

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WESTMORELAND COUNTY COURT RELATED :
EMPLOYEES ASSOCIATION :
 : CASE NO. PERA-C-17-87-W
v. :
 :
 :
 :
COUNTY OF WESTMORELAND and :
WESTMORELAND COUNTY SHERIFF :

PROPOSED DECISION AND ORDER

On April 7, 2017, Westmoreland County Court Related Employees Association (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the County of Westmoreland (County) and the Westmoreland County Sheriff (Sheriff) violated Section 1201(a)(1), (3) and (5) of the Public Employee Relations Act (PERA).

On April 26, 2017, the Secretary of the Board issued a complaint and notice of hearing, in which the matter was assigned to a pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating June 16, 2017, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was necessary and was held on June 16, 2017, in Greensburg, before the undersigned Hearing Examiner. The hearing was transferred from Pittsburgh to Greensburg by agreement of the parties. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed its post-hearing brief on August 21, 2017. The County filed its post-hearing brief on September 29, 2017. By letter dated October 3, 2017, the Sheriff joined the County's post-hearing brief.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9).
2. The Sheriff is a public employer within the meaning of Section 301(1) of PERA. (N.T. 9).
3. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8-9).
4. The County and the Sheriff are joint employers. (N.T. 9).
5. Stephen Felder has been an employe in the Sheriff's Department since 1994. He is a Deputy Sheriff with the rank of Corporal. (N.T. 52).

6. For the two years prior to March 28, 2017, Felder was assigned to Family Court building security. (N.T. 52-53, 55).

7. Felder is President of the Association. He has been the President of the Association since its inception approximately ten years ago. (N.T. 54).

8. The Association represents court-related and court-appointed employees in two separate units. Relevant to this matter, the court-related unit includes non-professional employees of the Sheriff among other employees. The court-appointed unit includes non-professional Adult Probation employees among other employees. (N.T. 54; PERA-R-07-455-W (Court-Related), PERA-R-07-456-W (Court-Appointed)).

9. Felder, in his role as President, handles grievances from both the court-related employee unit and the court-appointed employee unit. (N.T. 54).

10. On March 28, 2017, Felder authorized a grievance to be filed on behalf of probation officer aides. It was filed by probation officer aides around 11:30 A.M. with the County's Human Resources Department. (N.T. 59-60, 102; Association Exhibit 7).

11. In January of 2017, the Sheriff's Department including Lieutenant Izzo was informed by Sharon Bold, Director of the Probation Office, and Amy DeMatt, the Court Administrator of problems in the holding cell in the Courthouse. The problems in the holding cell included the safety of probation officer aides who had experienced threatening and hostile behavior from criminal defendants held in the holding cell while the probation aides were completing duties in the holding cell. In late January, 2017, Bold and DeMatt had a meeting with Lieutenant Izzo and Captain Mermon about issues probation aides were having in the holding cell. Izzo followed up with DeMatt about her concerns, and on March 8, 2017, DeMatt issued a memorandum to Izzo and Mermon which detailed her concerns about the holding cell. (N.T. 22-27, 110-115; County Exhibit 1, Association Exhibit 5).

12. After the January meeting, Felder's name was brought up as a possible employee who could be assigned to the holding cell to partially address some of the issues raised by Bold and DeMatt because of his experience. (N.T. 153, 167).

13. In response to the concerns about the holding cell raised by Bold and DeMatt, Lieutenant Izzo made the decision to transfer Felder to the holding cell in the afternoon of March 28, 2017. Izzo made the decision in consultation with Captain Mermon. Felder was chosen because of his long experience with inmates and his physical size. Izzo believed he was the best man for the job. Sheriff Jonathan Held approved the decision to transfer Felder to the holding cell that same day. (N.T. 115, 130-131, 135, 155).

14. Izzo was not aware of the grievance filed by the Association when he made the decision to transfer Felder to the holding cell. Sheriff Held was not aware of the grievance when he approved the transfer of Felder. (N.T. 116-117, 147, 155).

15. At approximately 1:30 or 1:45 P.M. on March 28, 2017, Felder received a call from Lieutenant Izzo in which Izzo told Felder that he was being moved to the holding cell. (N.T. 60).

16. On March 30, 2017, Felder's job location was moved to the holding cell. (N.T. 61-62).

17. Deputy Sheriffs are periodically assigned to the holding cell as a form of informal discipline. (N.T. 69-70).

DISCUSSION

In its charge, the Association alleged that the County and the Sheriff violated Section 1201(a) (1), (3), and (5) of the Act when Felder, the Association President, was transferred to holding cell duty after a grievance was filed on March 28, 2017.

In a Section 1201(a) (1) and (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 matter, the Association has not met its burden of establishing a *prima facie* case. It is not contested that Felder engaged in a protected activity when he authorized a grievance to be filed. However, the record in this matter does not support a conclusion that the employer knew of the grievance when the decision to transfer Felder was made because neither Lieutenant Izzo nor Sheriff Held were aware of the grievance on March 28, 2017.

