

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MICHAEL SEASHOLTZ :
 :
 v. : Case No. PERA-C-10-297-E
 :
 MONTGOMERY COUNTY :

PROPOSED DECISION AND ORDER

On August 25, 2010, Michael Seasholtz filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Montgomery County (County) violated Section 1201(a)(3) and (4) of the Public Employee Relations Act (PERA).¹ In its charge, Mr. Seasholtz specifically alleged that the County denied him a lateral transfer from Park Region III to Park Region II because of his union activity when it awarded the position to another County employe who was allegedly less qualified.

On September 1, 2010, the Secretary of the Board issued a complaint and notice of hearing, designating a hearing date of December 15, 2010. During the hearing on that date, SEIU (Union) represented Mr. Seasholtz, and both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties provided oral argument at the hearing in lieu of filing post-hearing briefs.

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

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 6).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6).
3. Mr. Seasholtz is a public employe within the meaning of Section 301(2) of PERA. (N.T. 6).
4. Mr. Seasholtz is a full-time park ranger with Montgomery County Parks and Heritage Services Department in Region III. As a park ranger, Mr. Seasholtz generally provides security and visitor assistance; he also enforces park rules. (N.T. 14, 23).
5. Mr. Seasholtz engaged in union organizing activities in 2007. In 2008, Mr. Seasholtz became active in SEIU and assisted union organizers by going to individuals' homes to solicit union membership. Mr. Seasholtz was again active in union organizing on behalf of SEIU in 2010. During the 2008 and 2010 campaigns, Mr. Seasholtz spoke with County park employes about unionizing. (N.T. 15-16, 21).
6. In 2008, Mr. Seasholtz told William Brosius, his regional manager at the time, that he was involved in union organizing. By the next organizing campaign in 2010, Mr. Brosius was no longer Mr. Seasholtz's regional manager. During the 2010 campaign, Mr. Seasholtz told Park Superintendent Ken Shellenberger that he was involved in union organizing activities. Mr. Seasholtz also has an SEIU sticker on his car and truck. (N.T. 16-17).
7. Jessica Plum began working as a clerk in the Parks and Heritage Services Department in May 2008. On March 6, 2010, she submitted an application for a full-time park ranger position at Greenlane Park. On her application, Ms. Plum indicated that she holds a bachelor's degree in recreational science and that she possessed knowledge of Greenlane Park and the surrounding area. (Union Exhibit 7).

¹ Mr. Seasholtz filed a prior charge against the County, at case number PERA-C-10-159-E, alleging that the County discriminatorily refused to promote him to the position of corporal ranger.

8. On March 16, 2010, Mr. Seasholtz sent a letter to Corporal Ronald S. Miller at the Norristown Farm Park and Richard Wood, Regional Manager of Region II of the Parks and Heritage Services Department. In the letter, Mr. Seasholtz informed Mr. Miller and Mr. Wood that he continued to be interested in transferring to a full-time park ranger position in Region II. (Union Exhibit 2).

9. On March 31, 2010, Mr. Seasholtz attended a Union meeting at the Human Services Center Building. County Commissioner Joseph Hoeffel also attended the meeting. At the meeting, Mr. Seasholtz spoke with Commissioner Hoeffel about his union activities. (N.T. 17-18; Union Exhibit 1).

10. On April 27, 2010, Department Director Ron Ahlbrandt posted a position vacancy. Mr. Seasholtz applied for the position and hand delivered his application to Mr. Ahlbrandt. Mr. Seasholtz was interviewed for the position. The interview team members were Scott Gearhart, Matt McGuire and Richard Wood. (N.T. 32-33; Union Exhibit 3).

11. During a telephone conversation with Mr. Gearhart before the interview, Mr. Seasholtz made statements similar to the following: (1) "it was nothing personal in the actions that I'd taken. You know, it was nothing personal and I don't want anything bad to happen to you;" and (2) "I didn't know if you know about the legal actions that I've taken or not, but it's nothing personal, you had nothing to do with it, you know. It's nothing personal." (N.T. 33, 54).

12. By letter dated June 8, 2010, Mr. Wood informed Mr. Seasholtz that the County selected another employe to fill the position of park ranger at Greenlane Park. In the letter, Mr. Wood stated that "[w]e received many excellent applications, but felt another candidate had better qualifications and experience." The County selected Ms. Plum for the position. (N.T. 34, 54; Union Exhibit 5).

13. The park ranger job posting provides that "[a]ny currently employed full-time or part-time employee of the P & HS Department" may apply and that the "position will also be posted externally, including the County website for job listings." A candidate for a park ranger position in Montgomery County does not have to be or have experience as a park ranger. (N.T. 58-59; Union Exhibit 3).

DISCUSSION

In his charge, Mr. Seasholtz alleged that he was denied a lateral transfer to Region II because of his union organizing activities and for filing a prior unfair practice charge against the County. To sustain his charge under Section 1201(3) and (4), Mr. Seasholtz has the burden of proving that he engaged in activity protected by PERA; that the County knew that he engaged in protected activity and that the County engaged in conduct that was motivated by Mr. Seasholtz'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).

Among the factors upon which an inference of animus may be drawn are the entire background of the case (including any anti-union activities of the employer) any employer statements showing state of mind, a failure of the employer to adequately explain the adverse action including disparate treatment, the timing of the adverse action and the extent to which the action was "inherently destructive" of important employe rights. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Final Order, 1978). Evidence of these factors may be part of the employe's prima facie case. Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Only if the union establishes a prima facie case that an employer's adverse action against an employe was motivated by the employe's protected activity does the **burden shift to the employer**. West Shore Educ. Ass'n v. West Shore Sch. Dist., 23 PPER ¶ 23031 (Final Order, 1992).

MOTION TO DISMISS

After the Union rested at the close of its case-in-chief, the County moved for the dismissal of the charge and argued in support thereof that the Union did not present evidence to support the second and third necessary elements of St. Joseph's (i.e., that the County employes responsible for hiring a candidate for the park ranger position at Greenlane Park in Region II knew of Mr. Seasholtz's protected activity and that the County selected another employe over Mr. Seasholtz because of his union activity). (N.T. 76-79).

For purposes of ruling on the motion, I conclude that enough evidence has been presented to impute knowledge to the County and the employes who made the hiring decisions for the park ranger position at Greenlane Park. Mr. Seasholtz communicated his union involvement and displayed his organizing activities to all the employes in the County's Parks and Heritage Services Department during the 2008 and 2010 organizing campaigns of SEIU. He directly informed one of the County Commissioners, a Park Superintendent and a Regional Manager of the Parks and Heritage Services Department of his organizing activity.

Mr. Seasholtz also discussed his litigation with Mr. Gearhart on the telephone prior to his interview for the position. In his testimony, Mr. Seasholtz indicated that his conversation with Mr. Gearhart was nondescript and did not specifically reference unfair practice litigation based on union activity. However, Mr. Gearhart was on the interview team with Mr. Wood, and Mr. McGuire. In Mr. Seasholtz's prior unfair practice charge (Case No. PERA-C-10-159-E) he alleged that Mr. Wood informed him, by letter dated March 10, 2010, that he was not selected for the position of Corporal Ranger in Region II. He further alleged that Mr. Wood based his decisions on discriminatory reasons. Mr. Seasholtz's allegations in the prior charge were directed at Mr. Wood. Mr. Wood is also the subject of the allegations in this charge and he was on the interview committee with Mr. Gearhart. Therefore, I am drawing the inference that Mr. Wood, Mr. Gearhart and Mr. McGuire knew of the prior charge and Mr. Seasholtz's union activities as outlined therein. Accordingly, because Mr. Seasholtz pursued his union organizing activities on behalf of such a large segment of his fellow employes, within the meaning of Child Development, supra, and directly informed several management level employes of his activities, I conclude that Mr. Seasholtz has satisfied the second prong of St. Joseph's.

However, Mr. Seasholtz has not satisfied his burden of proving that he was denied the transfer to Greenlane Park because of his union organizing activities. During the hearing, the parties' representatives were given an opportunity to argue their respective positions on the motion to dismiss presented by the County. In response to the motion, Mr. Seasholtz's Union representative argued that "if we were to listen to their testimony, we can show that the reasons are untrue." (N.T. 81). In other words, the Union contends that I should deny the motion and require the County to present its case so that the Union could demonstrate, with the County's witnesses, that its reasons for denying Mr. Seasholtz the transfer to Region II were pretextual.

The Board's case law makes clear that, should a complainant wish to establish a prima facie case with evidence of pretext or shifting employer explanations, the complainant may call defense witnesses during their case-in-chief to add to the entire background of the case, yield a sufficient inference of unlawful motive and meet his or her burden of proof. Upland, supra; West Shore, supra. When a complainant fails to adduce such evidence during its case-in-chief, it risks forfeiting an opportunity to do so during the respondent's case if, as here, the examiner grants the respondent's motion to dismiss, either at the hearing or later when preparing an order. Having determined that the Union did not establish an inference of unlawful motive in this case, the burden never shifted to the County to present a defense after the Union rested.

I emphasize that the Union has not been deprived of any opportunities here. Rather, the Union forfeited those opportunities by failing to utilize the testimony of County witnesses to meet its burden during its case. To further illustrate the point, the same result would obtain if the County simply chose not to present a defense case and immediately rested after the Union rested, rather than presenting a formal motion to dismiss. The County was confident that the burden never shifted. A complainant simply

cannot depend on a respondent presenting a defense case to meet his or her burden of proving a prima facie case.

On this record, the Union's case lacks substantial evidence to support an inference of unlawful motive. The record contains no evidence of anti-union activities of County employees or anti-union statements demonstrating an unlawful state of mind on the part of any supervisory or management level employees. Although Mr. Seasholtz was engaged in Union organizing activities in 2010 which was close in timing to his application for the transfer to Region II, timing alone is insufficient to establish unlawful motive. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004). The Union has not established the requisite nexus between Mr. Seasholtz's union organizing activities and the County's selection of another County employee for the Region II park ranger position. Also, as stated above, the Union did not adduce any explanations from the County regarding their reasons for selecting another employee over Mr. Seasholtz. Consequently, the Union did not establish either a failure of the County to adequately explain its actions or an exposition of shifting or untruthful explanations.

The complainant's case was largely based upon his qualifications, training, experience and background as a park ranger as compared to Ms. Plum's lack of such qualities. However, the April 27, 2010, posting for the position of full-time park ranger provides that "[a]ny currently employed full-time or part-time employee of the P & HS Department" may apply for the position. (F.F. 14). It further provides that the "position will also be posted externally, including the County website for job listings." (F.F. 14). According to the posting, the County published its position that a successful candidate for full-time park ranger does not have to be a park ranger or have experience as a park ranger. The fact that the successful candidate had less experience and training as a park ranger than Mr. Seasholtz, therefore, does not have any tendency to support an inference of unlawful motive. Moreover, Mr. Seasholtz admitted that Ms. Plum was the type of person qualified to apply for the position. (N.T. 58).

Since park ranger experience, training and skills were not necessarily prerequisites for the position in Region II, and the Union did not solicit the testimony of County witnesses, I am unable to determine the criteria the County considered or relied upon in selecting Ms. Plum or in determining that she possessed "better qualifications and experience." According to her job application, which was offered by the Union, Ms. Plum was already familiar with Greenlane Park and the surrounding area. She had been working in the Parks and Heritage Services Department since 2008. Beyond speculation, however, I am unable to conclude that Mr. Seasholtz would have been selected, but for his union activity, simply because he has more park ranger experience and training than Ms. Plum. The County provides on-the-job training for its rangers and publishes that ranger experience is not required. Experience and training comparisons are simply not determinative in a case involving a lateral transfer to an entry level position, in contrast to a case involving a promotion.

CONCLUSIONS

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

1. The County is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employee organization within the meaning of Section 301(3) of PERA.
3. Mr. Seasholtz is a public employee within the meaning of Section 301(2) of PERA.
4. The Board has jurisdiction over the parties hereto.
5. The County has not committed unfair practices in violation of Section 1201(a)(3) and (4) of PERA.

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 fourteenth day of January, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner