COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SEIU LOCAL 668 PSSU	:	
	:	
	:	
v.	:	Case No. PERA-C-18-120-E
	:	
YORK COUNTY and YORK COUNTY COURT OF COMMON PLEAS	:	
	:	
	:	

PROPOSED DECISION AND ORDER

On May 25, 2018, the Service Employees International Union (SEIU or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against York County (County) and the York County Court of Common Pleas (Court), alleging that Respondents violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA or Act) by retaliating against Adult Probation Officer Jason Walker for having the Union file a grievance on his behalf.

On June 18, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on September 18, 2018, if necessary. On July 2, 2018, the Court filed a Motion to Dismiss, alleging that the Board lacks jurisdiction over the Court due to the separation of powers doctrine. On July 3, 2018, the County filed its own Motion to Dismiss, which joined in the Court's Motion, and which asserted additional bases supporting dismissal of the charge, as against the County.

The parties elected to submit factual stipulations in lieu of appearing for an evidentiary hearing. The Board received the duly executed stipulations of fact on September 13, 2018. The Union filed a brief in support of its position on December 12, 2018. The Court filed a response to the Union's brief on December 17, 2018. The County did not file a brief in support of its position.

The Hearing Examiner, on the basis of all matters and documents of record, makes the following:

FINDINGS OF FACT

1. York County and the York County Court of Common Pleas are both 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. (Joint Exhibit 1)

3. SEIU is the exclusive bargaining representative for a unit of court-appointed professional employes at the County. (Joint Exhibit 1, 2; PERA-R-12, 601-C)

4. The County Commissioners are the managerial representatives of the judiciary in collective bargaining negotiations involving employes paid by the County. (Joint Exhibit 1)

5. Pursuant to the certification, the Union and the County entered into a collective bargaining agreement (CBA) which was renegotiated periodically. The parties were subject to a CBA, which was effective from January 1, 2010 to December 31, 2014, and which was amended by an interest arbitration award effective January 1, 2015 to December 31, 2019. (Joint Exhibit 1, 3)

6. As set forth in the current CBA, the Court has never waived its rights under Section 1620 of the County Code either through negotiations between the County and the Union or otherwise. (Joint Exhibit 1, 3)

7. Adult Probation Officer Jason Walker is part of the court-appointed bargaining unit. Walker is supervised by the Court. (Joint Exhibit 1)

8. On February 26, 2018, Walker received a written reprimand from Holly Wise, Supervisor, and Michael Stough, Deputy Chief of Probation Services, for failure to follow proper procedures under the Court's Search and Seizure policy, failure to debrief his supervisor regarding an incident, and failure to submit a written incident report within 72 hours of an incident. (Joint Exhibit 1, 4)

9. On March 2, 2018, the Union Shop Steward Crystal Perry filed a grievance demanding that the Court withdraw Walker's written reprimand. (Joint Exhibit 1, 5)

10. On March 5, 2018, the Director of Probation Services April Billet-Barclay responded to the grievance by way of a written letter and increased the discipline to a two-day suspension, along with other corrective discipline. The letter stated in relevant part as follows:

> I am responding to the grievance submitted by Officer Crystal Perry dated March 2, 2018. I have reviewed the original Written Reprimand dated February 26, 2018, the Search and Seizure Policy effective July 10, 2017, the Policy Acknowledgement signed by [Walker] on June 29, 2017 indicating you had reviewed and understood the Search and Seizure Policy, and the Arrest/Search Report completed by you (along with Officers Titzell, Whitcraft and Hennigan) and signed by you on February 1, 2018 and submitted to Supervisor Holly Wise on February 8, 2018.
>
> Before going into the merits of the grievance, it is important to note that this grievance was improperly filed by Crystal Perry acting as a representative of [the Union]. Article 19.1 cited by Ms. Perry in her General Grievance was declared invalid. Both the Constitution of the Commonwealth of Pennsylvania and Section 1620 of the County Code, give the Court of Common Pleas, through the President Judge, the unfettered right to hire, supervise and discharge employees. Article 3.3 of the Union contract clearly acknowledges this right and renders unenforceable any provision of the contract that may conflict with the Court's rights. Officers seeking to file non-economic grievances must follow procedures outlined under the provisions of the Court Employee Policy Manual.
>
> Despite this, I will respond to issues raised by Ms. Perry in the general grievance. There are a great many concerns related to

the search of the residence where Defendant Stitzel requested to reside. First and foremost, no one residing in the home was under active supervision by the York County Department of Probation Services. Therefore, no authority existed to search this home with or without a signed Consent to Search form by the home's resident. This is clearly stated on page one of the Search and Seizure Policy along with the policy acknowledgement signed by you on June 29, 2017. Not only did you search the home of an individual not on active probation/parole supervision, but you directed the home owner to dispose of property belonging to her while conducting this search with no authority to do so. Your argument that the DUI Court team sometimes gives individuals a second chance to bring requested residences into compliance is invalid and does not justify an illegal search. The DUI Court team's decision and/or requests do not supersede the Fourth Amendment.

Second, you indicate in your report that you received *verbal* permission from the home's resident to search the home. However, you failed to complete and have the resident sign the Consent to Search form until after the entire residence had been searched and you found several items that are indicative of illegal drug use and after having turned these items over to a police officer who happened to be at the home for unrelated reasons. Again, I will point out that no authority existed to search this home. This residence was not Defendant Stitzel's approved residence. Even if this were the defendant's approved residence, you violated the Consent to Search portion of the Search and Seizure Policy beginning on page seven (7). Consent to search rests on whether the officers can show there was a knowing, voluntary and intelligent waiver of a defendant's Fourth Amendment rights *prior* to searching. Only after an officer has completed the Consent to Search form, explained it in detail to the defendant and had a defendant sign the form can the officer proceed with the search. When questioned by Supervisor Wise about why you did not review and have the resident sign the Consent to Search form prior to searching, your answer was that you were not aware you needed to have the Consent to Search signed first and that you should probably review the policy again.

As indicated in the grievance, you felt exigent circumstances existed to allow for the search without supervisory approval based on finding the butterfly knife and BB gun in plain view in a bedroom of the home, people in the home acting strangely, a female roommate pacing from room to room in the home, the presence of an inexperienced officer and the defendant's prior assaultive history. However, per page two (2) of the Search and Seizure Policy, nowhere in your search report do you indicate you felt exigent circumstances existed to conduct a search. You indicate you found the butterfly knife and BB gun in plain view *during* your search of a bedroom after being given verbal permission by the resident to search. Additionally, you directed Probation Officer Kevin Titzell to go outside and speak with the police officer despite your alleged concern over the pacing female roommate and the defendant's assaultive history. Lastly, you had already proceeded with the search without a signed

Consent to Search form, without supervisor approval and with no legal authority to even search the residence.

Regarding failure to debrief the incident, per page eight (8) of the Search and Seizure Policy, officers shall verbally notify the approving supervisor or on call supervisor (after hours) as soon as possible after a search is completed. This search was completed by 1:32 pm the afternoon of January 11, 2018. Per your field and time sheets, you worked until 9:35 pm that evening. At no time did you attempt to contact Supervisor Wise that afternoon or evening. As indicated in the grievance, you waited until the next day to email Supervisor Wise. Concerning your safety concerns and the items found, it was your responsibility to notify Supervisor Wise immediately after clearing the home (sic) not to wait until the next day. Additionally, you knew there were concerns with the contact as your email to Supervisor Wise indicated the following: "[i]f you get a moment, let me know, and I can tell you about the shit show that happened at [Defendant's] 'new address check' yesterday so you don't get blindsided in court on 1/17."

Regarding logging of evidence, page four (4) of the Search and Seizure Policy indicates that a probation officer shall maintain a record of all items seized as evidence or contraband, whether the items are given to local police or another agency for storage, or stored in the Probation Department.

Regarding timely submission of the Arrest/Search Incident Report, the Search and Seizure Policy indicates on page nine (9) that all officers involved in the incident will submit one incident report with (sic) seventy-two (72) hours of the incident for any search conducted including where an individual gives voluntary consent. You acknowledge submitting the report late. However, you only accepted responsibility for being two days late and place blame on your fellow officers for failing to timely complete their sections of the report despite you emailing reminders to them. At no time did you notify your supervisor or any member of management that the report would be late or that other officers were failing to comply with timely submission of the incident report.

After reviewing the information, I am incredibly concerned about your gross disregard for the Fourth Amendment rights of the citizens of our community, your failure to accept any responsibility for your behavior, your complete disregard for department policy put in place to protect probation officers from liability, and the poor example you set for rookie officers. Probation Officers must be above reproach. The citizens of our community expect that we follow the same laws we hold defendants accountable to (sic). I have reviewed this incident with District Court Administrator Paul Crouse and although it was his opinion that your blatant disregard for so many policies, which renders the court vulnerable to civil suit, should result in termination, I have opted to temper this discipline.

With that being said, I find that not only does enough evidence exists (sic) to support the Written Reprimand, but I am

> increasing the disciplinary action to a two day suspension, mandating retraining by a Field Training Officer of management's choosing, no field or home contacts unless accompanied by another officer approved by Supervisor Wise, a six month ban from conducting any searches and a complete review of the Search and Seizure Policy with Supervisor Wise and myself. Finally, you will not serve in any capacity as a mentor, trainer or team leader until notified otherwise by Supervisor Wise.

(Joint Exhibit 1, 6)(emphasis in original)

11. Probation Services is a Court Department, and Billet-Barclay is a Court employe. (Joint Exhibit 1)

12. Walker's February 26, 2018 reprimand and the March 5, 2018 suspension were both issued by the Court. (Joint Exhibit 1)

13. The County was not involved in the disciplinary action. (Joint Exhibit 1)

DISCUSSION

In its charge, the Union alleged that the County and Court violated Section 1201(a)(1) and (3) of the Act[1] by retaliating against Walker for having the Union file a grievance on his behalf. The Respondents contend that the charge should be dismissed because the separation of powers doctrine and Section 1620 of the County Code provide the Court with exclusive power to supervise and discipline its employes.

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

[1] 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." 43 P.S. § 1101.1201.

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 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 not sustained its burden of proving a prima facie case for discrimination under Section 1201(a)(3) of PERA. Although the record shows that the Union filed a grievance on March 2, 2018 and that the Court was aware of the grievance, the record is devoid of any evidence whatsoever supporting an inference of unlawful motive on behalf of either Respondent. The Union contends that Billet-Barclay's March 5, 2018 response to the grievance, in which she increased the discipline, supports an inference of discrimination because "it is very unlikely that Billet-Barclay, the Director of Adult Probation Services, would be unaware of such serious Constitutional violations [of the Fourth Amendment rights of the citizens]" prior to her review of the matter. *See* Union brief at 5. However, the Union adduced no evidence whatsoever to support such a conclusion. The Union's argument in this regard is based entirely on conjecture.

Further, the Union submits that Billet-Barclay's March 5, 2018 grievance response demonstrates her anti-union animus because she commented on Walker's alleged "failure to accept any responsibility for (his) behavior." *See* Union brief at 5. The Union argues that this remark suggests that Billet-Barclay perceived Walker's grievance to be a demonstration of him not taking responsibility for his behavior. Once again, however, the Union's argument is not persuasive. Billet-Barclay's March 5, 2018 grievance response does not demonstrate any anti-union animus. Her reference to Walker's alleged failure to take responsibility for his conduct simply addresses his apparent willingness to blame his fellow officers for his own untimely submission of an Arrest/Search Incident Report, and not the March 2, 2018 grievance. Indeed, Billet-Barclay rebukes Walker in that discussion for his untimely report, his failure to accept responsibility by blaming other employes for the untimely report, and his failure to notify his supervisor or any member of management that the report would be late due to untimely contributions of fellow officers. Her grievance response contains no evidence of unlawful motive.

In making these arguments, the Union maintains that the record supports a finding of discrimination under Section 1201(a)(3) of PERA because the

Court failed to adequately explain the reasons for the adverse employment action and that its reasons were pretextual. However, on this record, the Court's explanations for Walker's suspension and other discipline must be accepted as credible and persuasive. Billet-Barclay's March 5, 2018 grievance response is replete with various policy infractions, not to mention Fourth Amendment violations of citizens, who were not subject to probationary or parole supervision. The Union has not presented any evidence to discredit the March 5, 2018 grievance response. Nor has the Union put forth any direct evidence of discriminatory motive. As a result, the only factor supporting an inference of unlawful motive here is timing, which is not sufficient to establish a prima facie case. Therefore, the Union's charge under Section 1201(a)(3) of PERA must be dismissed.

The Union has also alleged an independent violation of Section 1201(a)(1) of the Act. The Board has held that an independent violation of Section 1201(a)(1) will be found if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employes have been shown in fact to have been coerced. Bellefonte Area School District, 36 PPER 135 (Proposed Decision and Order, 2005)(citing Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 1201(a)(1). Northwestern School District, supra. However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Dospoy v. Harmony Area School District, 41 PPER 150 (Proposed Decision and Order, 2010)(citing Ringgold Education Ass'n v. Ringgold School District, 26 PPER ¶ 26155 (Final Order, 1995)).

In this case, the Union has not established an independent violation of Section 1201(a)(1) of PERA. The record shows that Billet-Barclay had legitimate reasons for increasing Walker's discipline in her March 5, 2018 grievance response, which included myriad policy and constitutional violations. This clearly outweighs concerns over potential interference with employe rights to file grievances challenging discipline. As a result, the Court has not committed any independent violation of Section 1201(a)(1) of PERA. Accordingly, the charge under Section 1201(a)(1) of PERA will also be dismissed.[2] [3]

CONCLUSIONS

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

1. York County and the York County Court of Common Pleas are both public employers 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.

[2] Based on my disposition of the charge, there is no need to specifically address the separation of powers and Section 1620 arguments.
[3] The record is devoid of any evidence that the County violated Section 1201(a)(1) or (3) of PERA, and as such, the charge will be dismissed as it relates to the County as well.

4. The Respondents have 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 the Public Employe Relations Act, the Examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge is dismissed.

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 13th day of March, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

_____
John Pozniak, Hearing Examiner