

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING :
ENGINEERS LOCAL 66 :
 :
 : CASE NO. PERA-C-12-98-W
 :
 v. :
 :
 ROCHESTER TOWNSHIP :

FINAL ORDER

Rochester Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on October 3, 2013 to a Proposed Decision and Order (PDO) issued on September 16, 2013, in which the Hearing Examiner concluded that the Township violated Section 1201(a) (1) and (3) of the Public Employee Relations Act (PERA).¹ The International Union of Operating Engineers, Local 66 (Local 66), filed a brief in response to the exceptions on October 24, 2013. The Finding of Facts are set forth in the PDO and are summarized for purposes of the exceptions as follows.

Deanne Eshbaugh was employed as the Township Clerk since March 3, 2003. The job description provides that the Township Clerk serves as the Township's Wage Tax Clerk, as clerical support staff for the Municipal Office and all Township Boards and as clerk for the Rochester Township Sewer Authority. As the Wage Tax Clerk, Ms. Eshbaugh gathered information for yearly returns; prepared returns and notifications to residents; stuffed envelopes with and mailed returns for approximately 1600 residents; verified completed returns and payments; processed returns and payments; processed business quarterly mercantile tax payments; requested reimbursement from other municipalities; researched non-filing residents and pursued collection; and filed collection proceedings with the district magistrate for non-paying residents. As part of Ms. Eshbaugh's duties as Clerk, she attended public meetings of the Board of Commissioners and kept meeting minutes. She also performed bank reconciliation for the Sewer Authority. In 2011 Ms. Eshbaugh was earning \$14.71 per hour as the Township Clerk.

Early in 2011, Ms. Eshbaugh became aware of the Local Earned Income Tax Act (Act 32). Act 32 required municipalities to relinquish their wage tax collection function to their county, which would eliminate many of Ms. Eshbaugh's job duties. At the time, Ms. Eshbaugh understood that the Township planned to reduce her hours due to the reduction of her job duties as a result of Act 32.

Also in early 2011, the Township hired an outside accounting firm by the name of Cottrill and Arbutina to do the accounting and payroll work that had been performed by the Township Assistant Secretary, Laura Hill. Because an audit by Cottrill and Arbutina revealed problems with the Township's bookkeeping and management of accounts, the Township sent Ms. Hill for education and training related to her job duties. In May 2011, Ms. Hill resigned from her employment with the Township. At the time, Ms. Hill was earning \$18.12 per hour as the Assistant Secretary.

Local 66 Business Agent Ron Cord filed Grievance No. 1-5-11 on May 12, 2011, on behalf of Ms. Eshbaugh complaining that the "vacant Assistant Secretary Position [has] not [been] posted for bid as per ... the [collective bargaining agreement]". Also on May 12, 2011, Mr. Cord filed Grievance No. 2-5-11 on behalf of the bargaining unit complaining that "non-bargaining unit workers [were] performing bargaining unit work, i.e., Asst. Secretary duties, in violation of [the collective bargaining agreement]."

¹ Because no allegations or evidence was presented to support a bargaining violation, the Hearing Examiner dismissed the charges under Section 1201(a) (5) of PERA.

In May and June 2011, the Township Solicitor, Shannon Steele, engaged in conversations with Local 66 Business Agent Cord about creating a hybrid position for Ms. Eshbaugh. During those discussions Business Agent Cord, Solicitor Steele and Carolyn Verszyla, the Township Manager, reached a consensus that Ms. Eshbaugh could perform the clerical duties from her Clerk position, excluding the tax collection duties eliminated by Act 32, and also perform the duties of the Assistant Secretary, excluding the financial work being performed by Cottrill and Arbutina, for a one-dollar-per-hour wage increase for Ms. Eshbaugh, to \$15.71 per hour. Solicitor Steele and Township Manager Verszyla agreed to present the proposal of combining the Assistant Secretary and Township Clerk positions at \$15.71 an hour to the Board of Commissioners. The Board of Commissioners considered and rejected the proposal.

At the July 7, 2011 public meeting, the Board of Commissioners voted to deny the grievance regarding the removal of bargaining unit work, and post the position of Assistant Secretary. The Assistant Secretary position was posted between July 12, 2011 and July 18, 2011. In the posting, the Township required that "[t]he successful candidate will have a B.S. in accounting with [a] minimum of 5-years work related experience and a solid understanding of governmental bookkeeping and chart of accounts." The job posting for the position of Assistant Secretary provides for a ninety-day probation period and a starting wage of \$18.12 per hour.

