COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UNITED MINE WORKERS OF AMERICA, AFL-CIO	:	
	:	Case No. PERA-C-17-50-W
v.	:	
CLARION COUNTY	:	

PROPOSED DECISION AND ORDER

On March 3, 2017, the United Mine Workers of America, AFL-CIO (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Clarion County (County or Employer), alleging that the County violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA or Act) by laying off Dan McDonald in retaliation for his protected activity.

On March 22, 2017, 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 June 7, 2017, in Pittsburgh, as the time and place of hearing, if necessary.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board, as scheduled on June 7, 2017, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties both filed post-hearing briefs in support of their respective positions on August 28, 2017.

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 County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 3)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 3-4)

3. Dan McDonald was employed with the County from June 9, 2014 until his position was eliminated on February 6, 2017. He was initially hired to work at the 911 center as a 911 network architect. On July 27, 2016, his position was combined with the County IT and reclassified as an IT specialist. (N.T. 18-20, 25-28)

4. On January 3, 2016, Commissioners Tharan and Heasley, who were newly elected, took office. The Commissioners had campaigned on a cost-savings platform and that was their number one priority coming into the

County. They immediately began to contemplate how they could consolidate departments and cut positions. (N.T. 33, 55)[1]

5. In early spring of 2016, the Commissioners began specifically considering the elimination of McDonald's position. Tharan went to a County Commissioners Association of Pennsylvania (CCAP) conference in March 2016 and questioned other county commissioners on whether they had a dedicated IT person for 911. (N.T. 34-35, 56-57)

6. In June or July 2016, the County created a budget which allocated no payer benefit amount for McDonald. His position, along with several others, was eliminated in the budget. (N.T. 37-39; Employer Exhibit 1)

7. On or about the week of July 5, 2016, McDonald became aware of rumors that his position might be consolidated or eliminated. (N.T. 17, 27-28)

8. In response, McDonald sent an email to Tharan on or about July 11, 2016 requesting a meeting and stating some of his concerns. Tharan perceived the email as a challenge to his authority and requested that Human Resources Director Trisha Douglas respond. (N.T. 17, 33, 68-69)

9. On July 12, 2016, Douglas emailed McDonald and stated that she found his communication to Tharan to be unprofessional. Douglas also cautioned in her email that McDonald was an at-will employe and that his job description stated he would perform all duties, as assigned. (N.T. 17-18, 46)

10. On July 13, 2016, McDonald attended a meeting with Tharan, Douglas, and Chad Johnston, the County's IT Director, during which Tharan advised McDonald that the Commissioners had not made a decision yet regarding his position, but it was under consideration. (N.T. 18-19, 48-49, 71)

11. In early October 2016, the County had a meeting to discuss whether to eliminate McDonald's position following the installation of a computer assisted dispatch (CAD) IT project. (N.T. 60-63; Employer Exhibit 4)

12. The Commissioners decided to eliminate McDonald's position in November or December 2016, but planned to wait until after the Christmas holiday and the completion of the CAD installation to effectuate the layoff. (N.T. 62-63)

13. On or about January 10, 2017, McDonald was leaving work when he saw Union representatives, who were involved in an organizing effort, speaking with Cherin Abdelsamie, the County's GIS mapping supervisor. (N.T. 10, 14-15, 26-27)

14. A couple days later, on or about January 12, 2016, McDonald told Abdelsamie that he was interested in joining the Union and asked her for their contact information, which she provided to him. McDonald believed Abdelsamie to be supportive of the Union. (N.T. 15)

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[1] The record shows that Commissioner Brosius was reelected in November 2015 and began a new term in January 2016 with the other two newly elected Commissioners. (N.T. 55-56).

15. On January 23, 2017, McDonald signed a Union authorization card and advised Abdelsamie that he had done so the following day, after which she asked him who else had signed cards. McDonald replied that he did not know. (N.T. 12-16)

16. On February 6, 2017, McDonald came to work and saw Johnston, who advised him that he needed to see Douglas in human resources. McDonald met with Douglas and Tharan and received his separation letter. (N.T. 25-26)

DISCUSSION

In its charge, the Union alleged that the County violated Section 1201(a)(1) and (3) of the Act[2] by laying off Dan McDonald in retaliation for his protected activity. The County contends that the charge should be dismissed because the Union failed to establish the County's knowledge of McDonald's protected activity, and the County had legitimate business reasons for its actions.

In a 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 employes engaged in union activities; and whether the action complained of was "inherently destructive" of employe

[2] Section 1201(a) of the Act 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... 43 P.S. § 1101.1201.

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 employe 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 Union has met its burden of establishing the first two prongs of the Section 1201(a)(3) test. The record shows that McDonald signed a Union authorization card on January 23, 2017, which is clearly an activity protected under the Act. The record also shows that McDonald told Abdelsamie, one of the County's supervisors, that he had signed a Union authorization card on January 24, 2017. Therefore, the County had knowledge of McDonald's protected activity. As a result, the issue, as is so often the case, depends on whether the County was motivated by McDonald's involvement in protected activity when it laid him off on February 6, 2017.

The Union has not sustained its burden of proving the third prong of the discrimination test under Section 1201(a)(3) of the Act. In support of its claim that the County was unlawfully motivated, the Union points to a number of factors, which it claims yield an inference of discriminatory intent, including the following: the timing of the layoff; an alleged conversation between Johnston and Douglas, during which Johnston whispered the word "union" and concealed the rest of the conversation from McDonald; an alleged change in attitude and demeanor towards McDonald by Johnston after McDonald signed the Union authorization card; lack of an adequate explanation for the layoff; and pretext. Specifically, the Union contends that the County's proffered reasons for the layoff, namely that it was a cost-savings measure, is not credible given that two employes in the IT department, Johnston and somebody else, received raises of approximately $4,500 when the standard pay increase was only about $400. (N.T. 78-79). Likewise, the Union maintains that the County intended to keep McDonald as an employe and simply reclassify his position in 2016 until he signed the Union authorization card in January 2017. However, these alleged factors do not support an inference of unlawful motive on behalf of the County.

First of all, the timing of the events here does not support an inference of unlawful motive. While the Union attempts to show that the decision to layoff McDonald came immediately after he signed the Union authorization card on January 23, 2017, the record shows that the County was actually considering the elimination of his specific position as early as the spring of 2016. Indeed, it was at that time that Tharan attended a CCAP conference wherein he questioned other county commissioners about whether they had a dedicated IT employe for the 911 center. This is corroborated by the fact that, in June or July 2016, the County created a budget which allocated no payer benefit amount for McDonald, meaning that his position, along with several others, was eliminated in the budget. This is also consistent with the credible testimony of Douglas, who described how two of the newly elected Commissioners had run for election on a cost-savings platform, which became their top priority upon taking office, and began to immediately contemplate consolidating departments and cutting positions. Thus, the timing of the events here militates against rather than in favor of a finding that McDonald's layoff was a result of him signing the Union authorization card in January 2017. *See* Peter Glasser v. Pennsylvania State System of Higher Education, California University, 43 PPER 1 (Proposed

Decision and Order, 2011) *citing* Delaware County Prison Employees Independent Union v. Delaware County, 28 PPER ¶ 28005 (Final Order, 1996)(no discriminatory intent found where the genesis of the employer's conduct predated the protected activity on the part of employes).

Further, I am unable to conclude that Johnston's alleged change in attitude and demeanor towards McDonald supports an inference of unlawful motive. As the County points out, McDonald testified that he felt that Johnston started treating him differently by questioning his work before he ever told Abdelsamie that he had signed the Union authorization card. (N.T. 12-13). As such, it was not possible for McDonald's protected activity to be the source of Johnston's alleged hostility. What is more, the alleged conversation between Johnston and Douglas does not support an inference of unlawful motive either. McDonald testified that, on February 2, 2017, he overheard part of a telephone conversation between Johnston and Douglas, during which he heard the word "union" and then Johnston lowered his voice and spoke in a whisper. (N.T. 22). To the extent this may be suspicious, it is not sufficient to sustain the Union's burden of proof. Without more, I am unable to conclude that the County was unlawfully motivated when it laid off McDonald in February 2017. *See* Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311, 313 (Pa. Cmwlth. 1974)(holding that substantial evidence is more than a mere scintilla and must do more than create the suspicion that an unfair practice was committed).

In any event, I have credited the testimony of Tharan that the reason for the elimination of McDonald's position was a cost-savings measure, and not his protected activity. (N.T. 56-57, 64). Indeed, Tharan convincingly explained how, upon entering office, he immediately began searching for ways to save the County money and that McDonald's position was an area of concern since most counties did not have a dedicated IT person at the 911 center. (N.T. 56-58). This was consistent with the credible testimony of Douglas, who outlined the process by which the County generated its budget, which planned for the elimination of McDonald's position as early as July 2016. (N.T. 33-39). Likewise, Tharan persuasively testified that the final decision regarding McDonald's position occurred in November or December 2016, which was well before McDonald signed his Union authorization card. The Commissioners simply decided to wait until after the Christmas holiday and the completion of the CAD installation to finalize the layoff. As a result, I must conclude that the record contains no evidence of pretext or lack of an adequate explanation on behalf of the County. The Union may not agree with the County's decision to eliminate a position, but I am unable to discern any discriminatory intent in connection therewith. Accordingly, the charge under Section 1201(a)(3) must be dismissed.

Finally, the Union has alleged that the County violated Section 1201(a)(1) of the Act. The Board holds that a violation of Section 1201(a)(1) may be derivative or independent. Neshannock Education Support Professionals, PSEA/NEA v. Neshannock Township School District, 46 PPER 48 (Final Order, 2013). A derivative violation of Section 1201(a)(1) occurs when an employer commits any violation of Section 1201(a)(2) through (9), whereas an independent violation of Section 1201(a)(1) occurs when an employer engages in conduct that, in and of itself, tends to coerce reasonable employes in the exercise of their rights under the Act. *Id.* In this matter, the County has not committed any violation of Section 1201(a)(3) of the Act, as alleged by the Union. Therefore, the County has not committed a derivative violation of Section 1201(a)(1). Further, the Union has not alleged an independent violation of Section 1201(a)(1) in its charge of

unfair practices. As such, the charge under Section 1201(a)(1) will also be dismissed.

CONCLUSIONS

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

1. The County is a public employer within the meaning of Section 301(1) of PERA.

2. The Union is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County has not committed unfair practices in violation of Section 1201(a)(1) or (3) of PERA.

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 of unfair practices 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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 5th day of October, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner