

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE :
COUNTY AND MUNICIPAL EMPLOYEES :
COUNCIL 13 :
v. : Case No. PERA-C-12-205-E
COMMONWEALTH OF PENNSYLVANIA :
DEPARTMENT OF PUBLIC WELFARE :
BUREAU OF PROGRAM INTEGRITY :

PROPOSED DECISION AND ORDER

On July 16, 2012, the American Federation of State County and Municipal Employees, District Council 13 (Complainant or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania, Department of Public Welfare, Bureau of Program Integrity (Respondent or Commonwealth) alleging that the Commonwealth violated Sections 1201(a)(1) and (2) of the Public Employee Relations Act (PERA)

On August 3, 2012, the Secretary of the Board issued a Complaint and Notice of Hearing setting January 17, 2013 in Harrisburg as the time and place of hearing before Thomas P. Leonard, Esquire, a hearing examiner of the Board

The hearing was held as scheduled, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. 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. The Commonwealth of Pennsylvania, Department of Public Welfare, Bureau of Program Integrity, is a public employer within the meaning of Section 301(1) of the Public Employee Relations Act.
2. The American Federation of State County and Municipal Employees, Council 13 (AFSCME), is an employe organization within the meaning of Section 301(3) of the Public Employee Relations Act.
3. The Bureau of Program Integrity contains a Division of Third Party Liability and employs Third Party Liability Claims Investigators (TPL Agents). (N.T. 44, 78-79, Commonwealth Exhibit 6)
4. Pennsylvania Social Services Union, Service Employees International Union, Local 668, is the collective bargaining representative for the employees in the classification of TPL Agents. (N.T. 44, 79)
5. AFSCME Council 13 is the collective bargaining representative for employees in the classification of TPL Investigator in the Trauma Code Tracking Unit, in the Division of Third Party Liability. (N.T. 79, Commonwealth Exhibit 6)
6. The Bureau is responsible for recovering money from estates and insurance companies for Commonwealth provided nursing home care. (N.T. 31-32)
7. In December, 2011, Karin Tyler, a TPL Agent, went to the Capitol Police with an allegation that Marie Trayer, another TPL Agent, assaulted her. (N.T. 44)

8. The Capitol Police filed criminal charges against Ms. Trayer alleging harassment and assault. (N.T. 44)
9. Tammy Sue Hughes is a claims investigation unit supervisor in the Bureau of Program Integrity, Third Party Liability. (N.T. 51)
10. Ms. Hughes supervises both Ms. Trayer and Ms. Tyler. (N.T. 51)
11. Pursuant to the Governor's Code of Conduct, Ms. Trayer was suspended from her employment, pending the outcome of the criminal charges against her. She has not been terminated from employment. (N.T. 71-72)
12. In February, 2012, Ms. Tyler was a witness against Ms. Trayer in the criminal proceedings before the District Magistrate. (N.T. 44)
13. In mid-March 2012, Ms. Tyler noticed buttons stating "Support Marie" in cubicles, and she reported it to her supervisor, Ms. Hughes. (N.T. 32-34, 45, Union Exhibits 2 and 4)
14. Also, approximately 30 employees were wearing the buttons. (N.T. 32-35)
15. Ms. Tyler believed that the buttons were an attempt to harass, bully and intimidate her because of the altercation that had taken place between herself and Ms. Trayer, and because she had recently testified against Ms. Trayer in criminal proceedings before the District Magistrate. (N.T. 45)
16. Both AFSCME and PSSU represented employees were wearing the buttons. (N.T. 35, 48)
17. In addition to complaints from Ms. Tyler, Ms. Hughes also received complaints about the buttons from two other PSSU-represented employees, Desirae Havasi and Judy Deavan. (N.T. 52)
18. Ms. Hughes became concerned about the escalating nature of the matter and contacted DPW labor relations analyst, Mike Meadows. Ms. Hughes believed the buttons created the perception of harassment due to the upcoming criminal trial. (N.T. 53, Commonwealth Exhibit 2)
19. Mr. Meadows contacted Laurie Rock, the director of the Bureau of Program Integrity, and advised her that the buttons were causing Ms. Tyler to feel harassed. On March 20, 2012, Ms. Rock issued an email directing the employees to remove the buttons from cubicles, offices, and clothing, and that the buttons should not be visible in any fashion in the workplace. She did so because of the complaints from the employees who felt harassed and threatened by the employees wearing the buttons, and because of the on-going criminal case against Ms. Trayer. (N.T. 75, 82-83, Union Exhibit 3)
20. Article 36, Section 7 of the collective bargaining agreement between PSSU and the Commonwealth contains a provision which states:

Employees shall be treated in a respectful manner which does not embarrass them or demean their dignity. The appropriate forum for addressing incidents which are inconsistent with this principle shall be the Labor-Management meetings under this agreement.

(N.T. 74, 88, Commonwealth Exhibit 5)
21. The collective bargaining agreement between AFSCME and the Commonwealth contains a similar provision at Article 31, Section 4, which states:

Employees shall be treated in a respectful manner which does not embarrass them or demean their dignity. Incidents which are at variance with this principle may be appealed through the Grievance Procedure, provided that the decision at the fourth step/Joint State Committee shall be final and binding.

(N.T. 25, 88, Commonwealth Exhibit 1)

22. DPW has a workplace violence policy which states, in relevant part:

DPW is committed to working with its employees to maintain a work environment free from violence, threats of violence, harassment, intimidation and other disruptive behavior. While this kind of conduct is not pervasive at our agency, no workplace is immune. Disruptive behavior at one time or another will affect every agency and workplace.

Violence, threats, harassment, intimidation, and other disruptive behavior in our workplace will not be tolerated. all reports of incidents of these types will be taken seriously, investigated, and dealt with appropriately. Such behavior can include verbal or written statements, gestures, or expressions that communicate a direct or indirect threat of physical and/or psychological harm.

(N.T. 54-55, Commonwealth Exhibit 3)

DISCUSSION

The Union's charge of unfair practices allege that the Commonwealth violated sections 1201(a)(1) and (2) when the director of the Department of Public Welfare, Bureau of Program Integrity, Third Party Liability directed employees to remove "Support Marie" buttons from cubicles, offices, and clothing, and that the buttons should not be visible in any fashion in the workplace. The buttons referred to Marie Trayer, who had recently been suspended after she was arrested by the Capitol Police for assaulting another employe in her unit.

Section 1201(a)(1) allegation

The first alleged statutory violation is that the Commonwealth violated Section 1201(a)(1) of PERA, which prohibits an employer from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this Act." 43. P.S. 1101.1201(a)(1). An employer commits an independent violation of section 1201(a)(1) of PERA "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).

"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 employee rights. **Id.** at 360.

The Union contends that the Commonwealth's button ban met the "tendency to coerce" test because Bureau Director Rock hastily chose sides in an employee workplace dispute and restricted employees from exercising their protected right of coming to the mutual aid of a suspended fellow employee. The Union argues that Bureau Director Rock's button ban was based on assumptions, conjecture and hearsay. The Union argues that no evidence was put forth that the buttons were intended to cause a divide between any of the employees, to start any type of conflict or to create a hostile environment

The Commonwealth points out that the premise to the Union's argument is not quite accurate. This was more than an employee workplace dispute. It was a criminal matter. Ms. Tyler had taken her complaint against Ms. Trayer into the criminal justice system. The Capitol Police had filed charges against Trayer and the District Magistrate rendered a decision. The matter was now heading to Common Pleas Court, where Ms. Tyler would have to testify against Ms. Trayer. Ms. Tyler complained to her supervisors that the "Support Marie" buttons were other employees' efforts to harass, bully and intimidate her before the Common Pleas trial took place.

After considering the parties' respective arguments, I cannot conclude that the button ban in this particular case would have "a tendency to coerce a reasonable employee in the exercise of protected rights." **Clarion County, supra.** Bureau Director Rock banned the buttons only after her deputy Ms. Hughes, reported the facts to her. Ms. Rock admitted that she did not talk to any of the button wearers. However, it was not presumptuous of her to believe that Ms. Tyler felt harassed and that it was necessary to end this harassment in order to follow the CBA's requirement that "[e]mployees shall be treated in a respectful manner which does not embarrass them or demean their dignity." In this particular situation, the Commonwealth acted in a reasonable way when it banned buttons in support of a one employee who was an alleged perpetrator of a crime against another employee.

Even if the Union had made a prima facie case that the Commonwealth's button ban had a "tendency to coerce" a reasonable employee in the exercise of his rights, the particular facts of this case support the Commonwealth's argument that it had "a legitimate reason that outweighed concerns over the interference with employee rights." **Ringgold Educ. Ass'n v. Ringgold Sch. Dist. supra.**

As was set forth above, the Commonwealth's reason to ban buttons supporting a suspended employee in this particular case was because another employee had filed criminal charges against the suspended employee and felt harassed when the buttons in support of the alleged perpetrator began appearing in the workplace. DPW Bureau Director Rock's decision was consistent with DPW's policy against workplace violence, which prohibits harassment. (Finding of Fact 25). Also, Ms. Rock's decision was to follow the CBA's requirement that employees "shall be treated in a respectful manner which does not embarrass them or demean their dignity." Ms. Rock's adherence to both of these provisions was a legitimate reason that outweighed any concern over interference with protected rights. Accordingly, no violation of section 1201(a) (1) will be found.

Section 1201(a) (2) Allegation

The second allegation is that the Commonwealth violated section 1201(a) (2) of PERA, which prohibits an employer from "[d]ominating or interfering with the formation, existence or administration of any employee organization." 43 P.S. 1101.1201(a) (2). This section is intended to prohibit an employer from establishing a "company union." **PLRB v Commonwealth (Department of Education)**, 14 PPER ¶ 14069 (Proposed Decision and Order, 1983), 14 PPER ¶ 14135 (Final Order, 1983). To prove such a violation, the union must show that the employer is interfering or dominating the union by placing managerial employees in the hierarchy of the union or by providing financial or other aid to the union to the point that the union is controlled by the employer and not longer represents

the wishes of the employees. **Pennsylvania Department of Labor and Industry**, 15 PPER ¶ 15025 (Proposed Decision and Order, 1984).

In the present case, the facts do not support a finding that the Commonwealth violated section 1201(a)(2). Bureau Director Rock's desire to follow the collective bargaining agreement's requirement that employees "shall be treated in a respectful manner which does not embarrass them or demean their dignity" cannot be turned against the Commonwealth to find that the Commonwealth is "dominating or interfering" with the union. Accordingly, based on this record, no violation of section 1201(a)(2) will be found.

CONCLUSIONS

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

1. That the Commonwealth of Pennsylvania, Department of Public Welfare, Bureau of Program Integrity, is a public employer within the meaning of Section 301(1) of PERA.
2. That the American Federation of State County and Municipal Employees, Council 13 is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the Commonwealth has not committed unfair practices in violation of Sections 1201(a)(1) and (2) 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 charge of unfair practices is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this thirty-first day of October, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner