

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 83 :
 :
 : CASE NO. PERA-C-17-102-W
 v. :
 :
 :
 CENTER TOWNSHIP :
 :

PROPOSED DECISION AND ORDER

On June 7, 2017, the American Federation of State, County and Municipal Employees District Council 83 (AFSCME or Union) filed a second amended charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Center Township (Township or Employer) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA).¹

On June 13, 2017, the Secretary of the Board issued a second amended complaint and notice of hearing, in which the matter was assigned to a pre-hearing conference for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating August 11, 2017, in Pittsburgh, as the time and place of hearing, if necessary.

A hearing was necessary. The hearing date was continued once upon request of the Township without objection by the Union. A hearing was held on October 18, 2017, in Pittsburgh, before the undersigned Hearing Examiner. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Union filed its post-hearing brief December 15, 2017. The Township filed its post-hearing brief on January 8, 2018. The Union filed a motion to strike non-admitted documentary evidence included in the Township's post-hearing brief on January 18, 2018.

The Hearing Examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The Township is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7).

¹ The Union filed an initial charge of unfair practices on April 25, 2017. The Union filed its first amended charge on May 5, 2017. It filed its second amended charge on June 7, 2017, and this matter proceeded on the second amended charge.

3. The Township employs labor operators. Labor operators perform road maintenance, plow snow, do drainage work, extricate drainage pipe, put in catch basing, haul stone, and related work. (N.T. 14, 38).

4. The Union represents the labor operators as well as one mechanic. (N.T. 59).

5. At the time of the hearing, there were three labor operators: Paul Colgan, Dan Bekina and Dale Bencic. Tony Peroli and Greg Cusimano were also labor operators at the beginning of 2017, for a total of five at the beginning of 2017. (N.T. 15).

6. Dave "Butch" Smyers, John Bertolino, and Jim Gatskie are Township Supervisors and Roadmasters. Gatskie became a Township Supervisor in 2016. The Supervisors hire themselves as Roadmasters to plan road projects and direct the work of the bargaining unit labor operators. (N.T. 14-15, 28, 31, 37, 85-87).

7. Greg Cusimano served as an appointed Supervisor and Roadmaster from July 2015 to January 2016. Cusimano was appointed to fill a Supervisor position which had opened due to a retirement. From January of 2016 to January of 2017, he was a labor operator and member of the bargaining unit. Cusimano was also the Union steward. (N.T. 36, 48, 50).

8. On or about January 19, 2017, Gatskie told Cusimano that he, Gatskie, was going to make a motion at the next Supervisor meeting to lay Cusimano off. Cusimano was furloughed the next day. The Union filed a grievance over the furlough on or about February 7, 2017. A meeting was held on the grievance on February 10, 2017, attended by Colgan, Terry Skultety (the Union representative), Cusimano, Peroli, and the three Supervisors. During the meeting, the parties discussed Cusimano's layoff and the possibility of bringing Cusimano back to work. The Township supervisors adopted a negative stance to the prospect and insinuated that the Union was responsible for the Township's budget issues and that the Union was holding back the Township from progressing. During the meeting, Gatskie said that the Supervisors were going to have to pick up the slack on work because there was one less labor operator. Smyers said that the reason for the furlough was financial and that the Township was overstaffed and that the Township needed to return to a level where bills could be paid. The Township did not reinstate Cusimano. (N.T. 38-48, 62-65, 113-114; Union Exhibit 2).

9. The Township is experiencing increasing costs and declining revenues. The Township decided to furlough Cusimano due to its budget numbers and its goal to reduce expenditures. (N.T. 93-94, 109, 117-118).

10. There had been at least four labor operators for the ten years prior to 2017. Prior to Cusimano being laid off there were five labor operators in the bargaining unit. The Township's budget for 2017 included five labor operators. (N.T. 33, 38, 133-136).

11. Subsequent to the furlough of Cusimano, Peroli, one of the other labor operators, unexpectedly resigned to take another job. At

this point, Skultety requested that the Township reinstate Cusimano in light of Peroli leaving and creating a job opening. (N.T. 58, 65-66, 110).

12. Skultety sent the Township Supervisors a letter dated March 7, 2017, which states in relevant part:

Dear Mr. Smyers, Mr. Bertalino, and Mr. Gaskie,

As you know, on January 19, Center Township furloughed Greg Cusimano. Since that time, the extent to which supervisors outside the AFSCME bargaining unit are performing bargaining unit work has increased. The Township has not bargained with the Union over this transfer of bargaining unit work. Under [PERA], it is well-settled that any removal of bargaining unit work from the unit is a mandatory subject of bargaining. AFSCME thus demands that the Township rescind Mr. Cusimano's furlough immediately and make him whole and further, that the Township meet with the Union to bargain over the transfer of bargaining unit work. I am available to meet March 20th, 21st, or 23rd. Please advise which day best accommodates your schedule.

Sincerely,

Terry Skultety

(N.T. 66-67; Union exhibit 5).

13. Subsequent to this letter, Skultety and the Township Supervisors did meet to discuss the duties the Roadmasters were doing since Cusimano was furloughed, and the reinstatement of Cusimano in light of the resignation of Peroli. The Township never agreed to reinstate Cusimano or negotiate the amount of work performed by the Roadmasters. (N.T. 66-67).

14. Prior to January 2017, Roadmasters had performed some work normally done by labor operators such as trimming trees, cold patching, and paving roads. After January 2017, Roadmasters, and especially Gatskie, have been performing more work than they had prior to January 2017. The amount of work performed by the Roadmasters has increased as a percentage in January through March 2017 as compared to January through March 2016. A comparison of the Township Payroll records from January through March of 2016 to the same period in 2017 shows an increase in the percentage of both straight time and overtime work for bargaining unit work performed by the Roadmasters. The time records from January through March 2016 show that Roadmasters performed 27.74% of the total straight time hours of bargaining unit work and 36.35% of the total overtime hours of bargaining unit work. In January through March of 2017, which includes time subsequent to two bargaining unit members leaving employment due to furlough and resignation, the share of bargaining unit work performed by the Roadmasters increased to 31.44% of straight time hours and 41.75% of overtime hours. (N.T. 16-19, 25, 34-35, 46, 51, 71-72, 76, 81; Union Exhibit 6).

DISCUSSION

In this matter, the Union has made three allegations. First, the Union alleges the Township violated Section 1201(a)(1) and (5) of PERA when it unilaterally transferred work out of the bargaining unit. Second, the Union alleges that the Township's refusal to recall Cusimano following the filing of a grievance is a violation of Section 1201(a)(1) and (3) of PERA. Third, the Union alleges that the Township's conduct constitutes an independent violation of Section 1201(a)(1) of PERA.

Section 1201(a)(1) and (5)

The removal of bargaining unit work is a mandatory subject of bargaining and an employer commits an unfair practice when it fails to bargain with the exclusive representative before transferring bargaining unit work to an employee outside the unit for economic reasons. Hazleton Area Education Support Personnel Ass'n v. Hazleton Area School District, 37 PPER 30 (Proposed Decision and Order, 2006); citing Midland Borough School District v. PLRB, 560 A.2d 303 (Pa. Cmwlth. 1989); PLRB v. Mars Area School District, 389 A.2d 1073 (Pa. 1978). The analysis for removal of bargaining unit work is a refined and focused factual inquiry into whether the public employer transferred any unit work to non-members without first bargaining with the unit. See City of Harrisburg v. PLRB, 605 A.2d 440, 442 (Pa. Cmwlth. 1992) (holding that a public employer commits an unfair labor practice when it unilaterally transfers any unit work).

Even where bargaining unit and non-unit employees have both performed similar duties, a union can satisfy the exclusivity requirement by proving that the bargaining unit members exclusively performed an identifiable proportion or quantum of the shared duties such that the bargaining unit members have developed an expectation and interest in retaining that amount of work. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992); City of Jeanette v. PLRB, 890 A.2d 1154, 1159 (Pa. Cmwlth. 2006).

Thus, the Board will find a violation of Section 1201(a)(1) and (5) if the employer significantly alters its past practice regarding the assignment of bargaining unit work to non-unit members or if the employer varies the extent to which members and non-members of the bargaining unit have performed the same work. Wyoming Valley West Educ. Support Personnel Ass'n v. Wyoming Valley West Sch. Dist., 32 PPER ¶ 32008 (Final Order, 2000).

The complainant in an unfair practices proceeding has the burden of proving the charges alleged. St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977).

In this matter, it is clear bargaining unit work (which consists of road maintenance, plowing snow, drainage work, extrication of drainage pipe, putting in catch basing, and hauling stone) has never been exclusively performed by the bargaining unit. Indeed, Roadmasters have always worked beside labor operators on the Township's streets and roads. However, this record supports the Union's charge that the Township committed an unfair practice because the Township unilaterally and significantly altered its past practice regarding the assignment of

bargaining unit work to non-unit members and changed the extent to which members and non-members of the bargaining unit performed the same.

The Union's charge is supported by the following four specific facts from the record. First, time records from January through March 2016 show that Roadmasters performed 27.74% of the total straight time hours of bargaining unit work and 36.35% of the total overtime hours of bargaining unit work. In January through March of 2017, which includes time subsequent to two bargaining unit members leaving employment due to furlough and resignation, the share of bargaining unit work performed by the Roadmasters increased to 31.44% of straight time hours of bargaining unit work and 41.75% of overtime hours of bargaining unit work. Second, the fact that the Roadmasters were performing more bargaining unit work in 2017 than before is supported by the testimony of Cusimano and Colgan, who both testified that they personally witnessed Roadmasters performing more bargaining unit work than they had prior to the furlough of Cusimano. Third, Cusimano credibly testified that, during the meeting in January, 2017, to discuss the furlough of Cusimano, Gatskie said that the Roadmasters were going to have to "pick up the slack" because there would be one less bargaining unit member (this was prior to Peroli making it known to the Township that he was resigning). I infer from this record that "picking up the slack" means that the Roadmasters would have to do more bargaining unit work in 2017 than they had done previously. Fourth, 2017 is the first year in at least the past 10 years that the Township only employed three labor operators, though the budget for 2017 had included five labor operators.

The record is clear: the Township entered 2017 with five labor operators and a budget for five. The Township then furloughed one labor operator and another resigned. The Roadmasters then did more bargaining unit work (as a percentage of work done) than the previous year. It is uncontroverted that the Township acted unilaterally. Thus, I conclude that the Township has violated Section 1201 (a) (1) and (5) of PERA by unilaterally significantly altering its past practice regarding the assignment of bargaining unit work to non-unit members and changing the extent to which members and non-members of the bargaining unit performed the same work.

Section 1201(a) (1) and (3)

In a Section 1201(a) (1) and (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 this matter, the Union argues that the discriminatory act was the refusal by the Township to reinstate Cusimano from his furlough. The Union argues that the first two prongs of the analysis above are met because the Township, when it refused to reinstate Cusimano, knew that he had filed a grievance. The record supports the Union's allegations on the first two prongs, as the record is clear a grievance was filed and the Township knew of the grievance when it refused to reinstate Cusimano.

Moving to the third prong of the analysis, the record in this matter does support the conclusion that Township was motivated by anti-union animus when it refused to reinstate Cusimano. The Union correctly points to the Township Supervisor comments in the grievance meeting to the effect that the Union was responsible for the Township's budget issues and that the Union was holding back the Township from progressing as a factor to support its claim of unlawful motive. These comments support a finding of anti-union animus sufficient for the Union to make its *prima facie* case.

However, in this case, the Township has adequately shown that the reasons for the furlough of Cusimano and the continued refusal to reinstate him were economic and based on the declining revenues and increasing expenditures of the Township. This conclusion is supported by the fact that the decision to initially furlough Cusimano was made before any grievance was filed. Further, based on this record, I conclude that the economic justifications for the Township's actions were not pretextual. The testimony of the Township witnesses credibly supports the conclusion that their actions were primarily motivated by financial reasons. Thus, I conclude that the Township has not violated Section 1201 (a) (3) of PERA.

Independent Section 1201(a) (1)

Section 1201(a) (1) 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) "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 employer's conduct was not coercive, then no violation of Section 1201(a) (1) may be found. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, supra.

Nor may a violation of section 1201(a) (1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. Temple University, 23 PPER ¶ 23118 (Proposed Decision and Order, 1992), *affirmed on another ground*, 25 PPER ¶ 25121 (Final Order 1994); Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989). However, if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 1201(a) (1) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order, 1995).

It is not contested that the Township decided to furlough Cusimano before any grievance was filed. After the grievance, the Township merely did not agree to reinstate Cusimano and instead, as discussed above, for economic reasons chose to assign bargaining unit work to Roadmasters to make up for the fact that Cusimano and Peroli no longer worked for the Township. Those actions do, as discussed above, support a derivative Section 1201(a) (1) violation in the context of the Section 1201 (a) (1) (5) violation. However, the decision of the Township to not reinstate Cusimano does not support a separate independent Section 1201(a) (1) violation as the record does not support a finding of any coercive effect on a reasonable employee's exercise of protected rights. Furthermore, the Township's legitimate business interests outweigh any alleged coercive effect.

Evidentiary Issues

Finally, there are two evidentiary issues. First, the Union moved to include Union Exhibit 1 into evidence. Union Exhibit 1 is an email by Cusimano to Skultety dated March 10, 2017. I deferred a ruling. I now rule that Union Exhibit 1 is inadmissible hearsay. Second, in its brief at Attachment 2, the Township attaches voluminous payroll records which were not introduced at the hearing. As the Township made no motion to reopen the record, I did not consider those records and they are not made part of the record. The Union's motion filed on January 18, 2018, to strike the non-admitted evidence is granted.

CONCLUSIONS

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

1. The Township 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 Township has committed unfair practices in violation of Section 1201(a) (1) and (5) of PERA.
5. The Township has not committed unfair practices in violation of Section 1201(a) (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 Center Township shall:

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

2. Cease and desist from 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.

3. Take the following affirmative action which the Hearing Examiner finds necessary to effectuate the policies of PERA:

(a) Restore the *status quo ante* which existed prior to the diversion of bargaining unit work to the Roadmasters and return the work to the bargaining unit;

(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 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 at Harrisburg, Pennsylvania, this fourteenth day of March, 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 83 :
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AFFIDAVIT OF COMPLIANCE

Center Township hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employee Relations Act; that it complied with the Proposed Decision and Order as directed therein; that it restored the *status quo ante* which existed prior to the diversion of bargaining unit work to the Roadmasters and returned the work to the bargaining unit; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has 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