

COMMONWEALTH OF PENNSYLVANIA
PENNSYLVANIA LABOR RELATIONS BOARD

SEIU HEALTHCARE PENNSYLVANIA :
:
:
V : Case No. PERA-C-11-52-E
:
LEHIGH COUNTY :
CEDARBROOK NURSING HOME :
:

and

PENNSYLVANIA SOCIAL SERVICES UNION, :
LOCAL 668 :
SERVICE EMPLOYES INTERNATIONAL :
UNION : Case No. PERA-C-11-75-E
:
v. :
:
LEHIGH COUNTY :

PROPOSED DECISION AND ORDER

Case No. PERA-C-11-52-E

On February 22, 2011, SEIU Healthcare Pennsylvania (SEIU or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Lehigh County, Cedarbrook Nursing Home (County) alleging that the County violated Sections 1201(a)(1) and (3) of the Public Employe Relations Act (PERA). This case was docketed to PERA-C-11-52-E

On March 7, 2011, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and May 9, 2011, in Allentown was scheduled as the time and place of hearing if necessary, before Thomas P. Leonard, a Hearing Examiner of the Board.

Case No. PERA-C-11-75-E

On March 18, 2011, Pennsylvania Social Services Union Local 668, Service Employes International Union (PSSU or Union) filed a charge of unfair practices with the Board against Lehigh County. This case was docketed to Case No. PERA-C-11-75-E

On April 5, 2011, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and August 12, 2011, in Harrisburg was scheduled as the time and place of hearing if necessary before Donald Wallace, Esquire, a hearing examiner of the Board.

A hearing was necessary, but was changed to July 12, in Allentown.

On May 12, 2011, the Chief Counsel of the Board reassigned Case No. PERA-C-11-75-E to Hearing Examiner Thomas P. Leonard, who notified the parties that a hearing in that case would also be held on July 12.

On the day of the hearing, the parties agreed to consolidate the PERA-C-11-75-E with PERA-C-11-52-E for hearing and decision. The hearing afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

Post hearing briefs were submitted by the Union on August 24, 2011 and by the County on September 13, 2011.

The examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. Lehigh County is a public employer within the meaning of Section 301(1) of PERA and is governed by a nine-member board of commissioners and a county executive.

2. The Pennsylvania Social Services Union, Local 668, Service Employes International Union is the exclusive representative of a unit of human services supervisors of Lehigh County. The Board certified PSSU to represent this unit in 2007. (N.T. 20-21; Union Exhibit 1)

3. The unit consists of approximately 26 human services supervisors in children and youth services, mental health and mental retardation and other county departments. (N.T. 20-21)

4. Subsequent to the Board certification of the unit, the Union and the County reached a written Memorandum of Understanding (MOU) (N.T. 21; Union Exhibit 2).

5. The MOU was signed by representatives of all parties. It was then ratified by the union membership and by the County Commissioners. (N.T. 22-23)

6. The MOU states that it was the intent of the parties that the MOU would remain in "full force and effect" for its term which was from November 26, 2008 through December 31, 2011. (N.T. 23; Union Exhibit 2 at pp. 21 and 23)

7. The MOU contains a wage article. (N.T. 24-25, Union Exhibit 2 at p. 14)

8. Under this article, employees were to receive a step increase annually. (N.T. 24-25)

9. In addition, a general wage increase was negotiated for each year of the contract including a 3.5% general wage increase effective January 2, 2011. (N.T. 25)

10. There was also a negotiated longevity bonus for each year of the MOU. (N.T. 26; Union Exhibit 2, 13.5(a))

11. These wage increases were implemented as scheduled in 2009 and 2010. (N.T. 46)

12. SEIU Healthcare Pennsylvania is the exclusive certified representative of a unit of first level supervisors at the County nursing home, known as Cedarbrook. The unit consists largely of LPNs and RNs. The Unit includes approximately 170 employees. (N.T 39-41)

13. In 2007, the Board certified the Union to represent this unit. (N.T. 41-42; Union Exhibit 5)

14. Subsequent to that certification, the parties negotiated the first MOU. (N.T. 42; Union Exhibit 5)

15. The term of that document is December 13, 2008 through December 31, 2011. It was signed by all parties and then ratified by the Union membership as well as the County Commissioners. (N.T. 43)

16. The MOU states that the parties intended this document to remain in "full force and effect" during its term. (N.T. 43-44; Union Exhibit 5 at p. 38)

17. Under this Memorandum, there was an agreement for various types of wage increases to be paid during the term of the Memorandum. (N.T. 44; Union Exhibit 5 at pp. 13-14)

18. In each year of the Memorandum, employees were to receive a step increase per a County wage scale. (N.T. 44)

19. In each year, employees were to receive a longevity bonus. (N.T. 46; Union Exhibit 5 at p. 15)

20. There was also a general wage increase set forth for each year of the Memorandum. For 2011, that increase was tied to what was negotiated between the County and the United Food and Commercial Workers (UFCW) with respect to the rank and file unit at Cedarbrook. (N.T. 45)

21. All the wage increases scheduled for 2009 and 2010 were implemented. None of these promised wage increases, however, were paid to members of the unit in 2011. (N.T. 46, 82)

22. None of the wage increases for 2011 were given to employees in either the human services supervisory unit represented by PSSU or the nursing supervisory unit represented by SEIU Health Care Pennsylvania, even though they had been scheduled and set forth specifically in the Memoranda. The County unilaterally rescinded those wage increases after a meeting when county officials informed the Union leadership of the decision. (N.T. 27, 46, 69, 82; County Exhibit 2 and Union Exhibit 3)

23. On August 31, 2010, County Executive Donald T. Cunningham, Jr. presented the proposed 2011 County Budget to the County Commissioners for their review and approval. At the same time, he sent a "Dear Lehigh County Employee" letter to the county employees with the major theme being that the bad national economy was causing a decline in revenues and forcing him to propose a tight budget that included an increase in the property tax to 11.9 mills. The County had reduced the millage in 2004 and 2006. The millage rate for 2011 would still be lower than it was in 2003. The letter, however, went on to inform the employees that, "our employes are struggling through this economic recession just like everyone else and that we need to provide pay increases, however, small they may be." The letter made no mention of eliminating the supervisory units' pay increases or step increases. It did mention "[s]tep increases would be restored in our budget, and for those at the top step, a two percent increase is proposed." (N.T. 31, 48, 53, 63; County Exhibit 1)

24. On October 5, 2010, at the Commissioners' budget review meeting, the Commissioners met as the Administrative Committee in the form of a committee as a whole. Director of Administration, Thomas Muller, advised the Commissioners that the County had a smaller ratio of union to non-union employees than neighboring counties and warned that "...if the County continued to 'hit' the non-union employes there will be a change in that statistic and the County will deal with more unionization." (N.T. 94-95, 97, Union Exhibit 11 at page 4)

25. On November 24, 2010, in an e-mail sent to the members of the PSSU unit, Tom Muller, Director of Administration, stated: "... **there will be no general increases, step/merit increases or longevity pay given in 2011.**" (bold in original). Since this is a meet and discuss unit, the County did not believe it needed Union concurrence and did not receive such concurrence. On November 23, 2010, Muller had sent the same information in a letter to Carlos Rivera, the SEIU Health Care Pennsylvania representative. (N.T. 29, Union Exhibits 3 and 6)

26. Muller's e-mail and letter noted that the implementation of these changes had to be approved by the County Board of Commissioners. (N.T. 29, 50, Union Exhibits 3 and 6)

27. The nursing supervisory unit did not receive wage increases in 2011 even though the UFCW negotiated and received a general wage increase of 2% for the rank and file unit at Cedarbrook effective January 1, 2011. Under the MOU, the UFCW wage increase was to provide the basis for the supervisory unit's wage increase. (N.T. 46, 51, 76-77)

28. Despite County Executive Cunningham's August 31 statement of the need to provide pay increases, the scheduled wage increases in the MOUs for the supervisory employes in the two meet and discuss units were not paid but instead unilaterally rescinded by the County. (N.T. 47, 50-51; Union Exhibit 6)

29. In November, 2010, Muller notified the Unions' leadership and membership of the County's decision to rescind the wage increases for the supervisory employes. This was before the County Commissioners even adopted the final 2011 budget. (N.T. 55-56, 52, County Exhibit 2, Union Exhibit 3)

30. Muller's November announcement to the Unions was later codified into ordinances adopted by the County Commissioners at the same time they adopted a formal 2011 budget. (N.T. 52, 56, Union Exhibits 7 and 8)

31. Ordinance No. 2010-212 was passed by the Board of Commissioners by a vote of 8-1 on December 15, 2010 and approved by the County Executive on December 22, 2010. It eliminated the general wage increase, step increase and longevity payments for the unit represented by SEIU Healthcare Pennsylvania. (N.T. 52, Union Exhibit 7)

32. Ordinance No. 2010-211 was passed by the Board of Commissioners also by a vote of 8-1 on December 15, 2010 and approved by the County Executive on December 22, 2010. It eliminated the general wage increase, step increases and longevity payments in 2011 for the unit represented by PSSU. (N.T. 56, Union Exhibit 8)

33. According to the County Ordinances and Muller's November 19, 2010 letter, the decision to eliminate the wage increases was done "in light of the current budgetary and economic conditions facing the County." (N.T. 50-56, 69, Union Exhibits 6, 7, 8; County Exhibit 2)

34. At the same time that the County decided to eliminate the scheduled wage increase for these two unionized groups, allegedly due to budgetary and economic conditions, the County decided to grant wage increases to the much larger group of nonunion employees of Lehigh County, many of them in management positions. (N.T. 30, 52)

35. While not mentioned in the County Executive's August 31, 2010 letter, the County's non-union employees also received a full longevity bonus in 2011. (N.T. 84; County Exhibits 3 and 4)

36. On September 15, 2010, the County Commissioners began hearings on the proposed budget. The budget contained sufficient funds for all the wage increases that were set forth in the two memoranda of understanding. (N.T. 84-85, 110, 113, Union Exhibit 9)

37. The County Executive's proposed budget became the County's final budget when the Board of Commissioners adopted it with no amendments. On October 5, 2010, the Commissioners did approve two amendments affecting only the bargaining units. One amendment removed longevity pay; another removed step increases and general wage increases. Chairman of the Board of Commissioners, Dean Browning, testified that these amendments were not "formally adopted" but only reflected the "sense of the Board." (N.T. 96, 110, 113, Union Exhibit 11)

38. According to the official minutes of the Commissioners' meetings, the Commissioners engaged in lengthy discussion of the merits of eliminating the pay

increases for the supervisory units. (N.T. 96, 98, 101 and 103, Union Exhibits 11, 12, 13 and 14)

39. According to the official minutes, the County's elimination of the pay increases for the supervisory units saved the county would have been \$357,600 (\$86,500 for the PSSU unit and \$271,500 for the SEIU Healthcare PA unit). (N.T. 72, 99, Union Exhibit 12, page 4)

40. The cost of the wage increases for the County's non-union employes was over \$1.2 million. (N.T. 87, 118, Union Exhibit 9)

41. The County's overall budget for 2011 was just over \$390 million. (N.T. 62, 106, County Exhibit 1, Union Exhibit 10, page 2)

42. The 2011 budget also included a property tax increase to a millage rate of 11.9 mills. This was a 16 percent tax increase. (N.T. 62, 106, 108, County Exhibit 1)

43. The County's revenue has two main sources: 25% comes from the property tax and 75% comes from the Commonwealth of Pennsylvania for health and human services programs and from the Federal Medicare and Medicaid programs for nursing home reimbursements. (N.T. 118-119)

44. At the beginning of 2011, the County had a reserve, sometimes called its "rainy day fund," in the amount of \$21 million. (N.T. 91, Union Exhibit 10)

45. The County Executive considered this a "healthy" level of reserves. (N.T. 91, Union Exhibit 10)

46. Also, at the beginning of 2011, there was a "tax relief fund" of \$4,370,000. (N.T. 114-115)

47. The County learned in April, 2011, that it had ended 2010 with a budget surplus of between \$4 million and \$5 million. (N.T. 92, 115)

48. Within this surplus was a \$500,000 surplus in the operation of the nursing home, Cedarbrook, where the supervisory unit of nurses represented by SEIU Healthcare Pennsylvania are employed. (N.T. 116-117)

49. At the end of 2010, the County was preparing to begin negotiations with four unions for successor collective bargaining agreements for bargaining units covering rank and file employes. (N.T. 66-67)

50. PSSU, the Union representing the unit of human services supervisors, was one of the unions representing a rank and file unit in the upcoming negotiations. (N.T. 76)

51. Four members of the Board of County Commissioners, Dean Browning, Percy Dougherty, Tom Creighton and Andy Roman, stated at open Board of Commissioner meetings in December that their intention in enacting the ordinances in eliminating the pay raises for the meet and discuss units was to send a message to the unions representing the rank and file employes that it wanted to achieve a zero per cent (0 %) increase in wages for the rank and file units scheduled for negotiations in 2011. (N.T. 27-28, 48, Union Exhibit 13 at p. 9, Union Exhibit 14 at page 4)

52. Dana Bortz is a supervisor in the County's Children and Youth Services. She is chief steward of the PSSU supervisory unit. She testified that the County's decision to eliminate the wage increase for the supervisors made her angry because she thought they had an agreement. The decision decreased morale and made her and her members wonder what was the purpose of the Union. They wondered whether they should "disband it if the County is just going to disregard what is in our MOU." (N.T. 38)

53. Bortz testified that the County's decision to eliminate pay raises for her unit has caused an employe she supervises, who has less time on the job than Bortz, earning more pay than Bortz. (N.T. 38)

54. The County did not study the parity issue between the supervisors and the employes they supervise before it made the decision to eliminate the supervisors' pay increases. (N.T. 89, County Exhibit 3)

DISCUSSION

The two unions' charges have been consolidated for hearing and decision because they involve the same issue: whether the County violated PERA when it eliminated wage increases that were in the first agreements reached with the Unions for meet and discuss units they represent. SEIU Healthcare Pennsylvania represents the County's nursing supervisors at Cedarbrook Nursing Home. Pennsylvania Social Service Union, Local 668, represents the first level supervisors in the County's human services offices. In 2007, the Board certified these Unions. In 2008, the Unions and the County entered into a memorandum of understanding (MOU) for each unit. After two years under the MOU, the County notified the Unions that it decided to eliminate the general wage increase, step increases and longevity payments for 2011. The County Director of Administration met with the unions to discuss the decision. In December, 2010, the County then enacted two ordinances that formalized the decision to eliminate the wage increases.

The first allegation to address is that the County's elimination of these wage increases violated Section 1201(a)(3). An employer commits unfair practices within the meaning of Section 1201(a)(3) of PERA if it discriminates against employes "to encourage or discourage membership in any employe organization." St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must prove that the employe engaged in protected activity, that the employer was aware of that protected activity, and that but for the protected activity the adverse action would not have been taken against the employe. St. Joseph's Hospital v. PLRB, id. The complainant must establish these three elements by substantial and legally credible evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). St. Joseph's Hospital, supra.

The Union has proven the first two elements of a discrimination charge. First, the evidence of protected activity is that the supervisory employes had recently sought representation for the purposes of meet and discuss under Section 301(17) of PERA. Shortly after the Unions attained certified representative status, the Unions succeeded in reaching their first memoranda of agreement for their respective units for the years 2009 to 2011.

The County questions whether employes in a meet and discuss unit can engage in "protected activity" so as to meet the St. Joseph's Hospital test for proving discrimination. The supervisory employes in the present case organized in a meet and discuss unit pursuant to Section 301(17) of PERA which states:

"(17) 'Meet and discuss' means the obligation of a public employer upon request to meet at reasonable times and discuss recommendations submitted by representatives of public employees: Provided, That any decisions or determinations on matters so discussed shall remain with the public employer and be deemed final on any issue or issues raised."

43 P.S. 1101.301(17)

The County argues that these two Unions, because they represent "meet and discuss" units and not bargaining units with collective bargaining agreements, lack the same legal

rights as unions representing bargaining units. The County cites a proposed decision and order in which it was stated that "... first level supervisors enjoy very few rights beyond those which a public employer chooses to extend to them." Transport Workers Union of Philadelphia, Local 290 v. Southeastern Pennsylvania Transportation Authority (SEPTA) 20 PPER 20164 (Proposed Decision and Order, 1989) at p. 438. However, that case did not address the issue the Unions raise in this case, an allegation of a Section 1201(a)(3) violation, but instead dealt with a challenge claiming the public employer failed to fulfill its meet and discuss responsibilities in violation of Section 1201(a)(9) of PERA.

In addition to SEPTA, *id.* the County cites Independent State Store Union v. Pennsylvania Labor Relations Board, 547 A. 2d 465 (Pa. Cmwlth. 1988), where the Court affirmed the Board's conclusion that the employer did not commit an unfair practice when it decided not to adhere to a grievance arbitration procedure set forth in the Memorandum of Understanding. The Board's reasoning, adopted by the Court, was that "the public employer is not bound to accept the proposal contained in the Memorandum, and the public employee union has no right to insist the public employer implement such proposals." *Id.*, citing Independent Association of Pennsylvania Liquor Control Board Employees v. Commonwealth, 384 A. 2d 1367 (Pa. Cmwlth. 1978)

Again, this case addressed the question of whether the employer's unilateral change violated Sections 1201(a)(5) or (9) of PERA. The present charge alleges that the employer made a unilateral change that violated Section 1201(a)(3), an issue not addressed in the case cited by the County.

The County does not argue that it is legally impossible for a Union representing a meet and discuss unit to claim a Section 1201(a)(3) violation. As a matter of textual analysis, Section 1201(a)(3) does not exclude employees who seek to become members of employee organizations representing meet and discuss units. Nor does the definition of "employee organization" in Section 301(3) of PERA exclude meet and discuss units. Such analysis would allow, for instance, an employer to discharge with impunity a supervisor who organized a meet and discuss unit. That analysis would be inimical to the one of the stated purposes of PERA, in Section 101, of "granting to public employees the right to organize and choose freely their representatives;..." 43 P.S. 1101.101.

Accordingly, it must be held that the supervisory employees in these units were engaged in protected activity in organizing themselves in meet and discuss units. The Unions have proven the first element of making a successful Section 1201(a)(3) discrimination case.

Second, the County was aware of this activity of the employees had sought the protection of the Board certification for their meet and discuss units. The minutes of the County Board of Commissioners' meetings at the time of the decision to eliminate the raises reflects this awareness and the impact of not giving the wage increases to the employees in these meet and discuss units. Accordingly, the Unions have proven employer knowledge, the second element of a discrimination charge.

As for the proving the third element of a discrimination charge, the law requires the Unions to prove that the County had anti-union motivation in deciding to eliminate the pay increases. In a charge of discrimination it is the employer's motivation which creates the offense. Perry County v. PLRB, 364 A.2d 898 (Pa. Cmwlth. 1994).

The County disputes that its decision to eliminate the supervisors' wage increases was motivated by anti-union animus. Instead, the County contends that its decision was caused by budgetary reasons in a difficult economic time.

Since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. PLRB v. Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982); St. Joseph's Hospital, *supra*. But an inference of anti-union animus must be based on substantial evidence consisting of "more than a mere scintilla and must

do more than create a suspicion of the existence of the fact to be established." Shive supra at 313.

In Child Development Council of Centre County (Small World Day Care Center), 9 PPER ¶ 9188 (Final Order, 1978), the Board stated:

There are a number of factors the Board considers in determining whether anti-union animus was a factor in the layoff of the Complainant: the entire background of the case, including any anti-union activities by the employer; statements by the discharging supervisor tending to show the supervisor's state of mind; the failure of the employer to adequately explain the discharge, or layoff, of the adversely affected employee, the effect of the discharge on unionization efforts-for example, whether leading organizers have been eliminated; the extent to which the discharged or laid-off employee engaged in union activities; and whether the action complained of was "inherently destructive" of important employee rights."

9 PPER at 380.

In the present case, the Unions have introduced evidence of several factors that come under the category of the County failing to adequately explain the reason for eliminating the pay increases. The Unions have introduced substantial evidence casting doubt on the County's claim that its budgetary situation was the cause of the decision to eliminate the pay increases for the supervisory meet and discuss units.

The Unions first point out the lack of evidence to support the County's assertion that "current budgetary and economic conditions facing the County" was the reason for the elimination of the wage increases. The cost savings from the County's decision was minimal. By eliminating the wage increases for the two meet and discuss units, the County saved \$357,600, less than one percent (1%) of the \$390 million budget. This cost savings must also be viewed in the context of other elements of the County's overall budget.

The County's 2011 budget included a tax relief fund of \$4,370,000 and a rainy day fund reserve of \$21 million. Also, in April, 2011, it was discovered that the County ended 2010 with a surplus of between \$4 million and \$5 million, which included a \$500,000 surplus generated at Cedarbrook. Although the County did not have the precise surplus number at the time of its November decision to eliminate the wage increases, the fact of a later discovered surplus or over \$4 million does cast doubt on the necessity of eliminated \$357,600 in personnel costs. The surplus also raises the question of why the County did not reverse its decision once the favorable surplus became known. In light of these numbers, the County's claim that it eliminated the wage increases for budgetary reasons is not persuasive.

Second, the Unions point out that the County Executive's proposed 2011 budget included money for the pay increases. In August, Executive Cunningham gave his 2011 budget address that gave no indication that the pay increases for the supervisory units would be eliminated. In fact, he noted that "our employes are struggling through this economic recession ...and that we need to provide pay increases, however, small they may be." (County Exhibit 1) The Unions were expecting to receive the steps and the other raises until they were told by Administrator Muller in November that they would not receive them. The Unions point out that the two ordinances which eliminated the wage increases were passed after the County Executive's budget, which funded the increases, was adopted.

Third, the Unions point out that while the County eliminated the wage increases for these meet and discuss units for alleged budgetary reasons, the County provided for new pay increases for non-union employes, including county managers. These latter raises cost

\$1.2 million, much more than the \$357,600 savings from eliminating the wage increases for the meet and discuss units. This exercise of spending discretion to provide pay increases for the non-union employes also casts doubt on the County's assertion that budgetary reasons caused the elimination of the wage increases for the meet and discuss units.

Fourth, the Unions point out that another factor of anti-union animus were the sentiments expressed by four members of the County Commission that the purpose behind the elimination of the pay increases for the meet and discuss units was to send a message to the unions who would be negotiating in 2011 for their own collective bargaining agreements. One of the unions involved in those negotiations was PSSU, which represented one of the supervisory units whose pay increases were eliminated in the present dispute. By linking the elimination of the supervisory unit employes' pay increases to labor negotiations with bargaining units, these Commissioners cast doubt on their assertion that the true motivation for the elimination of the wage increase was a concern over its effect on the budget.

I am mindful that the County increased the property tax in 2011 by 16% to a level of 11.9 mills. However, the County's decision to then spend those new tax revenues on pay increases for non-union employes, while eliminating pay increases for the meet and discuss units, was not an equitable approach to managing personnel costs.

The County argues that its decision to give pay increases to the non-union employes was an attempt to give those employes parity with the union employes. The County argues that the non-union employes received no step increases in 2010, while the supervisory employes received step increases of three percent (3%). (County Exhibit 3). However, the attempt to achieve parity only compared the 2010 pay. It did not perform a comprehensive analysis over a longer time period of the relative compensation for the employes in both union and non-union categories.

However, parity was not a consistent approach with the County. The County did not analyze parity between the supervisory employes and the union employes they supervised. The elimination of the supervisors' pay increase caused at least one supervisor, Chief Steward Dana Bortz, to have her wages fall behind an employe she supervised. And, inexplicably, the County negotiated an agreement with UFCW for the rank and file unit at Cedarbrook that included a two percent (2%) general wage increase and a 50% longevity bonus.

Furthermore, the parity rationale for giving the non-union employes a pay increase is not entirely benign. The minutes of the October 5, 2010 Commissioners' budget review meeting revealed that Director of Administration Muller advised the Commissioners that Lehigh County, compared to neighboring counties, had a smaller ratio of union to non-union employes. He advised that by giving the non-union employes a pay increase, the County would likely prevent them from seeking union protection and therefore preserve the smaller ratio of union to non-union employes.

Even if standing alone any of these four factors only raised a mere suspicion of animus, the combination of these four factors have given the Unions sufficient basis to infer that anti-union animus motivated the decision to eliminate the wage increases for the supervisory units. The combination of these factors, when taken as a whole, compel me to arrive at the conclusion that the County possessed a discriminatory motive that went beyond budgetary reasons in a difficult economic time when it eliminated the pay increases for the meet and discuss units and enacted Ordinances #2010-211 and #2010-212 in December, 2010.

Additionally, the Unions argue that there is a fifth factor to infer that a discriminatory motive was behind the decision. A discriminatory intent may be found whenever an employer takes an action that is inherently destructive of an important employe right, even if there is no direct proof of unlawful motivation. Chester County Deputy Sheriff's Association v. Chester County, 28 PPER ¶ 28045 (Final Order, 1997), citing NLRB v. Great Dane Trailers, Inc., 388 U.S. 26, 65 LRRM 2465 (1967). See also Joan F. Smith, et al v. Lakeland School District, 39 PPER ¶ 148 (Final Order, 2008); Teamsters

Local No. 764 v. Lycoming County, 37 PPER ¶ 15 (Final Order, 2006), aff'd., 943 A.2d 333 (Pa. Cmwlth. 2007).

It is significant that the employes in these two units had recently been organized for the first time into meet and discuss units under PERA. This recently won protection soon proved fragile when the County eliminated the pay increases with a rationale that, as discussed above, was discriminatory. The PLRB has held that the refusal of a County to implement the financial portion of an interest arbitration award when there was sufficient money in the budget to fund the award was an action inherently destructive of employe rights. Teamsters v. Lycoming County, supra at footnote 6.

In at least three other cases involving pay increase issues, hearing examiners have found that the employer engaged in conduct that ran afoul of Great Dane Trailers, supra., either for being inherently destructive of employe rights or for having a tendency to coerce employes in the exercise of their rights. In Mt. Carmel Township, 21 PPER ¶ 21154 (Proposed Decision and Order, 1990) an employer announced that a previously scheduled wage increase would not be implemented because employes had sought to unionize. The hearing examiner found that even without specific proof of anti-union motivation, this constituted unlawful discrimination under the inherently destructive theory. In Mercer County, 24 PPER ¶ 24038 (Proposed Decision and Order, 1993), the hearing examiner found that the County engaged in unlawful discrimination by granting retroactive wage increases that provided greater compensation to non-striking unit employes. Regardless of the County's intent, the wage increase had a "tendency to coerce" employes who exercised their protected right to strike. Even though the wage increase, which went to two non-striking employes, had only a "slight" impact upon employe rights, it was held to violate Section 1201(a)(3) of PERA. In Erie County, 33 PPER ¶ 33165 (Proposed Decision and Order, 2002), the hearing examiner found that when the county amended the personnel code so as to treat unionized employes differently without good justification, the county violated Section 1201(a)(3) under the Great Dane Trailers theory. The examiner did not find a Section 1201(a)(5) violation because the union had no right to bargain over the underlying change in wages or working conditions as the employes had transferred to different bargaining units represented by other employe organizations.

In this case, the County eliminated the pay increases in the third year of the first ever MOU with these two Unions. PSSU Chief Steward Dana Bortz testified credibly that the supervisory employes wondered why they even bothered to join the union. The facts of this case, where the employer favored the non-union employes over the union employes, compel a finding that the County's decision was inherently destructive of employes' protected rights.

In summary, for the reasons set forth above, it is reasonable to infer that it was the organized existence of these supervisors in a meet and discuss unit and not budgetary reasons that caused the County to eliminate the wage increase, the step increase and longevity payments. The Unions have met the third prong of proving a Section 1201(a)(3) violation.

The Unions have also alleged that the County's actions violated Section 1201(a)(1) of PERA which prohibits employers from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV." 43 P.S. § 1101.1201(a)(1)

An independent violation of Section 1201(a)(1) of PERA occurs, "where in light of the totality of the circumstances the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights." Fink v. Clarion County, 32 PPER ¶ 32165 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employes have in fact been coerced. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985); Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER ¶ 97 (Final Order, 2004).

In this case, the County's actions did have a tendency to coerce employes into withdrawing from the protection of the meet and discuss units. PSSU Chief Steward Bortz

testified to the effect the decision had on her and her fellow union members. Eliminating the scheduled wage increase for the unionized employes, while granting a wage increase for the non-union employes of the County has a coercive effect on the meet and discuss units and on all unionized employes.

"If the complainant carries its burden of establishing a *prima facie* case of a Section 1201(a)(1) violation, the burden shifts to the respondent to establish a legitimate reason for the action it took and that the need for such action justified any interference with the employes' exercise of their statutory rights. Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989)." Bethel Park Custodial/Maintenance Educational Personnel Association v. Bethel Park Sch. Dist., 27 PPER ¶ 27033 (Proposed Decision and Order, 1995). In Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER ¶ 26155 (Final Order, 1995), the Board held that an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. *Id.* at 360.

As discussed above, the County cannot reasonably claim legitimate reasons for the elimination of the pay increases. The County's contentions that budgetary reasons drove the decision were not persuasive. Accordingly, those reasons cannot be found to outweigh any possible interference with employe rights. Having weighed the respective reasons set forth in both these charge cases, it is appropriate, therefore, to conclude that the County violated Section 1201(a)(1) of PERA when it eliminated the pay increases for the supervisory employes in both units.

CONCLUSIONS

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

1. Lehigh County is a public employer within the meaning of Section 301(1) of PERA.
2. SEIU Healthcare Pennsylvania is an employe organization within the meaning of Section 301(3) of PERA.
3. Pennsylvania Social Services Union, Local 668, Service Employees International Union is an employe organization within the meaning of Section 301(3) of PERA.
4. The Board has jurisdiction over the parties hereto.
5. In Case No. PERA-C-11-52-E, the County has committed unfair practices in violation of Sections 1201(a)(1) and (3) of PERA.
6. In Case No. PERA-C-11-75-E, the County has committed unfair practices in violation of Sections 1201(a)(1) and (3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the County shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Cease and desist from discriminating against employes to encourage or discourage membership in an employe organization.

3. Take the following affirmative action:

(a) Immediately restore all wage increases in the two units on the terms and in the amounts set forth in the respective Memoranda of Understanding and make the wage increases retroactive to January 1, 2011.

(b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days;

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

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 (20) days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventeenth day of April, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner