

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AUDIE DAVIS :
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 v. : CASE NO. PERA-C-12-174-W
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 MERCER COUNTY REGIONAL COUNCIL OF :
 GOVERNMENT :

PROPOSED DECISION AND ORDER

On June 11, 2012, Audie Davis filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Mercer County Transit alleging that the Transit violated Section 1201(a) (3) of the Public Employee Relations Act (PERA) by refusing to rehire him after he voluntarily resigned because of his union activities while he was employed as a driver for the Transit. By letter dated July 9, 2012, the Secretary of the Board informed Mr. Davis that no complaint would be issued on his charge because he improperly charged the Transit and not his employer, the Mercer County Regional Council of Government (COG). With a United States Postal Form 3817, dated July 13, 2012, Mr. Davis filed with the Board exceptions to the Secretary's no-complaint letter and properly charged the COG. On August 28, 2012, the Board issued an Order Directing Remand to Secretary for Further Proceedings.

On September 10, 2012, the Secretary issued a complaint and notice of hearing designating a hearing date of April 24, 2013, in Pittsburgh. After several granted continuances, a hearing was held on April 30, 2014. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. The complainant is not an attorney and appeared unrepresented by counsel for the hearing.¹ Both parties presented oral closing arguments on the record 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 COG is a public employer within the meaning of Section 301(1) of PERA. (N.T. 3).
2. Mr. Davis was a public employe employed by the COG within the meaning of Section 301(2) of PERA. (N.T. 3).
3. The COG operates a regional public transit system. (N.T. 4).
4. Teamsters, Local 261 (Union) is the exclusive collective bargaining representative of the transit employes employed by the COG. (N.T. 5-8).
5. Mr. Davis was a Union steward when he voluntarily resigned. The parties stipulated and agreed that Mr. Davis was involved in Union activity and that the COG was aware of that activity. The parties also stipulated and agreed that Mr. Davis submitted a resignation letter dated February 6, 2012, and that his resignation became effective one week later on February 13, 2012. (N.T. 8-9, 41, 59, 74).
6. Five to six weeks after his resignation from the COG, Mr. Davis' new job closed down, and he sought to be rehired by the COG. (N.T. 9-12).

¹ The head Union steward for transportation employes at the COG is Clyde George who entered an appearance on behalf of Mr. Davis. Mr. George is not an attorney. Also, Mr. George was a complainant's witness at the hearing, but he did not perform the function of an advocate or representative on behalf of Mr. Davis at the hearing.

7. The testimony of Union steward Clyde George was equivocal, ambiguous, self-conflicting, confused and unclear. (N.T. 5-30).
8. Thomas R. Tulip is the Executive Director of the COG. (N.T. 54).
9. Mike Nashtock has been the Transit Manager for the COG for six years. (N.T. 32, 37).
10. Mr. Nashtock unequivocally and credibly denied ever mentioning, during any conversation with anyone, Mr. Davis' prior Union status or activities when he sought to return to the COG. Mr. Davis' accident record, attire and attitude were the reasons why the COG did not rehire Mr. Davis. Mr. Nashtock never referred to any comment made by Mr. Davis during contract negotiations about signing bonuses. Mr. Davis expressly asked Mr. Nashtock if the refusal to rehire him was related to his Union activities to which Mr. Nashtock unequivocally responded: "No." (N.T. 33, 36, 41, 48-49, 95, 99).
11. On May 1, 2009, Mr. Davis was involved in an at-fault accident and reported it twenty minutes later. Company policy requires immediate accident reporting so a COG representative can take pictures of and investigate the accident before it is cleared. Mr. Nashtock had an informal conversation with Mr. Davis about the accident and no discipline resulted. The collective bargaining agreement provides that proven negligent accidents are grounds for termination. On May 16, 2011, Mr. Davis drove his bus in reverse into a half-closed garage door. He received a verbal reprimand for the garage door incident. (N.T. 42-46, 83, 87, 89, 94; Employer Exhibit 1, Article 11).
12. Mr. Tulip and Mr. Nashtock both personally observed Mr. Davis operating a bus while on his cell phone in violation of COG policy. He ignored requests to stop wearing a tattered jean jacket and pants and to be more presentable to clients. Mr. Davis continued to wear the tattered pants and jean jacket after he was told not to do so. Mr. Davis was a substandard driver, and the COG received a couple of client complaints about him. (N.T. 47-48, 49-51, 58).
13. Mr. Davis asked Mr. Tulip directly whether the decision not to rehire him was related to him being a Union steward, and Mr. Tulip responded: "absolutely not." Mr. Tulip's decision not to rehire Mr. Davis was unrelated to his Union activities, and he never told Mr. Nashtock that his decision was related to Mr. Davis' Union activities. (N.T. 60-61, 69).
14. At the time of Mr. Davis' application for rehire, the COG had just hired two gentlemen with CDLs with passenger endorsements and had no more positions available for a while. A person filling a full-time position at the time of Mr. Davis' application for rehire was required to hold a CDL with a passenger endorsement. Mr. Davis does not hold a CDL. Mr. Nashtock told Mr. Davis that the COG simply had no positions left. The COG does not have a contractual obligation to rehire drivers who have voluntarily resigned. (N.T. 62, 75, 96).

DISCUSSION

Mr. Davis claims that the COG violated Section 1201(a)(3) of PERA because the decision of the COG to refuse to rehire him was unlawfully motivated. Mr. Davis argues that Mr. Nashtock and/or Mr. Tulip stated that Mr. tulip would not rehire Mr. Davis because of his activities as a Union steward and, more specifically, because of a sarcastic statement that he made during contract negotiations regarding signing bonuses. However, the record does not support the factual premise for Mr. Davis' claims.

Section 1201(a)(3) of PERA prohibits public employers from discriminating in regard to hiring employes. 43 P.S. § 1101.1201(a)(3). In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that

the employe engaged in activity protected by PERA; (2) that the employer knew that the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe'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).

In **Teamsters, Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order 1992), 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).

In this case, the COG stipulated and agreed that it was aware of Mr. Davis' Union activities. The only remaining issue, therefore, is whether Mr. Tulip's decision not to rehire Mr. Davis was unlawfully motivated by Mr. Davis' Union activities or his sarcastic statement regarding signing bonuses during contract negotiations. The record, however, is devoid of substantial, competent evidence that either Mr. Tulip or Mr. Nashtock were unlawfully motivated. I have discredited the testimony of Mr. Clyde George in its entirety because it was equivocal, ambiguous, self-conflicting, confused and unclear. I have also discredited Mr. Davis' testimony that, on or about March 20, 2012 or March 22, 2012, Mr. Nashtock told him that Mr. Tulip and Kim in the COG office had concerns about rehiring Mr. Davis because of his Union activities during contract negotiations.

I have credited the testimony of Executive Director Tulip and Transit Manager Nashtock in their clear and unequivocal denial that they made any anti-union statements to anyone at any time. I base the credibility determinations of Messrs. Tulip and Nashtock on their appearance, general bearing, conduct on the stand, demeanor, manner of testifying, candor, frankness and **certainty with respect to the facts, Mid Valley Education Ass'n v. Mid Valley School District**, 25 PPER ¶ 25138 (Final Order, 1994) (citing **Kiskiminetas Township**, 25 PPER ¶ 25007 (Proposed Decision and Order, 1993),

The only evidence presented by Mr. Davis of unlawful motive is Mr. George's testimony (that Mr. Nashtock referred to Mr. Davis' Union status when he spoke to Mr. Nashtock about Mr. Davis' rehire) and Mr. Davis' testimony (that Mr. Nashtock mentioned that Mr. Tulip and Kim in the COG office had concerns because of his Union activities during contract negotiations). Having discredited all of that testimony that any anti-union statements were made, Mr. Davis is unable to meet his burden of proof and did not establish a **prima facie** case of discrimination.

Having not established a **prima facie** case of discrimination, the burden did not shift to the COG to establish a legitimate business reason for refusing to rehire Mr. Davis. However, in the interest of expediency, should the Board review and disagree with the above decision, I will evaluate the COG's case. Also, because the COG presented a case, I must evaluate whether its proffered reasons are pretextual.

The COG credibly established that their motivation for refusing to rehire Mr. Davis was based on the following non-pretextual reasons: his poor attitude; unsatisfactory attire, which he refused to correct after being counseled; complaints from clients (i.e., passengers); his substandard driving record and performance; his accident history; and his unlawful cell phone use while driving. Although Mr. Davis questioned why Mr. Tulip would not rehire a ten-year employe with minor discipline, Mr. Tulip credibly explained that it is easier not to rehire a substandard employe rather than terminate him because of the "just cause" provision in the contract. Mr. Nashtock credibly explained that, because he was friends with Mr. Davis, he never told Mr. Davis that his performance was

substandard, which is why Mr. Davis has difficulty understanding why he would not be rehired.

Additionally, at the time of Mr. Davis' application for rehire, the COG had just hired two gentlemen with CDLs with passenger endorsements and had no more positions available for a while. A person filling a full-time position at the time of Mr. Davis' application for rehire was required to hold a CDL with a passenger endorsement. Mr. Davis does not hold a CDL. Mr. Nashtock told Mr. Davis that the COG simply had no positions left.

Accordingly, Mr. Davis failed to establish that the COG was motivated by his Union activities when it refused to rehire him. Moreover, the COG established with substantial, credible evidence that it was motivated by Mr. Davis' poor performance, poor attitude, accident history, client complaints, illegal cell phone use and unpresentable attire while he was employed as a driver with the COG. Also, the practical and determinative reason that Mr. Tulip did not rehire Mr. Davis is that the COG had no available positions for Mr. Davis, at the time he sought to be rehired, and Mr. Davis lacked the basic qualification for the job, i.e., a CDL with a passenger endorsement. The COG, therefore, did not engage in unfair practices in violation of 1201(a)(3).

CONCLUSIONS

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

1. The Mercer County Regional Council of Government is a public employer under PERA.
2. Mr. Davis is an employe under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Mercer County Regional Council of Government has **not** committed unfair practices within the meaning of Section 1201(a)(3).

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 twenty-second day of May, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner