COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ELEASE ELLIOTT	:	
	:	
v.	:	Case No. PERA-C-14-358-E
	:	
LANCASTER COUNTY	:	

FINAL ORDER

Elease Elliott (Complainant) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on October 26, 2015, challenging a Proposed Decision and Order (PDO) issued on October 6, 2015. In the PDO, the Board's Hearing Examiner concluded that Lancaster County (County) did not violate Section 1201(a)(1), (3) or (4) of the Public Employe Relations Act (PERA) when it reposted a second shift position and awarded it to a correctional officer with more seniority than the Complainant. Pursuant to an extension of time granted by the Secretary of the Board, the Complainant timely filed a brief in support of the exceptions on December 3, 2015.[1] After a thorough review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDINGS OF FACT

8. The American Federation of State, County and Municipal Employees, District Council 89 (AFSCME) is the exclusive bargaining representative for the correctional officers employed by the County. On June 11, 2014, the County received information from AFSCME's local president that a lieutenant on the 4:00 p.m. to 12:00 a.m. shift erroneously advised his subordinates that the May 21, 2014 posting for the position on the 8:00 a.m. to 4:00 p.m. shift was not open to female correctional officers. As a result, on June 24, 2014, the County reposted the position on the 8:00 a.m. to 4:00 p.m. shift. (N.T. 61-63; 82-83; 88-91; Employer Exhibits 1, 3, 8, 9).

9. On June 29, 2014, Elliott submitted another bid for the 8:00 a.m. to 4:00 p.m. shift after the County reposted the position. However, she did not get the position because a more senior officer had also submitted a bid. On July 14, 2014, Elliott learned that she would be moving to the 4:00 p.m. to 12:00 a.m. shift. (N.T. 18-22; Complainant Exhibit 3).

DISCUSSION

The findings of fact relevant to the exceptions are summarized as follows. The Complainant was hired by the County on May 20, 2013 as a full-time probationary correctional officer, and was assigned to the 8:00 a.m. to 4:00 p.m. shift. On August 5, 2013, the Complainant volunteered to move to the 12:00 a.m. to 8:00 a.m. shift in place of another employe with medical issues. Thereafter, the Complainant requested several times to move back to the 8:00 a.m. to 4:00 p.m. shift. On May 29, 2014, the Complainant submitted a formal bid in response to a May 21, 2014 posting for a position on the 8:00 a.m. to 4:00 p.m. shift. The Complainant received the transfer and worked the 8:00 a.m. to 4:00 p.m. shift for several weeks beginning in June 2014.

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On July 14, 2014, Elliott learned that she would be moving to the 4:00 p.m. to 12:00 a.m. shift because a more senior officer had also bid on the 8:00 a.m. to 4:00 p.m. position in response to the June 24, 2014 posting. On July 23, 2014, the Complainant filed

[1] The County did not file a response to the exceptions.

a grievance protesting the award of the 8:00 a.m. to 4:00 p.m. shift to a more senior officer. The grievance progressed to step 3, but was ultimately withdrawn by AFSCME.

The Complainant filed a Charge of Unfair Practices on November 6, 2014, which was amended on December 1, 2014. In the Charge, as amended, the Complainant alleged that the County violated Section 1201(a)(1), (3) and (4) of PERA, stating as follows:

> Violation of CBA Article XVI Section 5: Complainant was the only applicant for 8-4 shift position but Respondent refused to move Complainant to that shift… permanently on 14 July 2014 (despite the position opening having been read at roll-call and posted) but instead re-posted the position. Complainant had temporarily been moved to the 8-4 shift (from 11 June – 28 July 2014) but then was put back on 12-8 as a result of this incident. Complainant believes the violation may also be retaliation by Respondent against her asking for assistance in restraining a patient/inmate while on hospital detail on 25 June 2014.

After a continuance requested by the Complainant, a hearing was held before the Board's Hearing Examiner on June 30, 2015, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the County did not violate Section 1201(a)(3) of PERA because the Complainant failed to present any evidence that she had engaged in protected activity prior to the reposting of the second shift position. The Hearing Examiner further concluded that the Complainant failed to establish a violation of Section 1201(a)(4) of PERA because she did not show that the County had discriminated against her for filing an affidavit, petition or complaint with the Board or for providing information or testimony before the Board.[2] The Hearing Examiner additionally dismissed the Complainant's allegation of a violation of Section 1201(a)(1) because she failed to demonstrate violations of Section 1201(a)(3) or (4), and did not allege an independent violation of Section 1201(a)(1) in her Charge or Amended Charge. Therefore, the Hearing Examiner rescinded the complaint and dismissed the Charge of Unfair Practices.

The Complainant alleges in the exceptions that the Hearing Examiner erred by failing to find that the initial posting on May 21, 2014 was valid and effective under the parties' collective bargaining agreement and side agreement and, consequently, there was no reason to repost the position in June 2014. The Hearing Examiner must set forth those findings that are relevant and necessary to support the conclusion reached concerning the charge of unfair practices, but need not make findings summarizing all of the evidence presented. **Page's Department Store v. Velardi**, 464 Pa. 276, 346 A.2d 556 (1975). Moreover, it is not the Board's role to resolve contractual disputes in the context of deciding charges of discrimination under PERA. **See Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia**, 480 Pa. 194, 389 A.2d 577 (1978). Thus, the Complainant's suggested finding of fact is not necessary or relevant to the disposition of the Charge of Unfair Practices. As such, the Hearing Examiner did not err in failing to make the additional finding offered by the Complainant.

The Complainant next asserts that the Hearing Examiner erred in concluding that she failed to allege in her Charge that the County retaliated against her for filing the July 23, 2014 grievance and that such allegation raised for the first time at the hearing was untimely. As stated in her exceptions, the basis of the Complainant's Charge concerned the County's reposting of the second shift position on June 24, 2014. However, the Complainant's grievance, filed on July 23, 2014, could not be the source of the alleged retaliation by the County because the County had decided to award the position on the 8:00 a.m. to 4:00 p.m. shift to a more senior employe on or before July 14, 2014 when the Complainant learned that she would be moving to a different shift. Indeed, the fact that

[2] In her exceptions filed on October 26, 2015, the Complainant does not challenge the Hearing Examiner's decision under Section 1201(a)(4) of PERA. 34 Pa. Code §95.98(a)(3) ("[a]n exception not specifically raised shall be waived").

the Complainant's grievance was filed after the County reposted the position and made its decision to transfer her to the 4:00 p.m. to 12:00 a.m. shift is dispositive of the Complainant's Charge and fatal to her exceptions. Accordingly, we need not reach the issue of whether the Complainant failed to timely rely on her protected activity of filing the grievance because it occurred after the County awarded the position to another employe, and thus could not have been the basis for the County's action.

Further, the Complainant failed to demonstrate in the presentation of her case at the hearing (N.T. 12-50), or in her exceptions, that she engaged in protected activity prior to the County's reposting of the position. In fact, the Complainant's asserted protected activity in her Amended Charge, **i.e.** requesting assistance in restraining a patient/inmate while on hospital duty, occurred on June 25, 2014, which was after the June 24, 2014 reposting of the 8:00 a.m. to 4:00 p.m. position. Additionally, there was no evidence presented of a grievance filed over the June 24, 2014 posting. Indeed, the Complainant did not even speak to Major Klinovski about the June 2014 posting until July 14, 2014, after the County had already made its decision to transfer her to the 4:00 p.m. to 12:00 a.m. shift. (Exceptions at 2, Employer's Exhibit 5). Absent proof of protected activity predating the alleged discriminatory adverse employment action, it is impossible, on this record, for the Complainant to carry her burden to prove that the County violated Section 1201(a)(3) of PERA. **Colonial Food Service Educational Personnel Association v. Colonial School District**, 36 PPER 88 (Final Order, 2005)(in order to establish a **prima facie** case of discrimination the charging party must demonstrate that the employe engaged in protected activity, that the employer knew of that activity and that the employer took adverse action against the employe because of a discriminatory motive or anti-union animus). Thus, the Hearing Examiner properly concluded that the Complainant failed to establish that the County violated Section 1201(a)(3) of PERA.

The Complainant also alleges that the Hearing Examiner erred in concluding that she failed to allege an independent violation of Section 1201(a)(1) of PERA. However, nowhere in the Charge or Amended Charge did the Complainant allege or assert facts to support a claim that the County's actions interfered, restrained or coerced employes in engaging in protected activity. Rather, a review of the Charge and Amended Charge reveals that the Complainant only alleged that the County reposted the position in retaliation for her engaging in protected activity. As such, the Complainant's Charge merely alleges a derivative violation of Section 1201(a)(1) of PERA. **Teamsters Local Union No. 384 v. Kennett Consolidated School District**, 37 PPER 89 (Final Order, 2006); **Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police**, 46 PPER 47 (Final Order, 2011), **aff'd sub nom., Pennsylvania State Troopers Association v. PLRB**, 39 A.3d 616 (Pa. Cmwlth. 2012); **Wattsburg Education Association v. Wattsburg Area School District**, 35 PPER 27 (Proposed Decision and Order, 2004), 35 PPER 54 (Final Order, 2004); **Derry Township Police Association v. Derry Township**, 40 PPER 38 (Proposed Decision and Order, 2009). Accordingly, the Hearing Examiner properly concluded that the Complainant failed to allege an independent violation of Section 1201(a)(1) of PERA.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final as amended herein. 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 Elease Elliott are hereby dismissed, and the October 6, 2015 Proposed Decision and Order be and the same is hereby made absolute and final, as amended.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this fifteenth day of March, 2016. 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.