The Association argues that the testimony of Felder and Deputy Zanarini support a conclusion that Izzo knew of the grievance when he made the decision to assign Felder to the holding cell. Specifically, the Association points to N.T. 62 and N.T. 96 where testimony from Felder and Zanarini put forth that Izzo mentioned the grievance when Felder asked Izzo why he was being assigned to the holding cell on March 30, 2017. However, Izzo denies mentioning to Felder about the

grievance on March 30th (N.T. 120) and, considering the record as a whole, including the demeanor of the witnesses on the stand, I find that it is more likely that Izzo did not mention the grievance on March 30, 2017.

The Association also argues that it could be inferred from the record that the Sheriff's department would have known about the grievance due to some communication that would have occurred due to the regular contact between the County's Human Resources Department and the Sheriff's Department. However, the burden in proving the *prima facie* case is the Association's, and I find that they have not provided sufficient evidence to make an inference from the record that either Izzo, Mermon or Held had knowledge of the grievance when the decision to transfer Felder was made. Therefore, there has been no violation of Section 1201(a)(3).

The Association has also alleged an independent violation of Section 1201(a)(1). Section 1201(a)(1) prohibits an employer from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this Act." 43 P.S. §1101.1201(a)(1). An employer commits an independent violation of section 1201(a)(1) "where in light of the totality of the circumstances the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights." Fink v. Clarion County, 32 PPER ¶ 32165 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employes have in fact been coerced. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985); Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER ¶ 97 (Final Order, 2004). If the employer's conduct was not coercive, then no violation of Section 1201(a)(1) may be found. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, *supra*.

Nor may a violation of section 1201(a)(1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. Temple University, 23 PPER ¶ 23118 (Proposed Decision and Order, 1992), *affirmed on another ground*, 25 PPER ¶ 25121 (Final Order 1994); Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989). However, if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 1201(a)(1) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order, 1995).

In this matter, I find that the record supports a conclusion that the transfer of Felder to the holding cell has a tendency to coerce a reasonable employe in the exercise of protected rights. In its brief the Association states that it is clear from the "totality of circumstances" that the transfer of Felder tended to "coerce and punish the Association and its members, via President Felder, from taking lawful action to address labor issues via grievances under PERA and their CBA." (Association's Brief at 11). I agree. Two important facts support the conclusion that the transfer of Felder to the holding cell would have the tendency to coerce a reasonable employe in the exercise of protected rights. First, the transfer of Felder was decided upon and communicated to Felder within hours of the grievance being filed. This extremely close concurrence in time would naturally

create a supposition in the mind of a reasonable employe that the two actions - the grievance followed by the transfer - were causally connected. Second, the holding cell assignment was generally considered to be a punishment shift. In other words, the Sheriff would periodically assign deputy sheriffs to the holding cell as unofficial discipline for some infraction. Thus, a reasonable employe would assume that the transfer to the holding cell was punishment for filing a grievance.

However, that is not the end of the independent Section 1201 (a) (1) analysis as the Sheriff and County have presented evidence of a strong legitimate business interest that outweighs any coercive effect the transfer of Felder may have had. The legitimate interest in this matter is that the Sheriff was responding to problems in the holding cell raised by the Court Administrator and Parole Office when he approved the decision to transfer Felder, who is an experienced Deputy Sheriff and considered by the Sheriff to be proper for the position, to the holding cell. Importantly, the concerns that the Sheriff addressed when transferring Felder to the holding cell were raised by an outside department and not the Sheriff himself. That is, the Sheriff did not himself identify the issue he claimed to address by transferring Felder to the holding cell. This fact strongly supports the conclusion that the business interest in this matter was substantial and not pretext for transferring Felder. This action, assigning experienced employes to areas of concern, is well within the normal course of business for an employer, and I find that the legitimate business interest outweighs any coercive effect. See Pleasant Valley School District, 49 PPER ¶ 18 (Proposed Decision and Order, 2017). Therefore, there has been no independent violation of Section 1201(a) (1).

Finally, the Association argues that the Sheriff and County violated Section 1201 (a) (1) and (5) of the Act by refusing to bargain collectively in good faith with the employe representative. To support its charge under Section 1201 (a) (5), the Association argues in its Brief: "Here the County/Sheriff revealed their lack of good faith in processing the grievance by retaliating against the Association through Felder by making the reassignment." (Association's Brief at 16). I find that this argument is an attempt by the Association to restate their retaliation claim under Section 1201 (a) (3), which was disposed of above. The Association has not cited any precedent which stands for the proposition that retaliation against a union member for filing a grievance is *per se* lack of good faith bargaining sufficient to establish a Section 1201 (a) (5) charge, and I will not reach such a conclusion in this matter.

Thus, for the reasons stated above, the County and the Sheriff have not violated Section 1201 (a) (1), (3) and (5) of PERA. As a result, the charge will be dismissed and the complaint rescinded.

CONCLUSIONS

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

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

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

3. The Association is an employe organization within the meaning of Section 301(3) of PERA.

4. The Board has jurisdiction over the parties hereto.

5. The Sheriff and the County have not committed unfair practices in violation of Section 1201(a)(1), (3) 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 is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirtieth day of October, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner