(a)(1) through (4) of the Act[5] by engaging in disparate treatment and/or taking adverse employment action against him in retaliation for his protected activity. The Commonwealth, for its part, contends that Angelucci has not met his burden of proving a prima facie case of discrimination under the Act and that it had legitimate, nondiscriminatory reasons for its actions.

Preliminarily, the charge under Section 1201(a)(2) of the Act for all three cases, including PERA-C-15-104-E, PERA-C-15-151-E, and PERA-C-15-292-E, must be dismissed as a matter of law. 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). The allegations contained in the specification of charges for all three cases are simply not sufficient to prove a violation of this Section. Nor did Complainant offer any evidence to establish a violation of Section 1201(a)(2).

It is well settled that the analysis for proving discrimination under Section 1201(a)(3) is the same as it is under Section 1201(a)(4) of the Act. Teamsters Local 429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000). In a Section 1201(a)(3) or (4) 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

[5] Section 1201(a) of the Act provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act. (2) Dominating or interfering with the formation, existence or administration of any employe organization. (3) 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. (4) Discharge or otherwise discriminating against an employe because he has signed an affidavit, petition or complaint or given any information or testimony under this act. 43 P.S. § 1101.1201.

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 addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. City of Philadelphia, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities-for example, whether leading organizers have been eliminated; the extent to which the adversely affected employes engaged in union activities; and whether the action complained of was "inherently destructive" of employe rights. City of Philadelphia, *supra*, *citing* PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, Teamsters Local 764 v. Montour County, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employe engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. Berks Heim County Home, 13 PPER ¶ 13277 (Final Order, 1982).

The charge in PERA-C-15-104-E must be dismissed because the Complainant has not sustained his burden of proving a prima facie case of discrimination under Section 1201(a)(3) or (4). In this case, the Complainant alleged that he was subpoenaed to appear before the Board for a hearing in a separate matter, which occurred on April 8, 2015. The Complainant alleged that the Commonwealth made him use his personal leave and car to attend the hearing, but allowed several other PBPP employes to attend the hearing on work time, which included travel time, reimbursement for tolls, and use of employer vehicles. The Complainant averred that this represented disparate treatment in retaliation for his "union activity." The record shows that Complainant received a subpoena to testify before the Board at a hearing scheduled for April 8, 2015 in PERA-C-14-176-E and appeared in that capacity, which is an activity protected under the Act. (N.T. 210-211; Exhibit C-1). Likewise, it cannot be disputed that the Commonwealth had knowledge of this protected activity as several PBPP management employes were present for that hearing on April 8, 2015. However, the Complainant has not demonstrated that the Commonwealth treated him disparately in retaliation for his protected activity. Indeed, the record is completely devoid of any evidence whatsoever that other PBPP employes were permitted to attend the hearing on work time, which included travel time, reimbursement for tolls, and use of employer vehicles, as alleged by the Complainant.[6] As a result, the charge in PERA-C-15-104-E will be dismissed.

Next, the charge in PERA-C-15-151-E must also be dismissed because the Complainant has not sustained his burden of presenting a prima facie case. In PERA-C-15-151-E, the Complainant alleged that he was given a three-day suspension without "just cause," as a result of missing a unit meeting and attempting to use a fax machine for personal reasons, which he alleged were not violations of the CBA, in retaliation for his "union activity." Likewise, the Complainant alleged that he was ordered to produce a doctor's note after being off work for sick leave, after one day, in violation of the CBA, and received a counseling session "for field contacts," both of which occurred in May 2015, which he averred to be disparate treatment for his "union activity."

[6] At the close of Complainant's case-in-chief, the Commonwealth made a motion to dismiss the charge at PERA-C-15-104-E for a failure to sustain a prima facie case, to which Complainant's counsel had no objection. (N.T. 235-236).

Complainant failed to allege with any specificity what his "union activity" was in this charge. At the hearing, he specifically relied on his decertification petition, which he filed on April 16, 2015. (N.T. 182-184). This was clearly protected activity under the Act. Likewise, the Commonwealth had knowledge of his decertification petition. In fact, the Commonwealth does not dispute that Complainant has satisfied the first two elements of the discrimination test in its brief. (*See* Employer brief at p. 15). As a result, the issue hinges on the third element of the test for discrimination, i.e., whether the Commonwealth had an unlawful motive relative to the actions complained of in the charge. Complainant did not present any direct evidence of unlawful motive during his case-in-chief. Instead, the Complainant relies on a number of factors, which, he argues, support an inference of unlawful motive, including timing, several alleged contractual violations, and disparate treatment. However, none of these factors support an inference of unlawful motive on behalf of the Commonwealth.

First of all, the timing of the events here does not support an inference of unlawful motive. While the Complainant attempts to show that he received a counseling session for his failure to adhere to the PBPP's field contact requirements on May 26, 2015, shortly after he filed the decertification petition on April 16, 2015, the record shows that the Commonwealth was concerned about his failure to adhere to the field contact requirements as far back as April 22, 2014. Indeed, Wilder completed an EPR on that date, which covered the preceding year, and which specifically documented Complainant's shortcomings relative to these requirements in multiple places. What is more, Complainant received counseling sessions for the same reason in December 2014 and February 2015, which was well before he filed the decertification petition. Thus, the timing of the events here militates against rather than in favor of a finding that the May 26, 2015 counseling session was a result of the Complainant's decertification petition. *See* Peter Glasser v. Pennsylvania State System of Higher Education, California University, PERA-C-10-269-E (Proposed Decision and Order, 2011) *citing* Delaware County Prison Employees Independent Union v. Delaware County, 28 PPER ¶ 28005 (Final Order, 1996)(no discriminatory intent found where the genesis of the employer's conduct predated the protected activity on the part of employes).

In any event, even if the timing did support an inference of unlawful motive, the other factors which Complainant relies upon to support an inference of unlawful motive are not sufficient to establish a prima facie case for discrimination. Specifically, the Complainant avers that he was given a three-day suspension for missing a meeting and attempting to use a fax machine for personal reasons, which he alleged to be in violation of the CBA. Likewise, the Complainant claims that the Commonwealth forced him to provide a doctor's note after being out sick for only one day, which was another alleged violation of the CBA. The Complainant points to these alleged contractual violations as evidence of unlawful motive. 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).

Indeed, it is far from clear that the Commonwealth violated or repudiated any CBA provisions in this regard. As the Commonwealth points out, with regard to the missed meeting, Complainant never claimed that he actually attended the meeting or did not have notice of the same. To the contrary, he conceded that the meeting was mandatory and that he did not inform his supervisor that he would not attend. (N.T. 220). Complainant relied upon a CBA provision in Section 5, Article 6 which contains a requirement of two-week's notice in the event of a schedule change, but later acknowledged that provision does not apply to parole agents who have employe controlled hours, which are governed by a separate side agreement containing no such two-week requirement. (N.T. 212, 215-217; Joint Exhibit 1, Exhibit R-6). To uphold the Complainant's position, I would have to determine that the side agreement does not apply to parole agents in this situation. However, this determination is best left for an arbitrator. While the Commonwealth still may have violated the CBA in some manner, I am unable to discern any clear repudiation or violation which would support an inference of unlawful motive. *See* Wyoming Valley West Education Ass'n & Linda Houck & Joann Prushinski v. Wyoming Valley West School District, PERA-C-13-360-E, (Proposed Decision and Order, 2015).

The same result must obtain with regard to the Complainant's allegation relative to his use of the fax machine. Complainant presented no testimony regarding his personal use of the fax machine. As a result, the charge must be dismissed for lack of proof. Even if Complainant had testified that he used the fax machine, the CBA contains a provision providing for "[r]easonable use of telephones for local calls on personal business by employees" in certain instances. (Joint Exhibit 1, p. 131). As the Commonwealth points out, the CBA says nothing about the use of fax machines to perform outside employment. Thus, to sustain the Complainant's position, I would have to determine whether his use of a fax machine and representation that he was an adjustor in this instance was reasonable, a determination best suited for an arbitrator. As previously set forth above, I am unable to discern any inference of unlawful motive in this regard.[7]

Further, the Complainant has not established any disparate treatment to support an inference of discriminatory intent. There is no evidence of any other employes using a fax machine for personal use. Nor is there evidence that any PBPP employe was not disciplined for missing a meeting and failing to inform his or her supervisor. While Complainant presented the testimony of Keith Grube, who indicated that he had missed a meeting and was not disciplined, Grube also acknowledged that he was sick when he missed the meeting and informed his supervisor beforehand that he would not be able to attend. (N.T. 66-67). The Complainant has not established any disparate treatment with regard to the May 2015 counseling session either. The Complainant did not testify that he actually made the field contacts at issue. Instead, he testified that he complained to his supervisor that he had too much work to do. (N.T. 170, 202). As the Commonwealth points out, however, his workload was not significantly different from any other agent in the unit. (N.T. 170; Exhibit C-4, C-5, C-6). And, his supervisor never needed to counsel the agents with the highest workloads. (N.T. 166).[8] As such, the charge docketed at PERA-C-15-151-E will be dismissed.

Finally, the charge docketed at PERA-C-15-292-E must also be dismissed as the Complainant did not sustain his burden of proving a prima facie case for discrimination. In this charge, the Complainant alleged that he had filed several "complaints" with the Board, along with a decertification petition. However, the Complainant focused solely on his decertification petition at the hearing and in his post-hearing brief. (N.T. 182-185). Once again, this was clearly protected activity, of which the Commonwealth had knowledge, as it concedes in its brief. As a result, the issue depends on whether the Commonwealth was unlawfully motivated when it discharged the Complainant from his position as a Parole Agent 2 with the PBPP in October 2015.

As was the case above, the Complainant has not submitted any direct evidence of unlawful motive. Instead, the Complainant again relies on a number of factors, which, according to Complainant, support an inference of discriminatory intent, including disparate treatment, a failure to adequately explain the adverse action, pretext, and timing. However, none of these factors support an inference of unlawful motive on behalf of the Commonwealth.

Indeed, the record does not reveal any disparate treatment with regard to the Complainant. Although Complainant tried to show that every agent was behind with regard to his or her offender contacts, there is no evidence whatsoever that any of these agents were also accused of falsifying their Daily Supervision Reports and/or Monthly Automotive Reports, like Complainant. The Commonwealth's removal letter clearly sets out both of these as specific reasons for the discharge here. Likewise, as previously set forth above, Complainant tried to rely on an Audit Report to show deficiencies in other agents'

[7] The same result must also obtain with regard to the Complainant's allegation relative to the doctor's note. The CBA contains a provision, which permits the Commonwealth to require a doctor's note for absences of less than three days where the Commonwealth has reason to believe the employe has been abusing sick leave. (Joint Exhibit 1). This determination is, again, best left for an arbitrator. In any case, there is no evidence that Complainant incurred any discipline with regard to the doctor's note. And, Complainant's counsel agreed to a dismissal of that portion of the charge at the hearing. (N.T. 237-238).

[8] Although Complainant relies upon an Audit Report admitted as Exhibit C-3 to show that other agents were deficient in their workload and not disciplined, the record shows that the Audit Report was only used as a sampling of an agent's caseload to assist the supervisor with making improvements in his unit. The Audit Report was not used as a source of discipline for any agents in the unit. (N.T. 77-79, 109, 164).

workloads; however, the Audit Report was not used as a source of discipline for any PBPP employes, but rather as a tool for the supervisor to improve his unit's performance. The record shows that Complainant had a long history of problems with regard to his offender contacts, dating all the way back to at least April 2014, for which he received counseling in December 2014, February 2015, and May 2015 before failing to meet the requirements again in June 2015.[9] There is simply no way to conclude that there were any similarly situated PBPP employes in light of this history, coupled with the falsification allegations.

In addition, the Complainant has not demonstrated a failure to adequately explain the adverse action or pretext in connection therewith. The record shows that Complainant logged a number of business miles driven on his Monthly Automotive Report for the dates of June 1, 2, 4, 8, 15, and 29, 2015, but indicated that he was in the office all day for each of those dates on his Daily Supervision Reports. Complainant asserted that he had simply made an error when filling out these forms, which he was always allowed to correct in the past. (N.T. 189-190). However, Complainant offered no credible or persuasive explanation whatsoever for how "an error" could have resulted in discrepancies for six separate dates in June 2015. Complainant testified that there are occasions where he would be in the office all day and still have to use his vehicle for job duties, such as performing mail runs, going to lunch, and traveling to and from court. (N.T. 194-196). However, he testified that he could not recall if he did any of those things in June 2015. (N.T. 194). Without more, I am unable to conclude that Complainant performed those duties on or even near the dates in question, as is necessary to discredit the Commonwealth's explanation for the discipline. It would be speculative at best to draw such an inference in this regard, and this testimony does not constitute substantial competent evidence to refute the Commonwealth's explanation.[10]

In any case, even if these factors did support an inference of unlawful motive, I credit the Commonwealth's proffered reasons for the adverse employment action here, namely the Complainant's failure to meet his offender contact requirements and the alleged falsification of Complainant's Monthly Automotive Reports and Daily Supervision Reports. To be sure, the record shows a long history of problems with regard to Complainant's offender contacts, dating all the way back to at least April 2014, for which he received counseling in December 2014, February 2015, and May 2015 before failing to meet the requirements again in June 2015. Notably, the Complainant has not averred that he did, in fact, meet those requirements in any of those periods, including the most recent in June 2015. As the Commonwealth notes in its brief, the mission of the PBPP is to supervise offenders released from incarceration, (N.T. 242), and that Complainant had repeatedly demonstrated an inability to maintain those standards. Although Complainant argues that he had been improving with regard to those deficiencies in recent months by not having quite as many deficient contacts, such an argument is better reserved for a just cause analysis in the context of grievance arbitration. Indeed, I have credited the testimony of McMinn, who persuasively testified that neither the Complainant's decertification petition, nor his prior unfair practice charges with the Board were

[9] As this long history of deficiencies predates the protected activity relied on by Complainant, the timing of the discharge in October 2015, which was approximately six months after the decertification petition was filed, militates against rather than in favor of a finding that the discharge was a result of the petition's filing. PASSHE, supra.

[10] The Complainant also points to the August 6, 2015 grievance settlement, which converted his three-day suspension with final warning to an ADLS, as evidence of unlawful motive. The crux of this argument is that the ADLS removed the final warning portion of the discipline such that Complainant would not have progressed to that point in the disciplinary process. The Commonwealth counters that the grievance settlement did not remove the final warning portion of the discipline, as evidenced by McMinn's August 6, 2015 letter to Complainant, which memorialized the events and which included the final warning. The Commonwealth asserts that the final warning remained viable given that Complainant did not file an additional grievance upon receipt of McMinn's August 6, 2015 correspondence, which included the final warning. Once again, however, I am unable to discern any unlawful motivation based on this evidence. Even if the Complainant's position is accepted, such that his final warning should have been removed in connection with the ADLS, 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).

involved in the recommendation to discharge the Complainant. (N.T. 268-269).[11] In the same vein, the record shows that Complainant had discrepancies for six separate dates in June 2015 between his Monthly Automotive Reports and Daily Supervision Reports, which he could not explain in these proceedings.[12] It is clear from the record that McMinn believed the Complainant had falsified those Reports. Accordingly, the Commonwealth's proffered reasons for the discharge are accepted as credible and Complainant's argument that the proffered reasons were pretextual is rejected.[13] As such, the charge in PERA-C-15-292-E will be dismissed.

CONCLUSIONS

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

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

2. Daniel Angelucci was a public employe within the meaning of Section 301(2) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The Commonwealth has not committed unfair practices in violation of Section 1201(a)(1) through (4) 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 in PERA-C-15-104-E, PERA-C-15-151-E, and PERA-C-15-292-E.

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 30th day of December, 2016.

PENNSYLVANIA LABOR RELATIONS BOARD

_____
John Pozniak, Hearing Examiner

[11] Incidentally, the Complainant has offered no theory or explanation for why the Commonwealth would be unlawfully motivated to retaliate against him for filing a petition to decertify AFSCME, which is especially curious given that there is no rival petition accompanying the decertification.

[12] At the hearing on July 19, 2016, I provisionally admitted McMinn's testimony regarding the notes from the pre-disciplinary conference, to which Complainant lodged a hearsay objection. (N.T. 266-268). The Complainant's objection is hereby sustained.

[13] The Complainant has not alleged an independent violation of Section 1201(a)(1) in PERA-C-15-104-E, PERA-C-15-151-E, or PERA-C-15-292-E.