Ms. Eshbaugh did not apply for the position because she did not hold a Bachelor of Science degree. Melissa² was hired as the Assistant Secretary on or about November 7, 2011, even though she does not have a Bachelor of Science degree. Between November 18, 2011 and December 31, 2011, Ms. Eshbaugh trained Melissa to perform the clerical, non-wage-tax duties of the Clerk position.

On November 17, 2011, an arbitration hearing was scheduled at the Township Building for Grievance No. 2-5-11 regarding the alleged removal of bargaining unit work. Ms. Eshbaugh appeared for that hearing, but the grievance was settled to allow Cottrill and Arbutina to continue performing the financial accounting work instead of the Assistant Secretary. On that same evening, at a public meeting, the Board of Commissioners notified Ms. Eshbaugh that she would be laid off, because her entire Clerk position was being eliminated effective January 1, 2012.³

The day after the November 17th Board meeting, Township Commissioner Thomas Summers⁴ was in Ms. Eshbaugh's office and made a comment about the grievances and that he felt that Ms. Eshbaugh was misrepresented by Local 66. Mr. Summers indicated that he was upset with the way Local 66 negotiated Ms. Eshbaugh's employment retention and thought that Local 66 had mishandled the grievances. He stated that he felt that Ms. Eshbaugh lost her job with the Township because of the grievances.

In concluding that the Township discriminated against Ms. Eshbaugh in violation of Section 1201(a)(1) and (3) of PERA, the Hearing Examiner found a nexus between Ms. Eshbaugh's protected activity and her separation from the Township. The Hearing Examiner found, *inter alia*, that Ms. Eshbaugh's separation from employment was without an adequate explanation by the Township and that Commissioner Summers effectively admitted that Ms. Eshbaugh lost her job because of the way her elected Local 66 representative pursued and negotiated grievances and job security on her behalf. The Hearing Examiner also found that the Township's treatment of Ms. Eshbaugh was "inherently destructive" of employee rights under PERA, further supporting a violation of Section 1201(a)(3). In addition, the Hearing Examiner found that even in the absence of motive, the Township's actions would have interfered with and coerced a reasonable employee in the pursuit of protected rights under PERA, in violation of Section 1201(a)(1) of PERA.

² Melissa's last name does not appear of record.

³ Ms. Eshbaugh was out of work from January 1, 2012, until March 19, 2012, when she began working at another job.

⁴ Before he retired, Commissioner Summers was the road foreman for the Township for fourteen years, and before that he worked for the Dravo Corporation where he was a Union Steward with Local 66.

On exceptions, the Township asserts that Local 66 failed to establish a *prima facie* case of discrimination under Section 1201(a)(3) of PERA. To establish a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must show 1) that the employe was engaged in protected activity, 2) that the employer knew of the protected activity, and 3) that the employer was motivated by anti-union animus in taking action against the employe. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). There is no dispute that Ms. Eshbaugh was engaged in protected activity by, *inter alia*, filing grievances, negotiating through her union representative for the creation of a hybrid position, and appearing at an arbitration hearing. There is also no dispute that the Township was aware of these activities.

The Township argues, however, that the Hearing Examiner erred in finding an unlawful motive for the Township not retaining Ms. Eshbaugh as an employe after January 1, 2012. Motive creates the offense under Section 1201(a)(3) of PERA. **PLRB v. Ficon**, 434 Pa. 383, 254 A.2d 3 (1969). As the employer's motives are rarely overt, a finding that the employer harbored union animus or an unlawful motive may be based on inferences drawn from the facts of record. **St. Joseph's Hospital, supra.**; **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). In determining whether union animus motivated the employer's decision, the Hearing Examiner may look to several factors, including the timing of the adverse action in relation to protected activities, any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employe, and the effect of the employer's adverse action on other employes and protected activities. **PLRB v. Berks County**, 13 PPER ¶ 13277 (Final Order 1982); **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978).

Unlike the typical discrimination case, here there are statements from a member of the Township Board of Commissioners, made the day after the Board of Commissioners' decision, which reflect the Township's motive in rejecting the proposal to retain Ms. Eshbaugh as an employe. Township Commissioner Summers testified as follows:

Q: So you indicated that Deanne [Eshbaugh] lost her job because ... the Union mishandled her grievance?

A: That's my feelings.... Yes, that's what I said.

Q: So you didn't indicate that Ms. Eshbaugh lost her job because of the passing of Act 32?

A: No, I didn't.

Q: Did you indicate to ... Deanne Eshbaugh at any point that she lost her job because of the filing of grievances?

A: That was my feeling that that's what was going to happen.

* * *

Q: Did you tell Deanne that you believe she was going to lose her job, because the Union filed grievances?

A: I might have...

(N.T. 124-125). Based in part on that testimony, the Hearing Examiner found as follows:

[Township Commissioner Thomas Summers] said that he felt that Ms. Eshbaugh was misrepresented and indicated that he disliked Ms. Eshbaugh's Union representation. He was upset with the way the Union negotiated Ms. Eshbaugh's employment retention and grievance settlement. He made statements indicating that the Union mishandled

the grievances. He felt that Ms. Eshbaugh lost her job because of the grievances, which he felt were wrong.

(Finding of Fact 29).

In rendering findings of fact, it is the function of the Hearing Examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and to weigh the probative value of the evidence presented and in doing so may accept or reject the testimony of any witness in whole or in part. **Pennsylvania State Troopers Association v. Commonwealth, Pennsylvania State Police**, 41 PPER 33 (Final Order, 2010), *affirmed sub nom, Commonwealth, Pennsylvania State Police v. PLRB*, No. 626 C.D. 2010 (Pa. Cmwlth. 2011). The Board will not disturb the Hearing Examiner's credibility determinations absent the most compelling of circumstances. **Mt. Lebanon Education Association v. Mt. Lebanon School District**, 35 PPER 98 (Final Order, 2004). Although Mr. Summers also stated that he was one of five Board members and was testifying as to his "feelings" (N.T. 124), his testimony is clear that he believed the Board of Commissioners voted to eliminate Ms. Eshbaugh's employment because of the filing of the grievances. The Hearing Examiner's Finding of Fact, evidenced by the credited portions of Commissioner Summers' testimony, supports the reasonable inference that the Township harbored union animus and an unlawful motive for eliminating Ms. Eshbaugh's employment because it disapproved of the grievances and negotiations on her behalf by Local 66.

The Township also argues that the Hearing Examiner erred in failing to consider the subject of the grievances that were filed. However, the activity protected by PERA is the act of filing a grievance, **Montrose Area Education Association v. Montrose Area School District**, 38 PPER 127 (Final Order, 2007), which is not necessarily dependent on the merits or subsequent resolution of the grievance. Indeed, sustaining the Township's argument that the outcome of the grievance resolution is a defense against the claim of discrimination for filing the grievance (Exception 15), would lead to the absurd result that an employer, by simply settling the grievance with the union, could lawfully terminate the employee who had filed the grievance challenging the employer's actions.

Moreover, the subject of the grievances involved and the totality of the circumstances surrounding their resolution, support an inference of an unlawful motive and an unfair practice. One of the grievances filed on May 12, 2011, requested the posting of the Assistant Secretary position for bids. As pointed out by the Township in its Exceptions, the Township and Local 66 agreed that the Assistant Secretary position would not be posted if a hybrid job and pay rate was successfully negotiated for Ms. Eshbaugh. Local 66 Business Agent Cord, Township Solicitor Steele, and Township Manager Verszyla engaged in discussions to resolve the grievance by having Ms. Eshbaugh perform the Assistant Secretary position excluding the financial work performed by Cottrill and Arbutina,⁵ plus the Township Clerk duties excluding the wage tax collection, for a one-dollar per hour wage increase.⁶

The Township rejected Local 66's offer that Ms. Eshbaugh perform the work of both the Assistant Secretary **and** her remaining Clerk duties for one dollar more per hour. The Township's only assertion in rejecting the settlement was that it thought Ms. Eshbaugh should be grateful to keep a job and health care at the same rate of pay as her Clerk position.⁷ Contrary to the Township's assertions, Act 32, which eliminated the wage tax collection duties from the Township Clerk, does not require the Township to reject Ms. Eshbaugh's offer to perform the duties of the Assistant Secretary and Township Clerk position without the wage tax collection duties eliminated by Act 32. The only viable

⁵ These are the same duties that were performed by Ms. Hill at \$18.12 per hour.

⁶ The arrangement reached by Mr. Cord, Ms. Steele and Ms. Verszyla would have also resolved the second grievance that was filed concerning Cottrill and Arbutina performing bargaining unit work.

⁷ Although there was never an assertion from the Township that Ms. Eshbaugh would be unable to perform the duties of a hybrid Assistant Secretary/Clerk position as agreed to between Mr. Cord, Ms. Steele, and Ms. Verszyla, there is no record evidence that the Township expressed to her, or Mr. Cord, a willingness to allow her an opportunity to work in that hybrid position at her current Township Clerk salary.

reason of record for the Township's rejection of retaining Ms. Eshbaugh in the Assistant Secretary/Clerk position was given by Commissioner Summers in his testimony - the protected activities of grievance filing and negotiations by Local 66 on behalf of Ms. Eshbaugh. However, reliance on such activities as a basis for an adverse employment action is prohibited by Section 1201(a)(3) of PERA.

The Township's claim that the Hearing Examiner should have considered the fact that Ms. Eshbaugh did not bid for the posted Assistant Secretary position is equally unavailing. The Township claims in its brief that "[it] could not provide the Assistant Secretary position to Ms. Eshbaugh without her bidding for the position." (Brief in Support of Exceptions at 8). However, this claim is incompatible with the Township's concession in its Exceptions that it agreed to withhold posting for bids while the parties were engaged in negotiations to create a hybrid Assistant Secretary/Clerk position for Ms. Eshbaugh.

The Township cannot shift the blame for its discrimination onto Ms. Eshbaugh by claiming that she should have applied for a position where the Township's posting contained a required qualification that she did not possess (a Bachelors of Science degree in accounting). The fact that the Township subsequently hired Melissa, who also did not have a Bachelor of Science degree, is not a defense, but evidence of disparate treatment and further support for an inference of a discriminatory motive. **See Police Association of Falls Township v. Falls Township**, 44 PPER 93 (Final Order, 2013). Further, through discussions by Ms. Eshbaugh's bargaining representative to create a hybrid Assistant Secretary/Clerk position for her, Ms. Eshbaugh in fact did what the Township now alleges she failed to do -- she was applying for the Assistant Secretary position, and in addition, offering to continue the remaining duties of the Township Clerk position, and to do so at a reduced cost to the Township.

After a thorough review of the exceptions and all matters of record, we conclude that the Hearing Examiner reasonably inferred from the facts of record, Mr. Summers' testimony, and the totality of the circumstances, that the motive for the Township's rejection of Local 66's offer of a hybrid Assistant Secretary/Clerk position for Ms. Eshbaugh was union animus. As such, the Hearing Examiner did not err in concluding that the Township violated Section 1201(a)(1) and (3) of PERA by discriminating against Ms. Eshbaugh with respect to her continued employment with the Township.⁸ Accordingly, the Township's exceptions shall be dismissed and the September 16, 2013 PDO shall be made absolute and final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Rochester Township are hereby dismissed, and the September 16, 2013 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, James M. Darby, Member, and Robert H. Shoop, Jr, Member, this nineteenth day of November, 2013. 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.

⁸ Because we find that the Township harbored union animus for its actions taken against Ms. Eshbaugh, which violates Section 1201(a)(3), and thereby Section 1201(a)(1) derivatively, we need not address the Township's remaining exceptions.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING :
ENGINEERS LOCAL 66 :
 :
 : CASE NO. PERA-C-12-98-W
 v. :
 :
 ROCHESTER TOWNSHIP :

AFFIDAVIT OF COMPLIANCE

Rochester Township hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (3) of the Public Employe Relations Act; that it has paid, and made Deanne Eshbaugh whole for, all wages and benefits that she would have earned from the last date of her employment with the Township on December 31, 2011 until the start of her new employment on March 19, 2012, including but not limited to wage increases received by the bargaining unit during the backpay period, out of pocket dental, medical and optical expenses for herself and responsible family members that would have been covered during her employment, holiday pay and accrued sick and vacation time; that it has paid interest at the simple rate of six percent per annum on any and all backpay due Deanne Eshbaugh; that it has posted a copy of the Final Order and Proposed Decision and Order as directed; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public