

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LEWIS L. LORDITCH

v.

UNIVERSITY OF PITTSBURGH
JOHNSTOWN CAMPUS¹

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Case No. PERA-C-10-21-W

PROPOSED DECISION AND ORDER

On January 19, 2010, Lewis L. Lorditch filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the University of Pittsburgh, Johnstown Campus (University) violated Section 1201(a)(3) and (4) of the Public Employee Relations Act (PERA) when it counseled and disciplined him on several occasions.

On February 4, 2010, the Secretary of the Board issued a complaint and notice of hearing, designating a hearing date of April 30, 2010, in Harrisburg. On April 20, 2010, I rescheduled the hearing for September 15, 2010, due to the medical unavailability of two of the University's essential witnesses. On April 29, 2010, I denied the University's request to defer the charge to arbitration and change the hearing venue. At the hearing on September 15, 2010 in Harrisburg, Mr. Lorditch represented himself, and both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. The University submitted a post-hearing brief, and Mr. Lorditch presented a closing argument on the record.²

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The University is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-03-83-W, Order and Notice of Election, 2003).
2. Mr. Lorditch has been an employee of the University for over thirty years and is a public employee within the meaning of Section 301(2) of PERA. (N.T. 108; 43 P.S. 1101.301(2)).
3. Andy Csikos is responsible for academic custodians, residential custodians, maintenance workers and groundskeeping workers. Dan Potchak is the supervisor of the groundskeeping crew. Mr. Lorditch attended a labor-management meeting on November 1, 2006, during which he told Mr. Csikos about Mr. Potchak's alleged hostile attitude toward bargaining unit employees. (N.T. 58-59, 175-176).
4. Mr. Lorditch was a member of the labor-management relations committee for approximately three years. He resigned in the summer of 2008. While on the committee he repeatedly complained to Mr. Csikos of Mr. Potchak's alleged anger towards and intimidation of bargaining unit employees. (N.T. 63, 109, 118, 149-151).
5. The University has seven bargaining units, two of which are at the Johnstown Campus. The University receives at least one or two grievances per week totaling fifty to seventy-five grievances per year. Since 2000, Mr. Csikos has received and responded to over 170 grievances. None of those grievances have gone to arbitration and only 88 have

¹ The caption appears as amended by the hearing examiner. (N.T. 5-6).

² On December 20, 2010, Mr. Lorditch filed a post-hearing letter brief, which was filed beyond the briefing deadlines and was not served upon the University or its counsel. On December 28, 2010, I informed Mr. Lorditch and University counsel that I would not consider Mr. Lorditch's post-hearing submission unless he served it on the University and the University did not object. By letter dated April 28, 2011, counsel for the University filed its objection stating that "Mr. Lorditch still has not served on me the document referenced in your letter dated December 28, 2010" and requesting that I not consider Mr. Lorditch's post-hearing submission. Accordingly, I have not read or considered it.

gone to step three. Almost everyone in the work crew has participated in either a group grievance or an individual grievance since 2000. Mr. Lorditch has not been the only grievant. Ralph Owens, as a three-term shop steward, has presented many grievances on behalf of the bargaining unit to Mr. Csikos. He has not been the subject of any discipline on this record. (N.T. 125, 180-181, 235).

6. Since 2000, Mr. Csikos has issued discipline to other employees. He has participated in and approved of suspensions, terminations and warnings. Mr. Csikos has disciplined other employees for disrespectful behavior and outbursts. He follows a progressive discipline policy. (N.T. 181-183).

7. On February 22, 2005, Mr. Lorditch attended contract negotiations during which he addressed the alleged dishonesty of supervisors. (N.T. 59).

8. On November 14, 2006, Mr. Lorditch advised Mr. Csikos that Mr. Potchak's alleged anger and attitude was an escalating problem requiring immediate attention. (N.T. 61-62).

9. On April 4, 2007, Mr. Lorditch again spoke with Mr. Csikos about Mr. Potchak's alleged anger and attitude toward workers. (N.T. 63).

10. On June 24, 2009, Mr. Lorditch and Joe Stiffler were assigned to plant five marigolds in each of the 20-inch-deep concrete planters. A marigold is a short flower that grows 5-6 inches tall. Mr. Lorditch and Mr. Stiffler planted the marigolds at the bottom of the planters with insufficient soil. The flowers were not visible unless one stood over the planters and looked straight down. (N.T. 184-185, 214-216; Exhibit F).

11. When Mr. Potchak indicated that the flowers were planted incorrectly, Mr. Lorditch responded that Mr. Potchak should have been looking over their shoulders if he wanted the flowers planted differently. When Mr. Potchak asked why Mr. Lorditch and Mr. Stiffler had planted flowers that way, Mr. Lorditch responded: "you don't understand. I have a problem with the University. I just lost a third step grievance." (N.T. 216-217).

12. Mr. Potchak had never seen anyone plant potted flowers in the manner that Mr. Lorditch and Mr. Stiffler had done on June 24, 2009. Mr. Potchak issued a counseling to both Mr. Lorditch and Mr. Stiffler for the planting incident. (N.T. 218-219, 184-185; Respondent Exhibit F).

13. On July 9, 2009, Mr. Lorditch filed a human resources complaint against Mr. Potchak for issuing the counseling and for allegedly yelling and swearing during the counseling session. Mr. Lorditch also alleged that Mr. Potchak threatened Mr. Lorditch and other crew members with financial cutbacks and job losses. The University concluded that Mr. Lorditch's complaint was unfounded. Mr. Potchak denied threatening job cuts. (N.T. 60-61, 218, 229-234; Respondent Exhibits YY & HHH).

14. On June 29, 2009, Mr. Lorditch met with Mr. Csikos and Mr. Owens, shop steward, and inquired into whether Mr. Csikos addressed Mr. Potchak's alleged harassment and intimidation of bargaining unit employees. Mr. Csikos responded in the affirmative. (N.T. 60-61).

15. On July 7, 2009, Mr. Potchak observed Mr. Lorditch reading a book with his feet up at 3:30 or 3:40 in the afternoon. His work day at that time ended at 4:00. When Mr. Potchak presented Mr. Lorditch with a step I discipline for the unauthorized break, Mr. Lorditch accused him of harassment. (N.T. 186, 219-221; Respondent Exhibit M).

16. On July 8-9, 2009, a contractor treated the football and intramural fields, but did not apply any fertilizer. The contractor noted that the "fields were shatter time aerated, seeded and core aerated." (N.T. 188-189; Respondent Exhibit R).

17. Each employee in maintenance and groundskeeping are issued respirators that are theirs to keep. The respirators are fit-tested every year and training is administered every year by the University's environmental health and safety department. Respirators are available to employees anytime they feel it is necessary. (N.T. 187).

18. In July 2009, Dan Potchak instructed Mr. Lorditch to drag the intramural field with the open cab tractor because the covered tractor was broken. The dragging process involves dragging the field with a steel grate designed to break up the dried dirt cores. Two or three days before Lorditch dragged the fields, the grounds crew applied a pelletized fertilizer that breaks down slowly after repeatedly getting wet. The fertilizer is in the form of BBs which cannot break or emit a dust by driving a tractor and grate over them. Mr. Lorditch claimed to suffer a headache and nausea from dragging the field. When Mr. Lorditch requested a copy of the safety data sheet, Mr. Potchak directed him to the book containing the data sheets by the time clock. (N.T. 188-191, 222-224; Respondent Exhibits R & T).

19. All four pages of the data sheets for the fertilizer in question were actually in the book in a plastic folder for that product. Mr. Lorditch could not locate the data sheets. These data sheets indicate that no precautions, such as closed cabs or respirators, are required when working with the fertilizer. (N.T. 222-223; Respondent Exhibit T).

20. Some groundskeeping crew personnel have received training in handling harmful substances, including pesticides and herbicides. Mr. Lorditch is not one of those trained employees. Anytime an agent or product is used where the data sheets contain a restriction, only trained personnel are permitted to work that assignment. The University has not used a toxic substance in eight years. (N.T. 225).

21. On July, 15, 2009, Mr. Lorditch filed a grievance alleging safety violations for being assigned duties that allegedly exposed him to fertilizer dust when he dragged the fields. He also complained directly to Mr. Csikos. (N.T. 190-191, 213; Respondent Exhibit T).

22. Mr. Lorditch contacted the University's environmental safety officer in Pittsburgh who contacted Mr. Csikos about the matter. Mr. Lorditch also filed a formal complaint with OSHA in Pittsburgh. As a result, Mr. Potchak provided a copy of the safety data sheet directly to Mr. Lorditch. (N.T. 104-106).

23. An OSHA representative came to the University's Johnstown Campus and investigated. (N.T. 105-106).

24. On September 30, 2009, at approximately 9:20 a.m., Mr. Potchak went to the recycling building to instruct Mr. Lorditch that Mr. Csikos wanted to meet with him and the OSHA investigator in the conference room. Upon arriving inside the recycling building, Mr. Potchak observed Mr. Lorditch smoking a cigar, while emptying used oil into a barrel, and stated that "he [Mr. Csikos] don't want to see you doing that." The recycling building contains flammable products such as cardboard, gasoline, diesel and waste oil. At the time, an OSHA representative was on campus. The University has a published policy prohibiting smoking inside buildings. (N.T. 12, 17-18, 21, 27, 110, 176, 226-228; Complainant Exhibits 3, 4, 5, 7 & 8).

25. The University smoking policy provides as follows:

Smoking is prohibited inside all University owned and leased facilities, including but not limited to: residence halls, off-campus housing, academic halls, health science facilities, athletic facilities, and food service operations; and in all University vehicles, campus busses, and vans; with explicit limited exceptions described below.

Smoking is prohibited within 15 feet of the building primary entrances and HVAC intake vents of all University owned and leased property. Primary entrances shall be defined as the common public access points to each building, and is not intended for doors designated as emergency exit only or as service entrances. However, portions of loading docks that are under building cover shall be considered as inside the building, and smoking shall be prohibited.

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University faculty, staff, and students are responsible for:

Making a good faith effort to see that all faculty, staff, students, and their University guests do not smoke in areas where smoking is prohibited per this Policy, and taking appropriate personnel action, as necessary, to enforce this policy.

(N.T. 30-31; Complainant Exhibit 4).

26. The smoking policy does not prohibit the use of smokeless tobacco (Complainant Exhibit 4).

27. On October 1, 2009, Mr. Potchak issued a written counseling letter to Mr. Lorditch citing the smoking policy contained on page 24 of the Employee Information Policy Handbook. The letter also stated the following:

Furthermore, you were standing beside the waste oil drum, while smoking, creating a serious safety hazard. Also, according to the policy mentioned above, Employees are not permitted to extend an established lunch, relief time or take additional time from their regular shift to smoke. Continued violations of the Policy Handbook, may lead to further disciplinary actions.

(N.T. 18, 21-22, 187; Complainant Exhibit 3; Respondent Exhibit Z).

28. Mr. Potchak had never before seen Mr. Lorditch or any other employee smoking inside the recycling building or other prohibited areas, but he has seen Mr. Lorditch smoking on campus. (N.T. 145, 227).

29. On October 6, 2009, Mr. Lorditch filed a complaint with human resources against Mr. Potchak, wherein he admitted smoking at 9:20 a.m. in the recycling building. (N.T. 37; Complainant Exhibit 5).

30. On October 22, 2009, Nancy McCann, Labor Relations Manager, responded to Mr. Lorditch's complaint and denied his claim. In her denial letter, Ms. McCann recognized that the Union contested the employee handbook in several grievances. However, she informed Mr. Lorditch that those grievances had been denied and that the handbook has been enforced since 2005.³ Ms. McCann concluded that the counseling was not a violation of the University's anti-harassment policy and that Mr. Lorditch admitted to smoking in the recycling building near an oil barrel, which warranted the counseling. (N.T. 40, 236; Complainant Exhibit 6).

31. On October 27, 2009, Mr. Csikos observed Mr. Lorditch and Mr. Owens measuring the patio area in front of the physical plant, which was an unassigned task. Mr. Lorditch had already received his work assignment. Mr. Lorditch interrupted Mr. Csikos to state that it was his duty to measure the building perimeter. Mr. Csikos twice ordered Mr. Lorditch to return to work. Mr. Lorditch again interrupted and raised his voice. Mr. Csikos again instructed Mr. Lorditch to return to work or his behavior would be considered insubordination. Mr. Lorditch responded: "Go ahead, Write me up!" On the same date, Mr. Csikos issued a written step II discipline to Mr. Lorditch for taking an unauthorized break period and insubordination. (N.T. 78-79, 191-192; Complainant Exhibit 13; Respondent Exhibit GG).

32. The October 27, 2009, reprimand stated, inter alia, the following:

I again asked you to return to your work assignment; noting you were already ten minutes past your assigned break and that refusal would be considered insubordination, resulting in disciplinary action. You

³ The University issued a new hand book in January 2005. The Union filed a grievance regarding the handbook. Mr. Csikos met with the Union regarding the handbook grievance. As a result of those meetings, the University and the Union reached a bargained for grievance settlement agreement, and the University made the agreed upon changes to the handbook. The University thereafter re-issued the handbook in April 2005. (N.T. 177-179; Respondent Exhibits B & C). Therefore, contrary to Mr. Lorditch's opinion, the handbook is a bargained for document that has been agreed to and accepted by the Union. The handbook has been governing terms and conditions of employment, in conjunction with the parties collective bargaining agreement, since April 2005.

continued to comment on smoking areas and I again reminded you[] of your situation and then you then stated "go ahead and write me up." You then turned and walked away; stopping again, turning to me, commenting why the Maintenance Employees are still waiting. I informed you that I would be in the shop if not for your insubordination. Your comments at this time and this morning while signing a grievance form, tone of voice and confrontation are not warranted, disrespectful and not appropriate and if not corrected will result in progressive discipline.

(Complainant Exhibit 13).

33. At 12:30 p.m. on the same day, Mr. Lorditch met with Mr. Csikos in Mr. Csikos's office. Mr. Owens was also present. During that meeting, Mr. Lorditch became visibly upset and his face became red. Mr. Lorditch told Mr. Csikos that he was "out of control" and that he was "only human and not a demi-god." Mr. Csikos felt threatened and obtained the approval of Nancy McCann for a one-day suspension. (N.T. 84-86, 130-134, 195-198; Complainant Exhibit 14).

34. On October 28, 2009, Mr. Csikos issued a one-day suspension to Mr. Lorditch without pay for insubordination, inappropriate behavior and name calling during the meeting on October 27, 2009. (N.T. 84-85, 195-198; Complainant Exhibit 1; Respondent Exhibits II & JJ).

35. On October 28, 2009, Mr. Lorditch filed another human resources complaint against Mr. Csikos seeking an investigation into Mr. Csikos's disciplinary action against him. (N.T. 88-92; Complainant Exhibit 16).

36. On November 10, 2009, Ms. McCann responded to Mr. Lorditch's October 28, 2009 complaint and concluded that "Mr. Csikos' actions have not violated the University Anti-Harassment Policy Statement. Mr. Csikos acted appropriately during his interaction with you on the morning of October 27." (N.T. 92, 238-240; Complainant Exhibit 16; Respondent Exhibit QQ).

37. Mr. Lorditch admits that he was taking an unauthorized break while measuring the patio in front of the physical plant. (N.T. 96).

38. Mr. Lorditch has seen Mr. Potchak and other supervisors smoking within fifteen feet from the entrance of the physical plant. Mr. Lorditch has seen other employees smoking in University carts. Mr. Lorditch believes that no one has been counseled for this manner of tobacco use. (N.T. 25-28).

39. Mr. Owens has seen supervisors smoking at the picnic table on the patio in front of the physical plant building with other bargaining unit employees. (N.T. 115-121).

40. A member of the grounds-keeping crew chews tobacco inside the breakroom and garage shop. Supervisors have seen that employee chew because he gets up to spit in a can during meetings in the breakroom. Mr. Lorditch believes that the employee has not received any counseling or reprimands. (N.T. 29).

41. Mr. Potchak was unaware of a policy regarding smokeless tobacco. (N.T. 142-143).

42. Mr. Csikos permits smoking during work time when the employee is out in the field. He has not restricted smoking to only break times. Mr. Csikos has occasionally observed supervisors on the physical plant patio smoking, and he has counseled them for it. (N.T. 148-149).

43. The University's statement of confidentiality and non-retaliation designates a complaint of harassment as protected activity. The policy prohibits adverse action as a result of filing a complaint or participating in an investigation. (N.T. 13-14; Complainant Exhibit 1).

DISCUSSION

Mr. Lorditch claims that he has been unjustly targeted for discipline as a result of his strong Union support. Mr. Lorditch contends that he has upset his supervisors and managers, Mr. Potchak and Mr. Csikos, by insisting that the University comply with safety guidelines and addressing other bargaining unit matters on behalf of employees while he was the safety officer and labor relations representative. (N.T. 7-8). Mr. Lorditch further argues that University management is aware of his Union activities as well as the harassment and intimidation that he has experienced. (N.T. 8). Mr. Lorditch stated that he feels like "a marked man walking around with a bull's eye on [his] back waiting for Dan or Andy to take disciplinary action against [him] as they ignore the same type of behavior from numerous other employees on [his] crew and throughout the bargaining unit." (N.T. 8). As a remedy, Mr. Lorditch seeks to have his one-day suspension without pay expunged from his personnel records and to be paid for that day. (N.T. 251-252).

In Central York Educ. Ass'n v. Central York Sch. Dist., 40 PPER 29 (Proposed Decision and Order, 2009), the examiner presented the following:

In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employee engaged in activity protected by PERA; (2) that the employer knew that the employee engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employee's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). . . .

Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employees Union v. City of York, 29 PPER ¶ 29235 (Final order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employee's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994).

The Board will give weight to several factors upon which an inference of unlawful motive may be drawn. In PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether anti-union animus was a factor in the [adverse action against] the Complainant." Id. at 380. These factors include the entire background of the case, including 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 employee, the effect of the employer's adverse action on other employees and protected activities, and whether the action complained of was "inherently destructive" of important employee rights. Centre County, 9 PPER at 380.

The close timing of an employer's adverse action alone is not enough to infer animus, but when combined with other factors can give rise to the inference of anti-union animus. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984). Adverse employer action closely following an employer display of union animus, further combined with an employer's failure to adequately explain its adverse actions or its shifting reasons for an adverse action, can support an inference of anti-union animus and may be part of the union's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Mere suspicion or conjecture is insufficient to sustain a discrimination charge. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311, 314 (Pa. Cmwlth. 1974).

For Section 1201(a)(3) cases, the Board has adopted the analysis of Wright Line, Inc., 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (1980). Teamsters, Local 776 v. Perry County, 23 PPER ¶ 23201 (Final Order 1992); Washington Township Municipal

Authority, 20 PPER ¶ 20128 (Final Order, 1989); Township of Springfield, 12 PPER ¶ 12354 (Final Order, 1981). In Perry County, the Board stated that, under Wright Line, "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." Perry County, 23 PPER at 514. Upon the employer's offering of 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 at 23 (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." Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 at 64 (Final Order, 1992). The parties, however, may elicit and offer evidence in support of their primary burdens of proof or their rebuttal case at any time during the proceeding.

More importantly, however, the burden only shifts to the employer if the Union establishes a prima facie case of discrimination. Id. In Teamsters, Local No. 764 v. Montour County, 35 PPER 147 (Final Order, 2004), the Board opined that "Wright Line requires the complainants to establish a prima facie case that protected activity was the motivating factor in the employer's decision. Then and only then must the employer counter that prima facie case.'" Id. at 452 (emphasis added) (quoting Temple 23 PPER at 64). "The burden, therefore, is first on the complainant to affirmatively establish every element required in a discrimination claim regardless of whether the employer specifically challenges any or all element(s)." Montour County, 35 PPER at 452.

Central York Sch. Dist., 40 PPER at 134-135.

1. Motion for Non-suit

After Mr. Lorditch rested, the University moved for non-suit contending that Mr. Lorditch failed to establish a prima facie case of discrimination. (N.T. 173). I immediately granted the motion and dismissed Mr. Lorditch's claims under 1201(a)(4) because there was no evidence presented that Mr. Lorditch had, at any time prior to this charge, presented or participated in a filing, testimony or proceedings before the Board. In ruling on the motion regarding the discrimination claim under 1201(a)(3), I am confined to examining whether Mr. Lorditch established the elements of St. Joseph's during his case-in-chief, and not on the record as a whole. Montour County, supra; Central York Sch. Dist., supra.

Mr. Lorditch presented substantial, competent evidence that he engaged in protected activity of which the University was aware. However, Mr. Lorditch did not establish that the University took adverse employment action against him, in the form of counselings and discipline for poor work performance, unauthorized breaks, smoking in the recycling building, insubordination and inappropriate behavior, because he engaged in those protected activities. Mr. Lorditch also failed to establish that he was being treated differently than other similarly situated employees, that the University failed to explain its reasons for its disciplinary actions against him or that those reasons were pretextual. Indeed, other employees, such as Mr. Owens, who regularly engage in protected activities, have not been the subject of discipline. Also, the record contains no evidence that Mr. Csikos or Mr. Potchak engaged in anti-union activities or made anti-union statements.

Mr. Lorditch participated in contract negotiations in 2005. In November 2006 and again in April 2007, Mr. Lorditch confronted Mr. Csikos regarding Mr. Potchak's alleged anger and attitude problems. He performed these functions on behalf of the bargaining unit as a member of the labor-management relations committee. Mr. Lorditch resigned from the committee in the summer of 2008. Beginning one year later, in June 2009, Mr. Lorditch began receiving counseling and disciplines for his poor performance and behavior. However, Mr. Lorditch did not establish a nexus between the three years he was on the committee (when he was involved in negotiations and meetings) and the counselings and disciplines he received in 2009. The record does not show that Mr. Lorditch received any adverse employment actions during the three years that he was engaged in the duties and

responsibilities of the labor-management relations committee. The record does establish that Mr. Lorditch's work performance and attitude on the job suffered in 2009, triggering the need for management to take corrective action.

On July 15, 2009, Mr. Lorditch filed a grievance alleging safety violations for being assigned to drag the intramural fields with an open tractor after fertilizer was applied to the fields. Mr. Lorditch contacted the University's environmental safety officer and OSHA. The assignment was not discriminatory because employees choose their assignments based on seniority and Mr. Lorditch is one of the more senior employees with over thirty years of service at the University. Also, the data sheets, which were available to Mr. Lorditch by the time clock, establish that the fertilizer used on the fields is a non-hazardous substance that does not break down into a toxic dust, as alleged by Mr. Lorditch. Moreover, Mr. Potchak and Mr. Lorditch both knew that Mr. Lorditch had access to his personal respirator if the dust from the dried dirt cores became bothersome. Additionally, Mr. Lorditch lacks the specialized training in handling toxic fertilizers and pesticides; thus, the University would not assign him to handle such products. Finally, the University has not used any toxic substances in the eight years that Mr. Potchak has been employed at the University. Accordingly, the factual predicate for Mr. Lorditch's allegation against the University regarding the fertilizer dust and his open tractor field grating assignment does not exist.

Also, there is no indication that the counselings and disciplines issued to Mr. Lorditch were related to his complaints to OSHA and the environmental safety officer. Those counselings and disciplines developed from routine (not targeted) supervision of Mr. Lorditch's work performance and behavior. Mr. Lorditch believes that he is a victim of retaliation when in fact he is merely being held accountable for his work performance and attitude. After thirty years of University experience, planting marigolds at the bottom of the 20-inch-deep concrete planters and telling his supervisor that he has a problem with the University because he lost a grievance constitutes deliberate and spiteful dereliction of duties, not just poor work performance, warranting some type of disciplinary action.

Mr. Lorditch's complicit coworker, Mr. Stiffler, also received a counseling for the planting incident, and there is no indication on this record that he was involved in any protected activities. Moreover, Mr. Potchak and Mr. Csikos have routinely counseled and disciplined other employees for poor work performance regardless of protected activity. Engaging in protected activity does not excuse poor work performance or attitude. There is no indication on this record that Mr. Lorditch was treated more harshly than others, that he was targeted for discipline or that the University's reasons for discipline and counseling were pretextual.

Mr. Lorditch believes that he was treated more harshly than other employees when he was counseled for smoking in the recycling building. Mr. Lorditch believes that supervisors who smoke on the patio to the physical plant, which is within fifteen feet of its entrance and which violates the smoking policy, have not been counseled for that behavior. However, the factual predicate for Mr. Lorditch's claim here is also lacking. Mr. Csikos credibly testified that he has in fact counseled supervisors for smoking on the patio. Moreover, employees smoking outside on the patio, in an openly ventilated area, are not similarly situated to Mr. Lorditch who was smoking inside with exposed volatile substances where explosive fumes accumulate and could be ignited by a cigar that he was smoking while handling those substances. Mr. Lorditch is also not similarly situated to the employee who chews tobacco inside the breakroom because, on this record, that behavior is not a violation of the smoking policy or other University policy, nor does it pose a safety hazard with respect to flammable materials.

Indeed, at the request of Mr. Lorditch, the University conducted investigations into the actions against him regarding the planting, smoking and suspension. Ms. McCann is a management employee who is removed from Mr. Lorditch and his daily work environment. She independently sustained each counseling and disciplinary decision relating to Mr. Lorditch. Given the lack of evidence of unlawful motive combined with the abundance of evidence of the University's interest in correcting and deterring Mr. Lorditch's behavior, I conclude that these actions were not inherently destructive of important employee rights nor did the discipline have a negative impact on other bargaining unit

employees with respect to protected activities. Accordingly, I am granting the University's motion for non-suit, in the nature of a motion to dismiss. Mr. Lorditch's charge of unfair practices and all claims of discrimination and retaliation contained therein are hereby dismissed.

2. Legitimate Business Reasons

Because Mr. Lorditch did not establish a prima facie case of discrimination or retaliation, the burden never shifted to the University to establish that it would have taken the action complained of independent of the Union activity. Montour County, supra. However, as an alternative basis for purposes of Board and appellate review, I conclude that the University also met its burden of proving that it would have taken all of the complained of actions with respect to Mr. Lorditch with or without any Union or protected activity.

I credit the University's position, that its counseling of Mr. Lorditch and Mr. Stiffler for deliberately planting the marigolds too low in the concrete planters to be seen, was justified and necessary. This action was motivated by a desire to correct Mr. Lorditch's poor performance and retaliatory attitude toward the University. A short time later, Mr. Potchak observed Mr. Lorditch reading a book with his feet up when he should have been performing his assigned duties, for which he received a step-I disciplinary notice. After the counseling for the planting incident, a step I disciplinary notice was warranted as the next step in the progressive disciplinary process. Although Mr. Lorditch met with Mr. Csikos on June 29, 2009, concerning Mr. Potchak's alleged harassment and intimidation of bargaining unit members, timing alone is insufficient to establish unlawful motive and there is no other evidence that either Mr. Potchak or Mr. Csikos was motivated by Mr. Lorditch's complaints or anything other than what had become a pattern of poor job performance by Mr. Lorditch.

I also credit the University's legitimate business reasons for counseling Mr. Lorditch for smoking a cigar in the recycling building. Mr. Potchak discovered Mr. Lorditch smoking near flammable materials in a closed combustible environment, when he attempted to retrieve Mr. Lorditch for a meeting with Mr. Csikos and the OSHA officer. As Ms. McCann concluded in her response to Mr. Lorditch's human resources complaint, the counseling was warranted due to the admitted policy violation in conjunction with the dangers created by the complete disregard for safety of persons and property posed by smoking near combustive materials.

On October 27, 2009, Mr. Csikos observed Mr. Lorditch measuring the patio in front of the physical plant instead of performing assigned duties. During their exchange, Mr. Lorditch interrupted Mr. Csikos, raised his voice, refused to return to work when instructed to do so and, when warned about insubordination, said: "Go ahead, Write me up!" Rather than accepting responsibility and the counseling for smoking near combustible materials, Mr. Lorditch spitefully set out to show that others should be counseled for smoking on the patio under the literal terms of the policy. By this time, Mr. Lorditch's behavioral missteps kept building. Accordingly, the step-II discipline Mr. Csikos issued to Mr. Lorditch as a result was a reasonable, progressive response to Mr. Lorditch's behavior in front of the physical plant on October 27, 2009, and it was not motivated by union animus. Rather it was motivated by a need to stabilize Mr. Lorditch's progressively deteriorating conduct at work.

Finally, the University established, with substantial evidence, that Mr. Csikos suspended Mr. Lorditch in response to his behavior during a meeting in Mr. Csikos's office on October 27, 2009. Mr. Lorditch's behavior during that meeting became angry and confrontational. Thus, the discipline became progressively more severe to deter Mr. Lorditch from proceeding further along a self-destructive path of poor job performance and poor behavior that could lead to termination. The University's reasons for the disciplinary actions taken against Mr. Lorditch do not have to be the most just or appropriate response at the time. The University's decisions to issue discipline simply must be, and were, devoid of unlawful motive. Accordingly, the University has supported its disciplinary actions against Mr. Lorditch with legitimate business reasons that are not pretextual.

CONCLUSIONS

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

1. The University is a public employer under PERA.
2. Mr. Lorditch is a public employe under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The University has not committed unfair practices within the meaning of Section 1201(a)(3).
5. The University has not committed unfair practices within the meaning of Section 1201(a)(4).

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 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 tenth day of May, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner