

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMALGAMATED TRANSIT UNION LOCAL 1279 :
:
: CASE NO. PERA-C-17-93-W
v. :
:
:
CAMBRIA COUNTY TRANSIT AUTHORITY :
:

PROPOSED DECISION AND ORDER

On April 6, 2017, the Amalgamated Transit Union Local 1279 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Cambria County Transit Authority (CamTran or Employer) violated Section 1201(a)(1), (2), (3) and (4) of the Public Employe Relations Act (PERA).

On May 17, 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 July 28, 2017, in Pittsburgh, as the time and place of hearing, if necessary.

A hearing was necessary. The hearing date was continued once upon request of the Union without objection by CamTran. A hearing was held on November 2, 2017, in Johnstown, before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed its post-hearing brief on January 8, 2018. CamTran filed its post-hearing brief on January 29, 2018.

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

FINDINGS OF FACT

1. CamTran is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7).
3. Eileen Zibura was hired as a bus operator by CamTran in April 1989. She has been a union officer for over 20 years and has served as president, recording secretary, and financial secretary for the Union. She was on the negotiation team for 20 years. Zibura was at the time of the hearing the financial secretary for the Union and served in that role at the time of her discharge. (N.T. 15-16, 53, 88, 99, 117-118, 122-123).
4. In September 2014, Zibura was suspended for five days for an incident involving a trolley hitting a bus in the transit center. This suspension was grieved and, ultimately, an arbitrator rescinded

the suspension in August 2015, and reduced Zibura's discipline to a six-month probation. The arbitrator's bill to CamTran was \$7,685.66. The Union was not charged by the arbitrator since it won the grievance. (N.T. 22-25; Union Exhibit 3).

5. Approximately one week after CamTran received the bill for the Zibura arbitration, the water cooler in driver's room at the Transit Center was removed. In April, 2016, Zibura questioned Ed Crenic, Chairman of the Board for CamTram, about the lack of a water cooler. Crenic said that CamTram cannot afford a water cooler in the Transit Center because Zibura's arbitration cost too much money. Zibura was the most outspoken member of the Union with regard to the water cooler issue. (N.T. 25-27, 88-89).

6. In her role as the Union's financial secretary, Zibura served on the committee that administers the pension for the members of the bargaining unit. During the April 16, 2016, meeting of the committee, Zibura made a motion to proceed with a buy-back provision that was opposed by the management representatives on the committee. Rose Lucey-Noll, the Executive Director, voted against Zibura's motion. (N.T. 30-34; Union Exhibit 6).

7. In her role as a Union officer, Zibura has testified in three or four arbitrations including a grievance arbitration over the five-day suspension of David Lindt. Zibura testified in Lindt's arbitration on September 26, 2016. (N.T. 36-41; Union Exhibit 8).

8. On Friday December 9, 2016, Zibura was in the breakroom at the Transit Center. Also in the break room was Mike Walters and Jon Walls. Jennifer Gojmerac, an HR Assistant and member of management, was also in the room hanging posters on the wall. Zibura and Gojmarac had a conversation. Zibura said to Gojmerac at one point: "Why do you come out of your cubby hole once a year." During this conversation, Zibura picked up and put down a kitchen knife. The knife is approximately 8 inches. The kitchen knife had been in the breakroom for years. After Gojmerac and Zibura had the conversation, Gojmerac left the room. Gojmerac was not visibly distressed or upset at any time in the room or when she left the room. (N.T. 43-47, 72, 91-95, 112, 116-117, 120, 125; CamTran Exhibits 4, 7, 8).

9. Later that day, on December 9, Gojmerac filled out an incident report and wrote the following narrative:

12/09/2016 - Transit Center/Drivers Room
At approximately 1:10 pm I was at the Transit Center . . . to hang the new workers comp physician panels and the 2017 pay schedule. . . . I walked into the driver's room. Mike Walters was sitting at the table and John Walls was sitting on the couch. I had my back turned to the room as I was hanging the papers and removing old ones on the bulletin board besides the fridge. While I was hanging papers, Eileen walked in. She asked what I was doing there and I told her that I was hanging new notices for workers comp so they knew where to go in case someone got hurt. She said to get out that it

was their room. She then asked if I wanted to play a game and when I turned towards her she picked up a long knife on top of the microwave and pointed it towards me a few inches from me. I told her I didn't want to play any game and to put the knife down. She then said "here catch" and motioned like she was going to throw it at me. She continued to hold the knife upwards towards me and I asked her to put the knife down again. She held the knife toward me until I finished hanging the papers and walked out of the room.

(N.T. 142-143; CamTran Exhibit 3).

10. On Monday December 12, 2016, Zibura was relieved on her regularly scheduled shift and was told to go to the main office. In the main office, she was informed that she was under investigation for an incident which occurred the previous Friday. (N.T. 42-43).

11. Tabatha McCormick is the Human Resource Manager for CamTran. McCormick along with Don Gibson, Director of Facilities, Safety, Security and Risk Management, conducted the investigation into the December 9th incident and submitted the information to Rose Lucy-Noll, the Executive Director. (N.T. 150, 154).

12. McCormick and Gibson did not consider Zibura's Union affiliation and activities on behalf of the Union when they investigated Zibura and recommended discipline based on that investigation. (N.T. 151-158, 167, 192-199).

13. McCormick and Gibson recommended to Lucey-Noll that Zibura be terminated for violating the weapons provision of the employee handbook. Lucey-Noll is responsible for final decisions regarding terminations. (N.T. 158, 187, 203-204, 210).

14. On December 20, 2016, Zibura was informed via letter that she was terminated due to the December 9, 2016, incident. The letter states in relevant part:

Dear Ms. Zibura:

Tabatha McCormick, HR manager, Denny Fuge, Operations Director, and I met with you and Mike Walters, ATU President, Local 1279, this morning to discuss the outcome of the investigation, with regard to the serious incident that occurred on December 9th in the driver's room between you and Jennifer Gojmerac, HR Assistant. I gave you the opportunity to add additional information to your statement given during the course of the investigation. You did not have anything to add to the answers.

After you gave your response, Tabatha, Denny and I left the board room. I took approximately 30 minutes to review the information that you stated in our meeting and reflected on the information

that was provided to as part of the investigation. When we returned to the board room I stated that the totality of the circumstances did not support your version of the facts as to what happened on December 9th in the Driver's lounge, and as a result, I stated that you were being terminated, effective immediately, do the following serious behavior and egregious misconduct:

1. You directed verbal hostility toward a management employee by entering the room and asking what she was doing in "their" room and why she came out of her "cubby hole," creating an unwelcome atmosphere.

2. You were in possession of a knife on Authority Property, endangering the safety of all employees. You intimidated and threatened an employee of CamTran, Jennifer Gojmerac, by asking if she wanted to "play a game," picking up the knife and holding the point towards her, motioning to throw the knife at her at one point, and not putting the knife down after asked.

3. You disregarded Jennifer's attempts to de-escalate the situation by continuing to hold the knife and moved your arm toward her as to throw/toss the knife at her. Even though you did not throw/toss the knife, it created a significantly unsafe and intimidating work environment.

The knife is considered a weapon, as it is not used for its intended purpose, which could have resulted in serious bodily injury. In today's climate of threats and violence in the workplace, there is no justifiable reason for this behavior.

Under Employee Responsibilities Section -EMPL- 20 of the Employee Handbook, it states:

7. Possession of Any Weapon While on Authority Property: A weapon is defined as any instrument that is not used for its intended purpose or an implement of crime that could result in serious bodily injury or endangers the safety of employees or the public. First Offense- Discharge.

. . . .
Sincerely,

Rose M. Lucey-Noll
Executive Director

(N.T. 75-76; CamTran Exhibit 10).

15. Lucey-Noll approved McCormick's and Gibson's recommendation to terminate Zibura. Lucey-Noll did not consider Zibura's activities on behalf of the Union when she made this decision and based her decision on the reasons summarized in her December 20, 2016, letter. (N.T. 220-226; CamTran Exhibit 10).

16. A grievance on Zibura's termination was submitted to arbitration. An arbitration hearing was held before Arbitrator Bernard Fabian. On July 31, 2017, Fabian issued an award in Zibura's favor. Fabian granted the grievance and set aside Zibura's discharge because CamTran did not meet its burden of proof to support the termination of Zibura. Fabian did, however, find that Zibura's behavior rose to the level where discipline was proper. (Union Exhibit 11).

DISCUSSION

The Union alleges four claims against CamTran. It alleges an independent Section 1201(a) (1) claim related to the termination of Zibura. It alleges a violation under Section 1201(a) (3) also related to the termination of Zibura. It alleges a violation under Section 1201(a) (4) relating to Zibura's participation in grievances. The Union also alleges a violation under Section 1201(a) (2).

Section 1201(a) (2) prohibits the formation of company unions, Erie City School District, 41 PPER 115 (Final Order, 2010), while section 1201(a) (4) prohibits "discriminating against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act." The Association has not alleged that CamTran formed a company union as prohibited by Section 1201(a) (2) and that claim is dismissed.

The Board has held that Section 1201(a) (4) of PERA is limited to situations where an employe is discriminated against by his or her employer for filing affidavits, petitions or complaints with the Board or providing information or testimony in a Board proceeding. Luzerne County Community College Association of Higher Education v. Luzerne County Community College, 37 PPER 123 (Final Order, 2006). The Union in this matter did not present sufficient evidence to establish a claim under Section 1201(a) (4) of PERA and the claim is dismissed.

In a Section 1201(a) (3) discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. Audie Davis v. Mercer County Regional Council of Government, 45 PPER 108 (Proposed Decision and Order, 2014) (citing St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977)). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Once a *prima facie* showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity. Teamsters Local 776 v. Perry County, 23 PPER ¶ 23201 (Final Order, 1992). If the employer offers such evidence, the

burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual. Teamsters Local 429 v. Lebanon County, 32 PPER ¶ 32006 (Final Order, 2000). The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct. Mercer County Regional COG, supra, (citing Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 (Final Order, 1992)).

In 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 employees engaged in union activities; and whether the action complained of was “inherently destructive” of employee 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 employee 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).

In this matter, the Union has presented sufficient evidence to establish that Zibura was engaged in protected activity previous to her termination. Furthermore, the Union has presented sufficient evidence to establish that CamTran was aware Zibura had engaged in protected activity. The record in this matter shows that CamTran was aware that Zibura won an arbitration in August 2015, and that Zibura protested the removal of a water color. Further, in April 2016, Zibura engaged in protected activity by pursuing a pension buy-back plan that was not favored by management. Management clearly had knowledge of this protected activity as Lucey-Noll, the Executive Director, voted against Zibura’s motion in the pension committee. Finally, on September 26, 2016, Zibura engaged in protected activity by testifying on behalf of David Lindt in an arbitration hearing. There is no direct evidence in this record that management knew Zibura testified, however I infer, based on the record as a whole, that CamTran would have known that she testified. The Union also points to Zibura’s participation in a public protest in May 2016, as relevant protected activity. However, I find that based on this record, CamTran did not have knowledge that Zibura participated in the May 2016, protest.

While the Union has presented sufficient evidence to support the first two prongs of a Section 1201(a)(3) claim, the Union has not sustained its burden of establishing the third prong of the discrimination standard. First, there is no evidence in this record that directly establishes that CamTran was motivated by animus against Zibura’s engagement in protected activities when it terminated her. Animus in this case must be inferred. I find that the following facts from the record weigh heavily against an inference of anti-union

animus. First, the decision to terminate Zibura was not made in close temporal nexus to any known engagement in protected activity by Zibura. She testified in an arbitration hearing on September 26, 2016, and was not terminated until December 12, 2016. I find that, based on the record as a whole, this is a significant lapse in time and shows that the decision to terminate Zibura was not motivated by animus. Other known protected activity occurred even more remote in time: the committee meeting where Zibura advocated for a buy-back plan and complained about the removal of a water cooler happened in April 2016 and her victorious arbitration against CamTran occurred in 2015. Second, in this matter CamTran has adequately explained the termination of Zibura. Importantly, Lucey-Noll, McCormick and Gibson credibly testified that their decision to terminate Zibura was based on their crediting the account of events by Gojmerac and their interpretation of CamTran's weapon policy which calls for discharge on the first offense. Lucey-Noll, McCormick and Gibson all credibly testified that they did not consider Zibura's Union affiliation or engagement in protected activities at any relevant point in their investigation and discipline determination. Further, I do not find the fact that, based on the decision of the Arbitrator Fabian to rescind the termination, that CamTran may have made the wrong decision to be evidence of animus in this matter. An incorrect disciplinary decision, is not, by itself, a statutory violation. Third, there is no evidence in this record that the CamTran management involved in the discipline process (Lucey-Noll, McCormick, Gibson and Gojmerac) made any anti-union statements or statements which would tend to show their mind as harboring animus against Zibura's engagement in protected activities.

The Union argues that I should make an inference of anti-union animus based on the fact that CamTran failed to follow the principles of just cause and progressive discipline when it terminated Zibura. (Union's Brief at 19). The Union relies on the recent case Lancaster County v. PLRB, 124 A.3d 1269 (Pa. 2015), for the proposition that when discipline imposed by an employer against an employee is not consistent with progressive discipline, the PLRB may make an inference of animus. (Union's Brief at page 17, 21). However, I find above that CamTran's decision to terminate Zibura was credibly based on reasons not related to animus, and, therefore, Lancaster County is distinguishable. Unlike Lancaster County, the discipline in this matter was reasonably related to a credible interpretation of the alleged events, even if an arbitrator later found CamTran to have made an error with regard to discipline.

The Union also argues that an inference of anti-union animus can be made in this case due to disparate treatment. (Union's Brief at 23-24). The Union argues that Zibura was treated less favorably than others who allegedly committed more serious conduct. However, the incidents pointed to by the Union do not involve alleged weapons offenses, and therefore I do not consider them relevant for the purposes of making an inference of disparate treatment.

For the above reasons, I find that CamTran did not violate Section 1201(a) (3) when it terminated Zibura and that claim is dismissed.

The Union also alleges an independent violation of Section 1201(a) (1) which 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, Zibura had not recently engaged in protected activity under PERA when she was disciplined nor was the behavior she was disciplined for (the incident with Gojmerac) in any way related to protected activity under PERA. Therefore, I find that a reasonable employe would not be coerced in their exercise of protected rights due to Zibura's termination. The connection of her termination to any protected activity is too vague. Furthermore, even if a reasonable employe would be coerced by CamTran's actions, CamTran had a legitimate reason for its decision to discipline Zibura as discussed above. This legitimate reason would outweigh any coercive effect that could be found on this record. Therefore, there is no independent violation of Section 1201(a)(1) on this record and that claim is dismissed.

CONCLUSIONS

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

1. CamTran is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. CamTran has **not** committed unfair practices in violation of Section 1201(a)(1), (2), (3) and (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 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 twentieth day of April, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner