

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SERVICE EMPLOYEES INTERNATIONAL :
UNION LOCAL 668 :
 :
v. : Case No. PERA-C-14-193-W
 :
BUTLER COUNTY and :
MICHELE MUSTELLO, BUTLER COUNTY :
RECORDER OF DEEDS¹ :

PROPOSED DECISION AND ORDER

On June 16, 2014, the Service Employees International Union Local 668 (SEIU or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Butler County and Michele Mustello, the Butler County Recorder of Deeds, alleging that Respondents violated Section 1201(a)(1), (3), (5), and (8) of the Public Employee Relations Act (PERA or Act). SEIU subsequently amended its charge of unfair practices on July 7, 2014.

On July 21, 2014, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating January 28, 2015, in Harrisburg as the time and place of hearing, if necessary. On August 5, 2014, the County filed an Answer to the Complaint, essentially denying all material allegations contained therein. On August 6, 2014, the Recorder of Deeds also filed an Answer to the Complaint, denying the averments contained therein.

A hearing was necessary and was held before the undersigned Hearing Examiner on January 28, 2015, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties elected to make closing arguments on the record in support of their respective positions in lieu of filing post-hearing briefs. 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. Butler County and Michele Mustello, the Butler County Recorder of Deeds, are public employers within the meaning of Section 301(1) of PERA. (N.T. 3-5)
2. SEIU is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)
3. SEIU is the sole and exclusive bargaining representative for the unit comprised of all regular full-time and part-time clerical/technical employes appointed by the Commissioners of Butler County. (Union Exhibit 1, Article 1)
4. SEIU and the County were parties to a Collective Bargaining Agreement (CBA) which was effective January 1, 2011 through December 31, 2014. Article 16.4 of the CBA provides that:

Any employee scheduled for a layoff shall have the right to exercise his/her seniority and bump a junior employee who holds the same job classification in the unit. In the event the senior employee cannot bump within the same job classification, he/she may bump a junior employee in any position in any lower pay grade within the unit, provided he/she has the skills and ability to do the job...

¹ The caption appears as amended by the Examiner at the January 28, 2015 hearing.

(Union Exhibit 1, Article 16.4)

5. In early 2014, the County sold its nursing home, Sunnyview, and notified a small group of bargaining unit employes at the nursing home that they would be laid off, which initiated the bumping procedure under the CBA. (N.T. 11)

6. Nancy Enright, who was one of those employes displaced by the sale and a 17-plus-year veteran of the County, received a list with two full-time positions into which she could bump and chose the existing Data Entry Clerk position in the Recorder of Deeds office. This position had the same rate of pay as her previous Switchboard Operator position. (N.T. 11-12, 32-33; County Exhibit 1)

7. Kathy Dreher, who was the current Data Entry Clerk at the time and who had less seniority than Enright, filed a grievance individually protesting the bumping procedure. Although SEIU did not support her grievance argument, the Union's position was that any member can file a grievance. (N.T. 12-18, 38-40)

8. In April 2014, the County and SEIU agreed to have the grievance heard by a mediator to expedite the process and to be bound by the mediator's decision. The parties did so in lieu of arbitration. (N.T. 12-18, 31; Union Exhibit 1)

9. On April 28, 2014, the mediator handed down his ruling which provided, in pertinent part, that:

...for purposes of interpreting Article XVI's bumping rights Seniority (length of continuous service with the County) determines the order in which bargaining unit members may seek a position after being displaced from their current position. With regards to classification, it is my recommendation that even though job titles may be unique and distinctive, positions that have the same rate of pay are in the same classification.

