

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING :
ENGINEERS, LOCAL 66 :
 : Case No. PERA-C-10-414-E
v. :
 :
FRANKLIN TOWNSHIP :

FINAL ORDER

The International Union of Operating Engineers, Local 66 (Union) filed timely exceptions, and a supporting brief, with the Pennsylvania Labor Relations Board (Board) on February 9, 2012. The Union's exceptions challenge a January 20, 2012 Proposed Decision and Order (PDO) in which the Hearing Examiner dismissed the Union's Charge of Unfair Practices alleging that Franklin Township (Township) violated Section 1201(a)(1), (3) and (4) of the Public Employee Relations Act (PERA). The Township filed a timely response to the exceptions on February 24, 2012. The Findings of Fact (FF) found by the Hearing Examiner are summarized, for purposes of the exceptions, as follows.

On October 23, 2008, the Board certified the Union as the exclusive representative of a unit of the Township's employes comprised of all full-time and regular part-time nonprofessional employes including but not limited to clerical workers, assistant secretary, road department workers, mechanics, equipment operators and laborers. (FF 3). At the time of the Board certification, there were two full-time road department employes and two full-time office employes. (FF 5).

By the time of the hearing in this charge, the road department had only one full-time employe, Tom Shefton. The other full-time employe, John Cihonski, retired in April, 2010. The Township did not fill his position. (FF 6).

The two office employes are Kathy Raabe Jesteadt and Deborah Zbuckvich. Jesteadt serves as the Township Secretary-Treasurer and also the zoning officer under the second class township code. (FF 7). Jesteadt's position is a management level employe under Section 301(16) of PERA and is excluded from the unit. (FF 10). Zbuckvich serves as the assistant township secretary-treasurer/zoning. (FF 7, 9). Zbuckvich's position is in the certified unit. She is a member of the Union and serves as its steward. (FF 10).

Since the Board certification, the Union and the Township have been negotiating for their first collective bargaining agreement. (FF 4). During the contract negotiations, the Township's Board of Supervisors questioned the need for two full-time employes in the road department and two full-time employes in the office. Supervisor Bob Thompson stated on more than one occasion during negotiations that the Township, in his opinion, based on its population, was only big enough to have one and one-half persons in the office and one and one-half persons in the road department. (FF 11). In the negotiations, the Township also proposed an "opt-out" provision for health insurance for Zbuckvich, by which the Township would pay her \$300 a month as a waiver payment for her to opt out of the Township's insurance plan rather than pay the \$1,032.41 per month to continue her under the Township's plan. (FF 13).

On August 19, 2010, the Union requested that the Board appoint a fact-finding panel pursuant to Section 802 of PERA to help resolve the impasse in negotiations. (FF 14). On September 20, 2010, the Board appointed a fact-finding panel. (FF 15). Zbuckvich participated in the fact-finding hearing by giving testimony on several matters in dispute. (FF 16). Zbuckvich testified that she was not interested in the Township's "opt-out" contract proposal for health insurance. She also testified in favor of the Union's proposal that employes participate in the Union's central pension fund. (FF 17). On September 28, 2010, the fact-finding panel issued its recommendations. The panel did not recommend the Township's "opt-out" provision and it recommended that the Township accept

the Union's pension proposal. (FF 18). On September 30, 2010 the Township received the report, and on October 4, 2010, at the next regular Board meeting, the Township supervisors rejected the fact-finder's report. (FF 19).

Discussions among the Supervisors about reducing Zbuckvich's hours and eliminating benefits also began in September and October, 2010. (FF 23). During those budget meetings, the Supervisors' discussions involved the relative need for two full-time clerical employes, given the Township's population and area. (FF 24). The Supervisors also noted a drop in building permit activity and septic permit activity. In addition, Zbuckvich's work to complete the 2010 census had been completed. (FF 24). Further, since 2008, the Township Supervisors have been reducing the duplication of work done by the two office employes. (FF 28). The Supervisors also noted that from 2008 to 2010, the Township's revenues have been trending downward, while during that same period, the Township saw an increase in expenditures for employe health insurance costs. (FF 29 - 30). In addition, in recent years, the Township saw an increase in expenditures for diesel fuel, road materials and winter maintenance materials. (FF 31). The Township's reduction of Zbuckvich's status from full-time to part-time provided the Township with an estimated cost savings of \$29,000. (FF 32).

On November 1, 2010, the Township Supervisors made the decision to reduce Zbuckvich's hours from 40 hours to 24 hours and to eliminate her health insurance benefits. (FF 21 and 22). In addition to reducing Zbuckvich's hours, the Supervisors also reduced the public hours of the Township offices, closing the office on Friday. (FF 33). All three Supervisors, Herman Bauer, Bob Thompson and Janet Gray, testified that Zbuckvich's participation in the fact-finding and negotiations had no bearing on their decision to reduce her to a part-time employe. (FF 34).

Based on the testimony and documentary evidence presented, the Hearing Examiner found that Zbuckvich was engaged in protected activity in her role as Union steward and at negotiations, and also by providing testimony at a Board fact-finding proceeding. Further, it is undisputed that the Township was aware of Zbuckvich's protected activity and testimony. As for the reason for the reduction in Zbuckvich's hours to part-time, the Hearing Examiner credited the Township's testimony of a legitimate business reason for its decision and determined that the Union failed to establish that the Township harbored union animus or a discriminatory motive. The Hearing Examiner also held that the reduction in Zbuckvich's hours because of the Township's business reasons would not tend to coerce employes in the exercise of protected rights. Accordingly, the Hearing Examiner concluded that the Township did not violate Section 1201(a)(1), (3) or (4) of PERA.

On exceptions, the Union challenges Findings of Fact 11, 12, 23, 24, 28 and 30. Generally, the Board will not disturb a Hearing Examiner's Findings of Fact where those findings are supported by substantial, competent evidence of record. Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support the conclusion. PLRB v. Kaufmann Department Stores, Inc., 345 Pa. 98, 29 A.2d 90 (1942). To support its argument that the Hearing Examiner's findings are in error, the Union points to other evidence of record which it asserts conflicts with the findings, and should have been found as fact. However, the Hearing Examiner need not render all possible findings on all the evidence presented. Page's Department Store Velardi, 464 Pa. 276, 346 A.2d 556 (1975). Upon review of the record, Findings of Fact 11, 12, 23, 24, 28, and 30 are supported by substantial evidence, as cited to the record by the Hearing Examiner. Accordingly, the Union's exceptions to the Findings of Fact are dismissed.

The Union also argues on exceptions that the Hearing Examiner erred in dismissing its charge under Section 1201(a)(1) of PERA, because reducing Zbuckvich's hours and eliminating her health benefits while collective bargaining was ongoing would be coercive of protected bargaining rights. An independent violation of Section 1201(a)(1) arises where, in light of the totality of the circumstances, the employer's actions would have a tendency to coerce a reasonable employe in the exercise of protected rights. Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). Under the totality of circumstances, the employer's credible, legitimate, non-discriminatory reason for taking the challenged action may militate against the finding of coercion. Pennsylvania State Troopers

Association v. Pennsylvania State Police, PF-C-09-83-E (Final Order, May 17, 2011), *affirmed sub nom.*, Pennsylvania State Troopers Association v. PLRB, ___ A.3d ___, 1082 C.D. 2011 (Pa. Cmwlth. March 5, 2012) (disciplinary investigation for violation of work rules does not coerce employes from exercising protected rights); Pennsylvania Social Services Union Local 668 v. Commonwealth, Office of Vocational Rehabilitation, 31 PPER ¶131127 (Final Order, 2000) (disciplinary action related to acts in defiance of the employer's instructions does not have a tendency to coerce the exercise of protected employe rights).

However, because motive is not an element of an independent claim of interference or coercion, E.B. Jermyn Lodge No. 2 v. City of Scranton, 38 PPER 104 (Final Order, 2007), the existence of a stated business reason for the employer's actions is not a dispositive bar to the finding of an unfair practice under Section 1201(a)(1). PLRB v. Commonwealth, Office of Employment Security, 16 PPER ¶16091 (Final Order, 1985) (employer's authority to grant or deny administrative leave did not shield employer from the finding of 1201(a)(1) violation for erroneously informing employes that annual leave must be used if the employe did not testify at an arbitration hearing); Teamsters Local No. 249 v. Millvale Borough, 36 PPER 147 (Final Order, 2005) (discipline of an employe for breaching the chain of command would tend to interfere and coerce employes from seeking mutual aid and protection); Somerset Area Education Association v. Somerset Area School District, 34 PPER 89 (Final Order, 2003) (noting the hearing examiner's finding that the employer's resolution to inquire into legal action against the union would have a tendency to coerce employes from engaging in a lawful strike). Thus, the pertinent inquiry, for an independent violation of Section 1201(a)(1), is whether the employer's actions, when viewed within the *totality of the circumstances*, would tend to influence a reasonable employe in deciding whether to assist or seek assistance from the union, or to pursue some other statutorily-protected activity. City of Scranton, supra; Northwestern Education Association v. Northwestern School District, 24 PPER ¶ 24141 (Final Order, 1993).

Here, during negotiations for an initial contract, the Township unilaterally implemented certain terms of its bargaining offer that were rejected by the Union and the fact-finding panel. It is well established in Board law that changes to the *status quo* and implementation of wages, hours and working conditions during contract negotiations is an unfair practice under Section 1201(a)(1) and (5) of PERA.¹ With respect to interference and coercion caused by a unilateral implementation of bargaining terms, the Pennsylvania Supreme Court noted that "[t]he coercive effect of the unilateral cancellation of benefits during the collective bargaining process is obvious, [and] [t]he bargaining authority of the union to freely bargain is seriously undermined." Cumberland Valley School District, 483 Pa. 134, 143, 394 A.2d 946, 951 (1978). Thus, the Township's unilateral implementation of its bargaining proposals during negotiations clearly interfered with the Union's right to bargain those wage, hour and working condition terms under PERA. Additionally, under the totality of circumstances, a reasonable employe would be coerced from speaking out against, or rejecting, the Township's bargaining proposals in fear that the Township would simply implement those terms if the employe or union did not concede.²

We find that under the totality of circumstances presented on this record, the Township's implementation of changes to Zbuckvich's hours and benefits during collective bargaining interfered with and would coerce a reasonable employe from exercising protected rights guaranteed under PERA.³ Accordingly, the Township violated Section

¹ We note that the Union did not allege a separate claim of a bargaining violation under Section 1201(a)(5).

² Under Section 701 of PERA, neither party may be compelled to agree to a proposal or make a concession in bargaining.

³ Generally, absent circumstances which would tend to coerce or interfere with employe protected rights, an employer has a managerial right to assign employes hours within an existing shift schedule. However, here, in addition to the coercive affects of the Township's actions, there is no evidence that the Township had an existing part-time shift schedule, or that part-time employes were not entitled to health care benefits. The parties were in the midst of bargaining an initial contract where these and other wage, hour and working condition matters for part-time employes should have been addressed. Instead, the Township took unilateral

1201(a)(1) of PERA warranting make-whole relief and restoration of the *status quo ante*.⁴ After a thorough review of the exceptions and all matters of record, the Union's exceptions shall be sustained in part and denied in part, and the January 20, 2012 Proposed Decision and Order shall be vacated and set aside.

CONCLUSIONS OF LAW

After due consideration of the record as a whole, Conclusions 1 through 3 are incorporated herein, Conclusion 4 is vacated and set aside, and the Board concludes:

5. That Franklin Township has committed unfair practices in violation of Sections 1201(a)(1) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the Union's exceptions filed to the Proposed Decision and Order of January 20, 2012 are hereby sustained in part and denied in part, and the Proposed Decision and Order is hereby vacated and set aside.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that the Township shall take the following affirmative action which the Board finds necessary to effectuate the policies of PERA:

1. Cease and desist from interfering with, restraining and coercing employes in the exercise of the rights guaranteed in PERA.

2. Take the following affirmative action which the Board finds necessary to effectuate the policies of PERA:

- (a) Return Deborah Zbuckvich to a full-time schedule of working forty (40) hours per week;
- (b) Make Deborah Zbuckvich whole for wages and benefits lost as a result of the unlawful reduction of her schedule to part-time;
- (c) Post a copy of the Proposed Decision and Order and this Final Order within five (5) days of the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days from the effective date hereof; and
- (d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Final Order by completion and filing of the attached affidavit of compliance.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and James M. Darby, Member, this seventeenth day of April, 2012. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

action with respect to these issues, unlawfully changing employes' wages, hours and benefits. On this record, restoration of the *status quo ante* and a make-whole remedy is appropriate.

⁴ Because we find that the Township committed unfair practices warranting full remedial relief, we need not address the Union's remaining exceptions concerning whether the Township also discriminated against Zbuckvich in violation of Section 1201(a)(3) and (4) of PERA.

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AFFIDAVIT OF COMPLIANCE

Franklin Township hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of the Public Employee Relations Act; that it has returned Deborah Zbuckvich to a full-time schedule of working forty (40) hours per week; that it has made Deborah Zbuckvich whole for wages and benefits lost due to the reduction of her schedule to part-time; that it has posted the Proposed Decision and Order and Final Order as directed; and that it has served an executed copy of this affidavit on the International Union of Operating Engineers, Local 66 at its current address.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public