COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 33 LOCAL 427	:	
v.	:	CASE NO. PERA-C-17-325-E
CITY OF PHILADELPHIA	:	

PROPOSED DECISION AND ORDER

On November 13, 2017, AFSCME District Council 33, Local 427 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Philadelphia (City) violated Section 1201(a)(1) and (2) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that, in September 2017, the City intimidated and retaliated against supporters of Union Vice President Omar Salaam by transferring Union members to "break up the clique."

On December 6, 2017, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on March 14, 2018, in Harrisburg. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. On May 8, 2018, the Union filed its post-hearing brief. The City filed its post-hearing brief on June 11, 2018.

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

FINDINGS OF FACT

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)

3. The Bureau of Sanitation (Sanitation Division) is part of the City's Streets Department. There are seven areas or districts within the Sanitation Division across the City, designated one through seven. (N.T. 104-106)

4. Keith Warren is the Deputy Commissioner of the Streets Department in charge of the Sanitation Division for the City. Deputy Commissioner Warren oversees the operating budget, staffing and equipment, cleaning operation, the sanitation enforcement unit and anything else involved in the operation of the Sanitation Division. (N.T. 103-106)

5. To save money during a time of budget deficits, the Streets Department extended the useful life of sanitation vehicles instead of replacing them on schedule. Many vehicles became maintenance problems

which caused a truck shortage. The equipment shortage was one reason that the Sanitation Division needed employes to work overtime to complete collection demands. The Sanitation Division of the Streets Department was experiencing cost overruns from overtime. (N.T. 18-19, 104-105)

6. During the last budget cycle, the City decided to replace old vehicles and return to the normal schedule for replacement. The lead time for a new truck is six months to one year. The City ordered approximately 135 new trucks. (N.T. 104-106)

7. In 2017, the City identified problems with productivity and attendance. Another reason contributing to the need for overtime operations was employe productivity deficits and attendance problems. Many senior employes were using a lot of unscheduled sick and vacation time and staffing levels were too low for safe or productive operations. (N.T. 106)

8. Each crew on a designated route is expected to collect a minimum weight of material to finish the route. In some areas, crews collected below the minimum weight and performed below the minimum production level. Overtime is more manageable when everyone meets the minimum production requirements. (N.T. 106-107)

9. When the number of available trucks began to decrease, the City stopped hiring new employes as veteran employes left or retired, which it had done with a full fleet of operable trucks. The City allowed a reduction in the work force until the City began receiving new trucks.[1] (N.T. 107)

10. Area 1 (or District 1-A) had developed the worst attendance and productivity levels than any other District in the City. (N.T. 107)

11. To address the productivity deficits, the Streets Department developed a matrix for production by estimating operational levels, the number of trucks per day and the allowable percentage of employes that could be out on leave on any given day while maintaining safe and effective operations. (N.T. 108)

12. The City performed a full-scale investigation of the attendance problems. The Commissioner of the Streets Department, Deputy Commissioner in charge of the Sanitation Division, Keith Warren and several other Human Resources employes travelled to all the districts and informed employes of the productivity deficits caused by employes using excessive unscheduled sick leave and by taking vacations during times when the Sanitation Division could not adjust for their absence. Management notified employes of the trends and patterns they discovered. A high percentage of employes used up all their accrued sick leave and continued to take unscheduled sick absences. Management re-issued copies of the attendance policy and explained to the employes

[1] I credit Deputy Commissioner Warren's testimony that employes were not sitting around idle because there were not enough trucks. I resolve the conflict in testimony in favor of Deputy Commissioner Warren who refuted the testimony of the Union's witness that employes were idle because of the truck shortage. I credit Deputy Commissioner Warren's testimony that the reduction in the work force was commensurate with the equipment deficits resulting in employes having work without idle time.

that those who were violating the policy were subjecting themselves to possible discipline. (N.T. 108-109)

13. Employes with accrued vacation time may take it if they follow procedure. An employe is expected to complete a leave request slip and submit it to his/her supervisor, wait for the supervisor to check the scheduling with respect to the calendar and expected attendance, and wait to receive the slip back with the supervisor's signature of approval. (N.T. 119, 126)

14. Management asked the employes for their help in trying to plan doctors' appointments in advance to allow the supervisors to plan for their absence. Management notified employes during these meetings that the problem was very serious and it had to be addressed. Some districts improved, but District 1-A did not improve. As a result, Deputy Commissioner Warren decided to implement a mass transfer in District 1-A. (N.T. 109-110)

15. The collective bargaining agreement (CBA) allows the City to require an employe to work two hours of mandatory overtime per day up to four days per week and as much as eight hours on Saturday. Overtime needs are also met by recruiting volunteers. Most overtime work is performed on a voluntary basis. When there are insufficient volunteers to complete the work, which occurred often in District 1-A, the Sanitation Division invoked mandatory overtime in order of reverse seniority per the CBA. Employes are given one excuse per week not to work mandatory overtime. (N.T. 112-113; Joint Exhibit 1)

16. When an employe in the Sanitation Division is temporarily assigned to another district on overtime, that time is charged to the employe's home district. District 1-A, with the largest attendance problems, received overtime employes from other districts to meet required productivity levels. That overtime was charged to the other districts and not reflected in District 1-A. The District 4 employes were reassigned on overtime to help complete the work in District 1-A. (N.T. 137-139)

17. Deputy Commissioner Warren asked Kenneth Purvis, the supervisor for Area 1, and his staff, to generate a list of veteran employes who had excessive accrued leave time, excessive unscheduled absences, low productivity and attendance problems. As a result of that list provided by Mr. Purvis, Deputy Commissioner Warren learned that there were a lot of senior employes in District 1-A, who accrued large amounts of time, who were absent a lot because they were using up their time as they approached retirement. This practice resulted in low attendance at the start of the work day leaving insufficient staff to complete the routes in that District. Operations are structured to absorb a 10% daily absence rate. District 1-A had significantly more than the allowable 10% absence rate. Deputy Commissioner Warren also learned that there were employes who presented for work every day but they did not load enough material on the trucks, and he learned that there were employes who were not staying for mandatory overtime. (N.T. 11-13, 91-92, 94, 97, 101, 110-113, 126, 140; City Exhibit 2)

18. Deputy Commissioner Warren decided to transfer a large concentration of people who were calling off in District 1-A and spread them out across other districts so that excessive absences would not be concentrated in one district. Two-to-three employes off in a district is better than 40 employes off in that district, where the work cannot be completed. These transfers were motivated by operational needs and

concerns and not for discipline. Deputy Commissioner Warren assumes all employes are Union members, and he does not know specifically which individuals are in the Union. His transfer decision was based solely on operational needs. Approximately 20 of the employes on the list prepared by Mr. Purvis were transferred from District 1-A. (N.T. 111-112, 115, 137, 142; City Exhibit 2)

19. Deputy Commissioner Warren and his management team met with Union leadership and discussed the transfers it deemed necessary. Management also considered hardship appeals from individual employes and, as a result, reversed some prior transfer determinations. (N.T. 114-115)

20. In September 2017, Darrell Bassett was the Union steward in Area 1. On or about September 1, 2017, Mr. Purvis informed Mr. Bassett and all employes in the District that management intended to transfer certain employes to other areas. There is a past practice/agreement between the Union and management not to transfer elected Union officials. In a meeting with Union leadership, Deputy Commissioner Warren agreed not to transfer elected Union officials so he waited until the Union elections results were obtained. Mr. Bassett was previously on the transfer list, but he was not re-elected, so he was transferred. (N.T. 13-15, 57, 93, 114-115)

21. Mr. Bassett submitted a hardship appeal stating that his hardship was location, not the one-hour difference in his shift. Based on his hardship appeal, Deputy Commissioner Warren transferred him only three blocks from his original assignment in District 1-A. Deputy Commissioner Warren was unaware that, by transferring Mr. Basset, it would affect his ability to work overtime, due to his personal responsibilities. (N.T. 144-145)

22. Deputy Commissioner Warren was unaware of any "clique" of Union supporters or activities. He transferred Mr. Bassett because he contributed to the work outages in District 1-A, by taking unscheduled sick time to the point of going into unpaid status as a result of his using up all of his accrued time. Mr. Bassett was disciplined for his leave abuse. (N.T. 145-146)

DISCUSSION

The Union claims that the mass transfer of employes in Area 1 was in retaliation for working to the CBA regarding mandatory overtime and supporting Union Vice President Omar Salaam in violation of Section 1201(a)(1) and (2). The Union argues that the mass transfers were a form of discipline motivated by anti-union animus, citing St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). (Union's Post-hearing Brief at 6). The Union maintains that neither the City's sick leave policy nor the transfer provision in the CBA provide that transfers are an appropriate form of discipline. However, the Union did not properly claim a cause of action for discrimination under Section 1201(a)(3) of PERA. Although the term "retaliation" is used in the specification of charges, there is no reference to Section 1201(a)(3) in either the specification of charges, the front of the charge form, where causes of action are selected, or the attached affidavits.

In Greater York Professional Fire Fighters and EMTs v. Spring Garden Township, York Area United Fire and Rescue Department, 41 PPER 5 (Final Order, 2010), the Board held as follows:

> The Union's Charge filed on May 8, 2009 did not allege a violation of Section 6(1)(e) of the PLRA. Although the Union's exceptions do allege a violation of Section 6(1)(e), they were received by the Board on May 29, 2009, which is more than six weeks after the alleged unilateral change in the sick leave policy. As such, the Union cannot amend its Charge to allege a violation of Section 6(1)(e) of the PLRA as that allegation is untimely. **Moreover, the Union's allegation of a failure to bargain in the specification of charges is insufficient to effectively charge a violation of Section 6(1)(e) of the PLRA where the Union neither checked off a violation of Section 6(1)(e) on the charge form, nor referenced that provision in its specification of charges**.

Spring Garden Township, 41 PPER at 13-14 (emphasis added). Accordingly, reference to the term "retaliation" in the specification of charges without reference to Section 1201(a)(3) in the specification of charges and without selecting that section on the face of the charge form is insufficient to preserve a cause of action under that Section. The City, in this manner, was not provided with adequate notice to defend against the elements of a discrimination claim. Also, neither the City nor the Board have any way of knowing whether the Union even wanted to file a claim under Section 1201(a)(3) of PERA simply by mentioning the term "retaliation."

Additionally, the record does not support a finding that the City violated Section 1201(a)(2). This Section provides that a public employer is prohibited 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 interpreted this statutory provision as prohibiting a public employer from forming a so-called "company union." Gerald Boling v. Commonwealth of Pennsylvania, Department of Public Welfare, Mayview Hospital, 16 PPER ¶ 161679 (Final Order, 1985). The charge does not allege any facts, and the record does not contain any facts, that could support a finding that the City ever attempted to dominate, influence, control or interfere with Union officials or operations, either generally or with respect to the mass transfers.

Under Section 1201(a)(1), a public employer is prohibited from "[i]nterfering, restraining, or coercing employes in the exercise of the rights guaranteed in Article IV of this Act," where Article IV lists protected activities. 43 P.S. § 1101.1201(a)(1). In pursuing a claim under Section 1201(a)(1), the Union has the burden of proving the following:

> [I]n 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); Northwest Area Educ. Ass'n v. Northwest Area Sch. Dist., 38 PPER 147 (Final Order, 2007). Under this standard, the complainant does not have a burden to show improper motive or that any employes have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v.

> Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order, 2004). However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER 26155 (Final Order, 1995).

Pennsylvania Association of Staff Nurses and Allied Professionals v. Temple University Health System, 48 PPER 54 at 217(Proposed Decision and Order, 2016). The employer's motive or intent is irrelevant, and even an inadvertent act may violate Section 1201(a)(1) of PERA if it would tend to coerce or interfere with employes' exercise of protected rights. Erie Education Association v. Erie City School District, 41 PPER 115 (Final Order, 2010). Although the existence of retaliatory motive is not necessary to prove a violation under Section 1201(a)(1), evidence of motive is admissible and probative in considering the totality of the circumstances. Faculty Federation of Community College of Philadelphia Local 2026 v. Community College of Philadelphia, 35 PPER 134 (Proposed Decision and Order, 2004).

Under the totality of circumstances in this case, the City's mass transfer of employes from District 1-A did not have a tendency to intimidate or coerce reasonable employes regarding the exercise of their protected rights where, on balance, the City's legitimate (in fact desperate) operational needs significantly outweigh any tendency to coerce employes.

The Union consistently characterizes the transfers as discipline. The transfers, however, were not disciplinary in nature. They were an exigent operational necessity. I have credited the testimony of Deputy Commissioner Warren over all other witnesses. I based this determination on his presence, command, knowledge and understanding of the information that he presented, the decisiveness and lucidity with which he presented his testimony, his conduct and demeanor on the witness stand as well as his confident explanation of his thorough investigation into the productivity problems experienced in the Sanitation Division. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994). Accordingly, I have based most of the findings of fact herein on his testimony.

The record does not contain substantial competent evidence from which to infer unlawful motive. I allowed the Union to present evidence from two of its witnesses that management wanted to "break up the clique." Mr. Bassett testified that Mr. Purvis mentioned breaking up the "clique" with respect to the transfers. (N.T. 26). However, Mr. Purvis categorically denied making any such statement, and he testified that he had not heard the statement until the hearing in this matter. (N.T. 92). I credit Mr. Purvis' testimony that he did not make the statement. Moreover, Mr. Purvis is a supervisor, not a manager authorized to speak on behalf of management, and there is no evidence that he was privy to management's deliberations or discussions. In this regard, the statement that Mr. Purvis allegedly made regarding the "clique" is inadmissible hearsay.

Furthermore, there was no evidence presented to determine who in management may have indicated to Mr. Purvis that the motive for the transfers was to "break up the clique" of Union or Union leadership supporters. Indeed, Mr. Basset himself characterized the statement as

hearsay and testified that no one from management was identified as having made the statement to Mr. Purvis. Additionally, the statement itself (to "break up the clique") even in this context does not necessarily support an inference of animus. It is unclear whether the "clique" could refer to supporters of Union officials or the Union's position on mandatory overtime on the one hand or a band of employes collectively abusing time or withholding productivity on the other. The statement, which management did not make, is inherently unreliable, and I am unable to draw the inference posited by the Union.

The Union also presented the testimony of Union Vice President Omar Salaam who testified that Kenneth Howell told him that management was transferring employes to "break up the clique."[2] (N.T. 58-59). I admitted the testimony over the City's objection. I am reversing that ruling herein. Mr. Howell "fills in as a supervisor." (N.T. 59). He is not a management employe authorized to speak on behalf of management or to bind the City. There is no evidence that Mr. Howell was privy to management's reasons for the transfers or that any particular management employe specifically told Mr. Howell that management wanted to "break up the clique." Accordingly, this evidence too is inadmissible hearsay and inherently unreliable. Union Vice President Salaam's testimony, that the City was transferring people to "break up the clique" is "still the conversation City-wide," supports an inference that it is a rumor among employes and not the position of management.

Moreover, Deputy Commissioner Warren, who made the operational decision to transfer employes, credibly testified that he did not decide to transfer employes to break up any "clique," and he credibly denied making any statements to anyone to that effect. Deputy Commissioner Warren credibly testified that his transfer decision was solely based on operational needs after conducting a thorough investigation into the causes of low productivity and unsafe, unacceptable absenteeism. Accordingly, there is no evidence that management was transferring employes to break up the "clique" and the record does not contain any evidence of unlawful motive on the part of the City.

The uncontradicted evidence of record demonstrates that the City was experiencing cost overruns from overtime due to low attendance and productivity. Management investigated the causes and determined that a significant percentage of employes assigned to District 1-A were taking unscheduled leave requiring overtime work from employes from other districts to adjust for the low material collections on the routes in District 1-A. Management at the highest levels, including the Commissioner of the Streets Department and Deputy Commissioner Warren visited all the districts and personally met with employes to seek their help and cooperation in fixing the absenteeism and productivity problems. Employes in most districts positively responded to management's plea, but not the employes in District 1-A.

The high concentration of absenteeism, which was significantly above the 10% operationally acceptable rate, in District 1-A handicapped the Sanitation Division's ability to safely and

[2] Union Exhibit 2 refers to Kenneth Holland. However, during Union Vice President Omar Salaam's testimony at the hearing, he referred to Ken Howell as the intermittent route supervisor. (N.T. 59).

productively complete the collection work in that District requiring the reassignment of personnel from other districts, costing more in overtime payments. There is no evidence that any employes were targeted for transfer because of their Union affiliation or their support for Union Vice President Omar Salaam or the Union's position regarding mandatory overtime under the CBA.

Deputy Commissioner Warren, who is responsible for the operations of the Sanitation Division, was on the hook to fix a desperate situation that had gotten out of control. Deputy Commissioner Warren spearheaded an investigation to determine the causes of the productivity and overtime issues. Based on the data that he obtained, he neutrally concluded that excessive absenteeism and low productivity, was causing low productivity and requiring excessive overtime. Deputy Commissioner Warren responded to and addressed the root causes of these issues without knowledge of anyone's Union involvement or activities. Significantly, the transfers did not constitute punishment or discipline for any reason. Employes in District 1-A were given notice and opportunity to work with management to reverse the problems generated by low productivity and excessive absenteeism. They did not rise to the occasion and take their responsibilities more seriously.

Deputy Commissioner Warren reasonably exercised his managerial discretion and expertise to take necessary action to transfer 20 employes from District 1-A to disperse the concentration of high absenteeism and low producing employes across other districts. Under the totality of circumstances, this record yields no coercive or intimidating effect on employes in the exercise of their protected rights under PERA. Moreover, even if there was any coercive effect here, the Sanitation Division's legitimate reasons and its interest in transferring employes to improve productivity and reduce the need for overtime far outweighs the employes' interests in and concerns over protected rights and activities.

CONCLUSIONS

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

1. The City of Philadelphia is a public employer under PERA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The City has not committed unfair practices within the meaning of Section 1201(a)(1) or 1201(a)(2) 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 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 twenty-third day of October 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

Jack E. Marino, Hearing Examiner