COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 773	:	
	:	
v.	:	Case No. PERA-C-11-159-E
	:	
JIM THORPE BOROUGH	:	

PROPOSED DECISION AND ORDER

On May 23, 2011, Teamsters Local 773 (Local 773) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Jim Thorpe Borough (Borough) violated sections 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) "by discharging Jeff Thomas in retaliation for his past Union activity." On June 2, 2011, the Secretary of the Board informed Local 773 that no complaint would be issued on the charge because "the Board is unable to determine whether your charge was timely filed" and because "you have failed to state a cause of action under Section 1201(a)(1) and (5) of PERA." On June 13, 2011, Local 773 filed an amended charge alleging that the Borough violated sections 1201(a)(1) and (3) of the PERA "by discharging Jeff Thomas on 4/15/11 in retaliation for his past Union activity." On June 1, 2011, the Board issued an order directing remand to secretary for further proceedings in which it construed the amended charge as exceptions and "remand[ed] this matter to the Secretary with direction to issue a complaint. On June 24, 2011, the Secretary issued a complaint and notice of hearing directing that a hearing be held on August 12, 2011.

On July 15, 2011, the Borough requested deferral of the charge or a continuance of the hearing. On July 21, 2011, the hearing examiner denied the Borough's request for deferral, explaining that "the Board will not defer charges alleging discrimination as here. See Dauphin County, 32 PPER ¶ 32007 (Final Order 2000), citing Pine Grove Area School District, 10 PPER ¶ 10167 (Order Deferring Unfair Practice Charge Until Further Order of the Board 1979)." The hearing examiner also denied the Borough's request for a continuance.

On August 12, 2011, and September 12, 2011, the hearing examiner held the hearing and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On November 7, 2011, the Borough filed a brief by deposit in the U.S. Mail. On November 9, 2011, Local 773 filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On March 25, 1976, the Board certified Local 773 as the exclusive representative of a bargaining unit that includes employes of the Borough. (Case No. PERA-R-7482-C)

2. On February 25, 1999, Mr. Thomas began working as an employe of the Borough. (N.T. 9)

3. By 2004, Mr. Thomas had filed a grievance over the Borough's posting of an equipment operator position, and the Borough had filled the position with him. (N.T. 10-15)

4. In 2004, Mr. Thomas became a shop steward for Local 773. (N.T. 10)

5. By February 8, 2007, the Borough and Mr. Thomas had resolved a grievance he filed over the Borough's removal of him as an equipment operator and a grievance he filed over a letter from the Borough that he had been verbally abusive toward another employe and had not followed a supervisor's instructions. Mr. Thomas also had "suggested" to a supervisor (Jim Trainer) on two occasions that the supervisor was not following the parties' collective bargaining agreement. On the first occasion, Mr. Trainer agreed to

follow the collective bargaining agreement. On the second occasion, Local 773 followed up with a letter to Mr. Trainer. Upon receiving the letter, Mr. Trainer said, "I'm trying to work with you guys, and this is how you do it, by sticking it to me." Mr. Trainer thereafter followed the collective bargaining agreement. (N.T. 15-28)

6. On February 8, 2007, after the parties negotiated the matter, the Borough adopted rules and safety regulations for conduct of all employees. Section 1 B of the rules provides as follows:

"Major avoidable chargeable accident after full investigation by the Borough:

(Major accident shall be defined as any accident which involves the loss of life or limb or property damage in excess of $2,000.00)

First Offense – Subject to discharge, depending on severity of accident."

Section 1 C of the rules provides as follows:

"Minor avoidable chargeable accident:

First Offense – Reprimand
Second offense – Subject to 1 day suspension without pay
Third offense – Subject to 3 day suspension without pay
Fourth offense – Subject to 5 day suspension without pay
Fifth offense – Subject to discharge"

(N.T. 27, 82-83, 119-120, 157; Union Exhibit 10, Respondent Exhibit 3)

7. On March 9, 2007, Mr. Thomas filed a grievance over not being called out to cinder in late February 2007, and the Borough issued a verbal reprimand to him for his involvement in an incident resulting in damage to the lights on the plow of a pick-up truck when he and another employe (Jay McElmore) pulled the truck from a snow bank on February 7, 2007, and a written reprimand and one day suspension to him for "popping" a tire on a dump truck with a front end loader on February 24, 2007. (N.T. 28-43, 87; Union Exhibits 1-3)

8. By the end of 2007, the parties had settled the grievance over Mr. Thomas not being called out to cinder and grievances he filed over the verbal reprimand and the written reprimand and one day suspension. Mr. Thomas also had ceased being a shop steward. (N.T. 10, 43-46, 98-100; Union Exhibit 3)

9. In 2008, the Borough disciplined Gary Kelshaw under section 1 C of the rules and safety regulations for conduct of all employees for having gashed the hood of pick up truck while he was plowing snow. (N.T. 63-64, 122-123)

10. In August 2010, Wesley Johnson became the Borough's manager. (N.T. 146-147, 169)

11. On September 16, 2010, the parties settled a grievance Local 773 filed over a June 21, 2010, letter of insubordination from the Borough to Mr. Kelshaw. (N.T. 101-106; Union Exhibit 9)

12. On March 24, 2011, Mr. Thomas accidentally hit a walk-in cooler with the corner of a snow plow on a dump truck he was driving as he turned into the Borough's garage. (N.T. 47-54, 89-90)

13. On March 25, 2011, Mr. Johnson began an investigation of the accident by directing the Borough's chief of police (Joseph Schatz) to investigate the accident and prepare an incident report. (N.T. 148-149; Respondent Exhibit 1)

14. On March 31, 2011, Mr. Johnson met with Mr. Thomas prior to 4:30 P.M. to question him about the accident. At Mr. Johnson's invitation, a business agent for Local

773 (Darrin Fry) also attended the meeting. Mr. Thomas explained that he hit the cooler because he misjudged the clearance between the corner of the plow and the cooler. He did not mention any extenuating circumstances. Mr. Thomas' "prior Union activity" did not come up at the meeting. Afterwards, based on the extent of his investigation to date, not being "intimately familiar" with the rules and safety regulations for conduct of all employees at the time and thinking that the cooler could be repaired, Mr. Johnson told Mr. Fry that he would be recommending to the Borough's council that Mr. Thomas be suspended. (N.T. 59-62, 93, 109-112, 152-155, 171-178, 196)

15. On March 31, 2011, at 4:30 P.M., ABC Refrigeration, Heating and Cooling, Inc., faxed to the Borough an estimate to replace the cooler for $31,886.00. No other vendor submitted a lower estimate. (N.T. 157-158, 161-163, 183, 186-188; Respondent Exhibit 5)

16. By April 14, 2011, Mr. Johnson had inquired of a number of vendors as to whether or not the cooler could be repaired and had been informed that the cooler had to be replaced. Anecdotally, Mr. Johnson also was aware of "some minor incidents where there were scrapes and bruises in the vehicles" during periods of inclement weather. No accident similar to Mr. Thomas' had been reported to Mr. Johnson during his tenure as Borough manager. (N.T. 157, 160-162, 166-167, 178-180; Respondent Exhibit 5)

17. On April 14, 2011, Mr. Johnson, based on his understanding that there were no extenuating circumstances for Mr. Thomas having hit the cooler and that the cooler could not be repaired but had to be replaced at a cost of $31,886.00, recommended to the Borough's council that Mr. Thomas be terminated for having violated section 1 B of the rules and safety regulations for conduct of all employees. Mr. Johnson was aware at the time that Mr. Thomas had been a steward and had filed grievances. Mr. Johnson did not take either fact into consideration in making his recommendation. Council accepted his recommendation. Council's president (John McGuire) voted in favor of the recommendation because of the amount of damages involved and because Mr. Thomas did not attempt to fix the cooler after he hit it. (N.T. 147-148, 155-158, 163-166, 179-180, 195, 199-200, 203-204, 215-216, 224-225, 238)

18. On April 15, 2011, Mr. Johnson gave to Mr. Thomas a memorandum "Re: Major Avoidable Accident" as follows:

> "On April 14, 2011 Jim Thorpe Borough Council voted in regular session to terminate your employment effective immediately as a result of the major avoidable accident you were involved in on March 24, 2011. This accident caused, in excess of $2,000 damage and is therefore a terminable offense under Section 1. B. Accidents (Vehicular or Other) in the Borough of Jim Thorpe Rules and Safety Regulations for Conduct of all Employees.
>
> This action was taken after the Borough undertook a full investigation into the circumstances surrounding the accident and after you were given an opportunity to appear with bargaining unit representation to describe in detail the circumstances leading up to the accident."

(N.T. 65-66, 164; Union Exhibit 4)

19. On April 18, 2011, Mr. Fry on behalf of Mr. Thomas filed with the Borough a grievance alleging "[u]n-just discharge on 4/15/11." (N.T. 67-68; Union Exhibit 5)

20. On April 26, 2011, the parties met at the first step of their grievance procedure. Mr. Fry argued why Mr. Thomas should not have been terminated. Afterwards, Mr. Johnson denied the grievance. (N.T. 112-114)

21. In early May 2011, Mr. Trainer provided members of council with two statements of Mr. Thomas' work history with the Borough. One of the statements was authored by another supervisor (Vince Yaich). (N.T. 78, 201-203, 218-220, 225-227, 230, 239, 244; Union Exhibits 11-12)

22. On May 5, 2011, the parties met at the second step of their grievance procedure. Mr. Fry opened the meeting by arguing that Mr. Thomas' discharge was not fair

and that it had more to do with his "union activity" than with the accident itself. Mr. McGuire said that was not true. Out of frustration with Mr. Fry, Mr. McGuire also said that Mr. Thomas was "a bad seed," that he did not care for unions because "Unions only protect bad employees," that Mr. Thomas was "a bad employee"[1] and that he had statements from Mr. Thomas' "supervisors that painted a really bad picture of" Mr. Thomas. Afterwards, by a 4-3 vote, council denied the grievance. (N.T. 68-75, 79, 114-118, 131-132, 192-194, 202, 204, 216-220, 245)

23. Insurance paid for all but $1,703.63 of the cost of replacing the cooler. (N.T. 121, 189)

DISCUSSION

Local 773 has charged that the Borough violated sections 1201(a)(1) and (3) of the PERA "by discharging Jeff Thomas on 4/15/11 in retaliation for his past Union activity." According to Local 773, support for the charge may be found (1) in an anti-union statement the president of the Borough's council (Mr. McGuire) made at the second step of the parties' grievance procedure during the processing of a grievance over Mr. Thomas' discharge and (2) in a statement of Mr. Thomas' work history made by a supervisor (Mr. Yaich) that members of council had before them at the same step of the grievance procedure.

The Borough contends that the charge should be dismissed because Local 773 did not present a prima facie case during its case-in-chief. In support of its contention, the Borough submits that Local 773 did not establish a causal connection between Mr. Thomas' protected activity and discharge, especially since his discharge occurred over three years after he last engaged in protected activity. The Borough also contends that the charge should be dismissed because it established that it would have discharged Mr. Thomas even if he had not engaged in any protected activity and thus rebutted any prima facie case that Local 773 may have presented.

An employer commits an unfair practice under section 1201(a)(3) if it discriminates against an employe for having engaged in an activity protected by the PERA. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Representing an employe organization as a steward is a protected activity. Commonwealth of Pennsylvania, Department of Corrections, 36 PPER 114 (Final Order 2006). So is the filing of a grievance. Commonwealth of Pennsylvania, Department of Public Welfare, Somerset State Hospital, 27 PPER ¶ 27086 (Final Order 1996). An employer violates section 1201(a)(1) on a derivative basis if it violates section 1201(a)(3). PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978).

"The motive creates the offense" under section 1201(a)(3). PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), quoting PLRB v. Ficon, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). An overt display of anti-union animus by an employer may support a finding that the employer was discriminatorily motivated. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). The timing of events alone, however, will not. Pennsylvania State Park Officers Association, supra. Nor will the lack of just cause as an arbitrator might define the term. Bucks County Community College, 36 PPER 84 (Final Order 2005). An employer does not violate section 1201(a)(3) if it takes an employment action for a nondiscriminatory reason. Kennett Consolidated School District, 37 PPER 89 (Final Order 2006).

In order to prevail on a charge under section 1201(a)(3), the charging party must show by substantial evidence during its case-in-chief that an employe engaged in a protected activity, that the employer knew that the employe engaged in the protected activity and that the employer took adverse action against the employe for having engaged

[1] Local 773 presented two slightly different versions of what Mr. McGuire said, one by Mr. Thomas (N.T. 72) and one by Mr. Fry (N.T. 116, 118). The hearing examiner has credited Mr. Fry's testimony over Mr. Thomas' because Mr. Fry's overall recollection of events appeared to be more certain than Mr. Thomas' and because the Township's witnesses (Mr. Johnson, Mr. McGuire and Kyle Sheckler) essentially agreed with Mr. Fry's version of what Mr. McGuire said (N.T. 194, 217, 245).

in the protected activity. Perry County, 634 A.2d 808 (Pa. Cmwlth. 1994). If the charging party presents a prima facie case during its case-in-chief, the charge is to be sustained unless the employer shows that it would have taken the same action even if the employe had not engaged in the protected activity. Id. Evidence introduced after the charging party presents its case-in-chief is not to be considered in deciding whether or not the charging party presented a prima facie case. Erie City School District, 39 PPER 8 (Final Order 2008). Speculation is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

There is no dispute that Mr. Thomas engaged in protected activity by filing grievances and being a shop steward for Local 773. There also is no dispute that the Borough knew that he had filed grievances and been a shop steward. The dispositive question, then, is whether or not the Borough discharged him because he had filed grievances and been a shop steward.

Notably, at the conclusion of Local 773's case-in-chief, the record showed that Mr. Thomas last filed a grievance and was a shop steward in 2007 but was not discharged by the Borough until April 14, 2011, following an accident he was involved in on March 24, 2011 (findings of fact 8, 12 and 17). On a substantially similar record in Cameron County School District, 37 PPER 45 (Final Order 2006), the Board found no basis for concluding that an employer was motivated by anti-union animus when it refused to promote an employe who had engaged in a protected activity. Noting that the employe had engaged in the protected activity two years before the employer refused to promote her, the Board reasoned that the passage of time between the time she had engaged in the protected activity and the time the employer refused to promote her militated against a finding that the employer was motivated by anti-union animus. Given that the Borough discharged Mr. Thomas over three years after he engaged in protected activity, the same result obtains here.

Arguing for a contrary result, Local 773 points out that support for the charge may be found in Scott Township, 27 PPER ¶ 27106 (Proposed Decision and Order 1996), where a hearing examiner found discrimination based on an anti-union statement the employer made more than two years before it furloughed an employe. Local 773's reliance on that case is, however, misplaced. On exceptions, the Board reversed, explaining as follows:

> "Stracham's statement was remote in time, because it was made more than two years before Lewis's furlough. There also was a significant, intervening event between the statement and the furlough (i.e., issuance of the arbitration award which substantially increased the cost of operating the police department). Upon consideration of all of these factors, we agree with the Township's contention that Stracham's statement in April 1991 does not support an inference that Lewis's furlough more than two years later was motivated by anti-union animus."

Scott Township, 27 PPER ¶ 27206 at 470 (Final Order 1996). Mr. Thomas' accident was a significant, intervening event between his protected activity and discharge as was the arbitration award the Board found to be a significant, intervening event between the statement and the furlough in that case, so Scott Township as decided by the Board actually provides further support for dismissal of the charge.

Local 773 also submits that support for the charge may be found (1) in an anti-union statement the president of the Borough's council (Mr. McGuire) made at the second step of the parties' grievance procedure during the processing of a grievance over Mr. Thomas' discharge and (2) in a statement of Mr. Thomas' work history made by a supervisor (Mr. Yaich) that members of council had before them at the same step of the grievance procedure. A close review of the statement made by Mr. McGuire, however, does not show that anti-union animus motivated his vote to discharge Mr. Thomas. To the contrary, it shows at best that he was frustrated with Local 773 for trying to protect "a bad employee." See finding of fact 22. Moreover, Local 773 did not show that the statement from Mr. Yaich was before the members of council when they voted to discharge Mr. Thomas. Beyond that, the record showed that the Borough had a history of amicably settling grievances (findings of fact 3, 5, 8 and 11). There is, therefore, no basis for finding that Local 773 presented a prima facie case of discrimination during its case-in-chief.

Even if Local 773 had presented a prima facie case during its case-in-chief, the result would be the same. In rebuttal to Local 773's case-in-chief, the Borough presented credible testimony by Mr. McGuire that he voted to discharge Mr. Thomas for non-discriminatory reasons, see finding of fact 17, and by members of council that they only came into possession of Mr. Yaich's statement after they voted to discharge Mr. Thomas. See finding of fact 21. On that record, it is apparent that the Borough would have discharged Mr. Thomas even if he had not engaged in protected activity.

Local 773 would have the Board find otherwise because the Borough did not take into account a myriad of factors, including that section 1 B of the rules and safety regulations for the conduct of all employees does not require discharge for a major avoidable chargeable accident, that Mr. Thomas made a simple mistake when he hit the cooler, that insurance on the cooler brought the actual cost of damages to the Borough below the $2,000.00 threshold for a major chargeable accident under section 1 B of the rules and safety regulations for the conduct of all employees, that the age of the cooler made it more susceptible to damage and less susceptible to repair rather than replacement and that Mr. Thomas' supervisor (Mr. Trainer) did not tell him to fix the cooler before going home. Local 773 essentially argues that no just cause as an arbitrator might define the term exists for discharging Mr. Thomas. In a case of this nature, however, the Board's focus is on motive rather than on just cause as an arbitrator might define the term, see Bucks County Community College, supra, so there is no merit to Local 773's argument.

CONCLUSIONS

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

1. The Borough is a public employer under section 301(1) of the PERA.

2. Local 773 is an employe organization under section 301(3) of the PERA.

3. The Board has jurisdiction over the parties.

4. The Borough has not committed unfair practices under sections 1201(a)(1) and (3) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

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-eighth day of November 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

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November 28, 2011

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JIM THORPE BOROUGH
Case No. PERA-C-11-159-E

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: REGINA C HERTZIG ESQUIRE
JIM THORPE BOROUGH