(N.T. 12-18; Union Exhibit 1)

10. Following receipt of the mediator's decision, SEIU attempted to move forward with the bumping procedure, but was notified by the County's human resources department that the Data Entry Clerk position had been vacated and would not be filled. On April 25, 2014, the Recorder of Deeds had moved Dreher into a higher paying job as an Accounts Clerk 2. (N.T. 19-21, 33-34, 44-45, 56-57, 64-65)

11. Enright was subsequently laid off in May 2014, which prompted a grievance by SEIU protesting the denial of her bumping rights. However, the grievance was withdrawn shortly thereafter in favor of the instant unfair practices charge. (N.T. 22, 26-27; County Exhibits 1 & 2)

12. Michele Mustello, the Butler County Recorder of Deeds, did not assert any rights under Section 1620 of the County Code prior to April 2014. Instead, Mustello acknowledged that she consented to the bumping of any Sunnyview employe. (N.T. 47, 53, 68-69)

DISCUSSION

In its charge, SEIU alleged that the County violated Section 1201(a)(1), (3), (5), and (8) of the Act² by moving an employe into a vacant position and refusing to fill the newly vacated position, which denied Nancy Enright her bumping rights under the CBA and mediation settlement agreement. The County, meanwhile, contends that it did not violate

² Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act... (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization... (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative... (8) Refusing to comply with the provisions of an arbitration award deemed binding under section 903 of Article IX. 43 P.S. § 1101.1201.

the Act because the Recorder of Deeds had a legitimate business reason for the complained of action, which did not violate any purported settlement agreement.

Preliminarily, SEIU has alleged that Respondents violated Section 1201(a)(5) and (8) of the Act. As a general matter, an employer's refusal to comply with a grievance settlement at a lower stage in the grievance procedure is an unfair practice. **Fraternal Order of Police, Lodge 5 v. City of Philadelphia**, 43 PPER 123 (Proposed Decision and Order, 2010) *citing* **Moshannon Valley School District v. PLRB**, 597 A.2d 229 (Pa. Cmwlth. 1991); **Zelienople Borough**, 27 PPER ¶ 27024 (Final Order, 1995); **New Eagle Borough**, 25 PPER ¶ 25026 (Proposed Decision and Order, 1994).

The Board's criteria for determining whether an employer has timely complied with a grievance arbitration award is equally applicable to the determination of whether an employer has timely complied with a settlement agreement. **City of Philadelphia**, 43 PPER 123 (Proposed Decision and Order, 2007). In determining timeliness, the Board will consider such factors as: (1) the nature and complexity of the compliance required under the agreement; (2) the length of time before compliance occurred; (3) the employer's ability to comply with the agreement; (4) the steps taken by the employer toward compliance; and (5) the employer's explanation or lack thereof for the delay. *Id. citing* **City of Philadelphia**, 19 PPER ¶ 19069 (Final Order, 1988); **Commonwealth of Pennsylvania (Department of Community Affairs)**, 19 PPER ¶ 19165 (Proposed Decision and Order, 1998); **Commonwealth of Pennsylvania (Office of Administration)**, 17 PPER ¶ 17151 (Proposed Decision and Order, 1986).

SEIU has not sustained its burden of proving a violation of Section 1201(a)(8) of PERA. Indeed, this Section of the Act precludes a public employer from refusing to comply with a binding arbitration award. However, SEIU has not established the existence of any binding arbitration award. To the contrary, the record shows that the parties agreed to have the initial grievance heard by a mediator to expedite the process and to be bound by the mediator's decision. The parties did so in lieu of arbitration, and utilized the services of the Pennsylvania Bureau of Mediation. (N.T. 12-18; Union Exhibit 1). There is simply no binding arbitration award in the record. As a result, this portion of the charge will be dismissed.

Similarly, SEIU has not sustained its burden of proving a violation of Section 1201(a)(5) of PERA. As set forth above, the parties agreed to submit the initial grievance to a mediator, whose decision would be binding. The mediator found that, for purposes of Article 16 bumping rights, seniority or length of continuous service with the County would determine the order in which bargaining unit members may seek a position after being displaced from their current position. In addition, the mediator ruled that job titles which have the same rate of pay are in the same classification. However, the record is devoid of any substantial competent evidence that the County did not follow this procedure with regard to Enright's attempt to bump into the Recorder of Deeds office. In fact, the record shows that the Data Entry Clerk position in the Recorder of Deeds office was still vacant at the time of the hearing. If anything, the charge is premature in this regard. To be sure, the Union conceded that the Recorder of Deeds was not obligated to fill the Data Entry Clerk position once it became vacant. (N.T. 20, 50-51). There is no binding arbitration award or grievance settlement agreement which requires the position to be filled. Instead, the settlement agreement simply mandates that seniority determines the order in which bargaining unit members can bump into another position, and that positions with the same rate of pay are in the same classification. Until the County or Recorder of Deeds fills the position on the basis of some other criteria not set forth in the CBA and settlement agreement, then the Union has no colorable claim and there has been no violation of Section 1201(a)(5) of PERA. As such, the charge under this section will also be dismissed.

With regard to the Union's Section 1201(a)(3) 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 the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. **Audie Davis v. Mercer County Regional Council of Government**, 45 PPER 108 (Proposed Decision and Order, 2014) *citing* **St.**

Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). 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. **Teamsters Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order, 1992). If the employer offers 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 (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. **Mercer County Regional COG, supra**, citing **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 (Final Order, 1992).

In addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. **City of Philadelphia**, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities—for example, whether leading organizers have been eliminated; the extent to which the adversely affected employees engaged in union activities; and whether the action complained of was "inherently destructive" of employee rights. **City of Philadelphia, supra**, citing **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, **Teamsters Local 764 v. Montour County**, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employee engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. **Berks Heim County Home**, 13 PPER ¶ 13277 (Final Order, 1982).

In this case, the first two prongs of the three-part test for discrimination under Section 1201(a)(3) of PERA have been met. Enright engaged in protected activity by attempting to exercise her bumping rights which are expressly set forth in Article 16.4 of the CBA, and which were the subject of the grievance mediation in which SEIU participated. Likewise, the County and the Recorder of Deeds had knowledge of the protected activity. Enright's attempt to exercise her bumping rights prompted the initial grievance from Dreher. And, the County agreed to have the grievance heard by the mediator and to be bound by his decision. Similarly, the Recorder of Deeds acknowledged that she was aware of the mediation for the initial grievance from Dreher. (N.T. 54). The Recorder further conceded that she was aware of Enright's attempt to exercise her bumping rights as of April 3, 2014 when she received an email concerning the subject. (N.T. 62-63). As a result, the issue in this case involves the third element of the test, i.e., whether the promotion of Dreher into the vacant Accounts Clerk 2 position and subsequent refusal to fill the vacant Data Entry Clerk position was motivated by anti-union animus.

The close timing of the adverse action here clearly supports an inference of animus. The Recorder of Deeds moved Dreher into a position with a higher classification on April 25, 2014. This was less than 30 days after the Recorder learned that Enright wanted to bump into her office. What is more, this was barely more than a week following the mediation on Dreher's grievance. Further, the Recorder did not even wait for the mediator's decision to come down. The Recorder argued at the hearing that this factor somehow supports her claim that she did not have an unlawful motive. However, I find this argument unpersuasive. The record shows that the Recorder was clearly aware of the dispute. Her claim that she could not anticipate a decision from the mediator that seniority would govern lacks credibility, especially in the face of such clear language in Article 16.4. In any event, the Recorder testified that she was going to make this personnel move all along. However, the record shows that she had been considering applicants for the Accounts Clerk 2 position at least as far back as February 2014; yet, she took no action on it until April 25, 2014 once it became clear that Enright might have the ability to bump into the Recorder's office. The Recorder provided no explanation whatsoever for why she made the personnel decision at that particular time. Even more telling, the Recorder readily conceded that the timing also coincided with her alleged

assertion of Section 1620 rights for bargaining "this and any future agreements" in the context of bargaining a successor CBA. (N.T. 56)³

The next factor which supports an inference of anti-union animus is the lack of an adequate explanation for the Recorder's personnel decision. The Recorder testified that she made the personnel move because she had been contemplating electronic recording for her office. She testified that she wanted to give Dreher an opportunity to perform the Accounts Clerk 2 position, which was a promotion from her Data Entry Clerk position. (N.T. 56-57). She also claimed that she was going to give Dreher a 30 day probation period to evaluate her in the new position. (N.T. 64). She testified that what she was going to do all along. (N.T. 65). Once again, however, I find the Recorder's testimony lacks credibility in this regard.

First of all, the Recorder never offered any explanation whatsoever for how promoting the Data Entry Clerk employe to the Accounts Clerk 2 position helped establish electronic recording for her office. The record shows that Enright inquired about the Accounts Clerk 2 position in February 2014. In response, the Recorder indicated at that time that she had a core group of applicants she was considering for the position and that Enright would not be considered. (N.T. 57-61; Respondent Exhibit 1). However, the Recorder did not testify at the hearing in this case that Dreher was one of those applicants. She simply made a bald assertion regarding electronic recording and giving Dreher a chance at a higher level job. Without more of an explanation as to why this personnel move was necessary, I am unable to conclude that the Recorder had a lawful motive here. As such, I reject as not credible and not persuasive the Recorder's proffered reasons for the adverse action of denying Enright's bumping rights.

It is well settled that, timing, coupled with the failure to provide an adequate explanation for an adverse employment action, together are sufficient to support an inference of anti-union animus. **Palmyra Borough Police Officers Ass'n v. Palmyra Borough**, 46 PPER 52 (Proposed Decision and Order, 2014), 46 PPER 72 (Final Order, 2015). On this record, I must conclude that the Recorder of Deeds would not have taken the adverse employment action on April 25, 2014 had it not been for Enright's protected activity. Therefore, the Recorder of Deeds has violated Section 1201(a)(1) and (3) of PERA.⁴

CONCLUSIONS

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

1. Butler County and Michele Mustello, the Butler County Recorder of Deeds, are public employers within the meaning of Section 301(1) of PERA.
2. SEIU is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. Butler County and Michele Mustello, the Butler County Recorder of Deeds, have not committed unfair practices in violation of Section 1201(a)(5) and (8) of PERA.
5. Michele Mustello, the Butler County Recorder of Deeds, has committed unfair practices in violation of Section 1201(a)(1) and (3) of PERA.

³ The Recorder of Deeds appeared to argue at times that Mustello, as a Row Officer, was not a signatory to the CBA or the mediation settlement agreement. However, the Recorder's Counsel later conceded that Section 1620 of the County Code is not applicable to this case. (N.T. 78). In any event, had the Recorder raised Section 1620 of the County Code as a defense, the record shows that Mustello had tacitly acquiesced to a limit on her Section 1620 rights by failing to assert them at any time prior to April 2014. See **Troutman et. al. v. AFSCME District Council 88**, 87 A.3d 954 (Pa. Cmwlth. 2014) (noting that, where a row officer has tacitly acquiesced to a limit on her Section 1620 rights, the county commissioners have the authority to bargain them away).

⁴ SEIU did not allege an independent violation of Section 1201(a)(1) of PERA. Therefore, the violation under Section 1201(a)(1) is a derivative offense based on the Section 1201(a)(3) violation.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the Examiner

HEREBY ORDERS AND DIRECTS

that Butler County and Michele Mustello, the Butler County Recorder of Deeds, shall:

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

2. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization;

3. Take the following affirmative action:

(a) Immediately place Nancy Enright in the Data Entry Clerk position in the Recorder of Deeds office and make her whole for any lost wages, benefits, and other emoluments of employment, including six (6%) percent per annum interest;

(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 the bargaining unit 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

(d) Serve a copy of the attached Affidavit of Compliance upon the Union.

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventeenth day of April, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SERVICE EMPLOYEES INTERNATIONAL
UNION LOCAL 668

v.

BUTLER COUNTY and
MICHELE MUSTELLO, BUTLER COUNTY
RECORDER OF DEEDS

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Case No. PERA-C-14-193-W

AFFIDAVIT OF COMPLIANCE

Butler County and Michele Mustello, the Butler County Recorder of Deeds, hereby certify that they have ceased and desisted from the violations of Section 1201(a) (1) and (3) of the Public Employe Relations Act; that they have complied with the Proposed Decision and Order as directed therein; that they have posted a copy of the Proposed Decision and Order as directed therein; and that they have served an executed copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public