COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

RYAN MARTIN	:	
	:	
v.	:	Case No. PERA-C-13-34-W
	:	
WASHINGTON TOWNSHIP MUNICIPAL AUTHORITY	:	

PROPOSED DECISION AND ORDER

On February 19, 2013, Ryan Martin (Martin or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Washington Township Municipal Authority (Authority or Respondent) alleging that the Authority violated sections 1201(a)(1),(2),(3),(5),(7) and (9) of the Public Employee Relations Act (PERA) when it laid him off.

On March 14, 2013, 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 September 13, 2013 in Harrisburg was assigned as the time and place of hearing if necessary, before Thomas P. Leonard, Esquire, a hearing examiner of the Board.

The hearing was necessary, but was continued to October 3, 2013 at the request of the Authority without objection from the Complainant. The hearing was held on the rescheduled day, at which time the parties were afforded a full opportunity to present testimony, introduce documentary evidence and cross-examine witnesses.

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

FINDINGS OF FACT

1. Washington Township Municipal Authority is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act.

2. Ryan Martin was a public employe within the meaning of Section 301(2) of PERA and was employed by the Authority as an operator from 2005 until January 3, 2013, when the Authority laid him off. (N.T. 23)

3. United Steelworkers of America, Local 3403 (USW or Union) is an employee organization within the meaning of Section 301(3) of PERA.

4. The Union is the exclusive representative of the Authority's employees. (N.T. 6, 10, Authority Exhibit 1)

5. Martin was employed at the Authority, from August, 2005 to January 6, 2013. In his position he performed a variety of duties, including water treatment, grass cutting, meter reading, repairing water main breaks, general plant maintenance such as cleaning filters and hydrant maintenance. (N.T. 9, 23, 80)

6. Martin was a part-time employee (32 hours a week) for the first five years then became a full-time employe the last three years. (N.T. 25)

7. On July 25, 2011, the Authority established two new shifts: Tuesday through Saturday (Sunday and Monday off) and Sunday through Thursday, (Friday and Saturday off). The shifts were filled by seniority. (N.T. 66-68, 70, Union Exhibit 2)

8. Martin worked the Sunday through Thursday shift. (N.T. 70)

9. The Authority and the Union are parties to a collective bargaining agreement (CBA) for the period of November 1, 2007 through October 31, 2012. (N.T. 6, 10, Authority Exhibit 1)

10. In 2012, Martin became the Union's lead negotiator for a successor CBA. (N.T. 9-10)

11. Negotiations began in late October, 2012. Martin characterized the negotiations as "tough." The Authority proposed certain give backs from the Union. The Union proposed adding a no-layoff clause, to which the Authority did not agree. (N.T. 4, 17, 32-33)

12. On January 3, 2013, the Board of Directors of the Authority notified Martin that he was being laid off because of "lack of work." (N.T. 36, 38, 74, 75-76, Authority Exhibit 2)

13. Martin was the least senior employe. (N.T. 29)

14. The parties' collective bargaining agreement (CBA), at Article 5, provides that seniority shall determine the order of layoffs. (N.T. 30)

15. Joseph Alvarez, III, is the Authority's plant manager. He served in that position for the last nine years. He testified that after being asked by the Board to assess the staffing needs of the Authority, he came to the conclusion that the Authority required one less employee. (N.T. 59-61, 81)

16. The Authority, in 2009, changed the way overtime was utilized so that it became less costly to the Authority and more fair to employes. Overtime usage has declined. For example, in the past, when there was a water main break, the Authority would call all the employes out on overtime. Now the Authority uses a system by which the employe with the lowest amount of overtime is called first. (N.T. 22, 61)

17. Alvarez testified that calling out employes on overtime for emergencies rarely happens. (N.T. 69)

18. Martin's layoff was not the first time the Authority laid off employes. In 2009, the Authority put in the Supervisory Control and Data Acquisitioning (SCADA), which automated the reading of the water plant's filter performance. The Authority eliminated a midnight shift and laid off Chris Haney, a 32 hour a week employe. (N.T. 61, 66)

19. The Authority also uses contractors to do work requiring special equipment the Authority does not own. (N.T. 55-58)

20. The collective bargaining agreement, at Article V, Section 1, states, "The Authority shall have the right to subcontract consistent with past practice." (N.T. 26, 51, 74, Authority Exhibit 10

DISCUSSION

Ryan Martin charges that the Authority violated several sections of PERA when it laid him off in January, 2013. The central emphasis of the charges is that the layoff was a retaliatory action aimed at Martin because he served as chairman of the union negotiation team and proposed adding a no layoff clause during negotiations.

An employer violates section 1201(a)(3) of PERA when it takes action against the employe for the employe because of the employes exercise of protected activity. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). To support a charge of discrimination, the complainant must establish 1) that the employe engaged in activity protected by the PLRA, 2) that the employer had knowledge of that activity, and 3) that

the employer took adverse action against the employe because of the protected activity. **St. Joseph's Hospital v. PLRB,** Id.

The complainant has the burden to prove the elements of the charge by substantial and legally credible evidence. **Perry County v. Pennsylvania Labor Relations Board,** 634 A. 2d 898 (Pa. Cmwlth. 1993)

The complainant proved the first two elements of the **St. Joseph's** test. Serving as a member of a collective bargaining negotiating team is protected activity. **Tri-Valley School District,** 30 PPER ¶ 30048 (Final Order, 1999). The Authority knew of Martin's protected activity since Authority Manager Alvarez sat at the negotiating table across from Martin.

The dispute is over the third part of the test, the employer motivation for laying off Martin.

The disputed issue in this case is the third part of the test for discrimination, employer motivation. The "motive creates the offense" under section 1201(a)(3). **PLRB v. Stairways, Inc.,** 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), **quoting PLRB v. Ficon,** 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). An overt display of anti-union animus by an employer may support a finding that the employer was discriminatorily motivated. **City of Reading v. PLRB,** 568 A.2d 715 (Pa. Cmwlth. 1989). An employer does not violate section 1201(a)(3) if it takes an employment action for a nondiscriminatory reason. **Kennett Consolidated School District,** 37 PPER 89 (Final Order 2006).

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.** However, 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 employe, 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 employe engaged in union activities; and whether the action complained of was "inherently destructive" of important employe rights."

9 PPER ¶ 9188, at 380.

The Association argues that anti-union animus can be inferred from several factors: the elimination of the union's lead negotiator; the close timing of the January 2013 layoff to the beginning of negotiations in October, 2012 and the "failure to adequately explain the layoff," that the stated reason for the layoff was really a pretext to rid the workforce of a union advocate.

Of the three factors, the "failure to adequately explain" the layoff is the central factor the Union uses to infer that anti-union animus motivated the Authority's layoff decision. The Authority's stated reason for the layoff was lack of work. This reason was explained in testimony by Joseph Alvarez III, the Authority's plant manager

for the last nine years, and by David Samek, a member of the Authority's Board of Directors. Both witnesses testified in a credible fashion that the Authority's staffing needs did not require Martin's services.

Martin argues that this explanation was a pretext to cover up anti-union motivation. He makes three arguments to try to dispute the Authority's assertion that it was lack of work that motivated the layoff.

First, Martin argues that the Authority's use of subcontractors demonstrates there is more work available and that he could have been retained. He points out that the Authority frequently uses subcontractors for work that its employes could do. However, the Manager Alvarez testified that subcontractors are used only when a project calls for special equipment that the Authority does not own. Furthermore, the Authority points out that subcontracting is permitted in the CBA and has been the practice for thirty years.

Second, Martin contends that the recent addition of 1,600 sewage customers also demonstrates that there is more work. However, the Authority Manager Joseph Alvarez testified that 1,600 new customers did not mean more work for the Authority employes because the sewage in the Township is being transferred to Belle Vernon's municipal plant for processing.

Third, Martin argues that the shift schedule leaves the Authority with only three persons on a shift and that such staffing is inadequate during emergencies. The Authority's response to that argument is that if there was an emergency that it has employes who work overtime on emergencies and get paid an overtime rate. Furthermore, Manager Alvarez points out that the actual use of overtime employes has been declining in past years.

In light of all of the competent evidence of record, the "failure to adequately explain" factor for inferring animus is not supported by substantial evidence. The other two factors to infer animus, the elimination of the lead negotiator and the close timing of the layoff to the beginning of negotiations, are not enough to outweigh the Authority's stated reasons for the layoff. Martin did not sustain his burden of proving the Authority acted with anti-union motivation when it laid him off. A charge of unfair practices has to be sustained on more than speculation. **Perry County v. Pennsylvania Labor Relations Board, supra**. Absent proof of the third part of the **St. Joseph's** test, there can be no finding of retaliation or discrimination.

CONCLUSIONS

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

1. That Washington Township Municipal Authority is a public employer within the meaning of Section 301(1) of PERA.

2. That Ryan Martin is a public employee within the meaning of Section 301(2) of PERA.

3. That the Board has jurisdiction over the parties hereto.

4. That the Authority has not committed unfair practices in violation of Sections 1201(a)(1),(2),(3),(5),(7) and (9) 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 is dismissed and the complaint is 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 twenty-seventh day of December, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner