COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ANGELIQUE JENKINS	:	
	:	
v.	:	Case No. PERA-C-19-60-E
	:	
SOUTHEASTERN PENNSYLVANIA	:	
TRANSPORTATION AUTHORITY	:	

PROPOSED DECISION AND ORDER

On March 20, 2019, Angelique Jenkins (Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Southeastern Pennsylvania Transportation Authority (SEPTA or Employer), alleging that SEPTA violated Section 1201(a)(1) through (9) of the Public Employe Relations Act (PERA or Act).[1] Specifically, Complainant alleged that SEPTA terminated her employment to thwart her future plans to run for President of the Transport Workers Local Union 234.

By letter dated April 24, 2019, the Secretary of the Board declined to issue a Complaint and dismissed the charge in its entirety. Complainant filed timely exceptions on May 1, 2019 challenging the Secretary's dismissal of her charge. On July 16, 2019, the Board issued an Order Directing Remand to Secretary for Further Proceedings, with regard to the charge under Section 1201(a)(1) and (3) of PERA.[2]

On July 25, 2019, the Secretary issued a Complaint and Notice of Hearing, directing a hearing on August 28, 2019, if necessary. The hearing ensued as scheduled on August 28, 2019, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence.[3] The Complainant filed a post-hearing brief on November 13, 2019. SEPTA filed a post-hearing brief on November 14, 2019.

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. SEPTA is a public employer within the meaning of Section 301(1) of PERA. (N.T. 10)

2. Angelique Jenkins was a public employe employed by SEPTA within the meaning of Section 301(2) of PERA. (N.T. 10)

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[1] The lone exception was that the charge did not allege a violation of Section 1201(a)(6) of PERA.

[2] The Board upheld the Secretary's dismissal of the charge under Section 1201(a)(2), (4), (5), (7), (8), and (9) of PERA.

[3] The Complainant is not an attorney and appeared unrepresented by counsel for the hearing.

3. The Transport Workers Union of America, AFL-CIO, Local 234 (Union or Local 234) is the exclusive bargaining representative of the SEPTA transit employes. (N.T. 21, SEPTA Exhibit 2)

4. Local 234 and SEPTA are parties to a collective bargaining agreement (CBA) effective November 7, 2016 through October 31, 2021. (SEPTA Exhibit 2)

5. Jenkins began working for SEPTA in January 2009 as a bus operator. By early 2019, she had started working as a train operator, which required her to safely transport passengers along the City of Philadelphia rail lines. In February 2019, she had been working as a train operator for nearly a year. (N.T. 19-21)

6. In February 2019, Jenkins was working pursuant to the terms of a July 2017 Work Resumption or Last Chance Agreement, which resolved all issues surrounding her June 2017 discharge from SEPTA, and which provided in pertinent part, as follows:

> Ms. Jenkins agrees to modify the objectionable performance and/or behavior which resulted in her discharge. She further understands that she must bring her performance to an acceptable level.
>
> In lieu of discharge Ms. Jenkins will be required to serve a one (1) day suspension without pay on [Tuesday July 11, 2017] followed by a one (1) year probationary period, commencing **May 24, 2017.**
>
> While on "last chance" probation, should Ms. Jenkins be charged with committing any infraction for which discipline is justified, she shall be subject to an immediate discharge.
>
> Ms. Jenkins is reminded that this last step discipline remains on her record for 730 calendar days.
>
> Ms. Jenkins understands that she shall be eligible for only one (1) last chance in her career...

(N.T. 124; Complainant Exhibit 3, 4, SEPTA Exhibit 1)(Emphasis in original)

7. Jenkins began posting on social media in or around April or May 2018 about her intentions to run for President in the next Local 234 elections, which were set for September 2019. (N.T. 22-26)

8. Jenkins told several managerial employes at SEPTA, including Glendale Thomas, Mark Lashly and Lee Roberts, about her intentions to run for Union office while she was working a light-duty job in November 2018. (N.T. 26-29, 41-42, 62-63)

9. On February 9, 2019, Jenkins was involved in an incident, during which she inadvertently used the train's override system to open the doors on the wrong side of the train away from the platform side. She testified that she panicked after seeing a passenger in a wheelchair attempting to board the train on the platform side after it had stopped and the doors were closing. She immediately notified the control center to inform her employer, performed

a ground inspection to make sure there were no injuries, and was then placed back in service. (N.T. 29-35, 135)

10. SEPTA has a rule which requires the train operators to open the doors on the platform side only. Employes who violate the rule typically receive a single step of discipline. (N.T. 133-137; SEPTA Exhibit 3)

11. The CBA contains a progressive disciplinary procedure whereby employes receive a verbal warning for their first offense, followed by a written warning, one-day administrative suspension, three-day administrative suspension, and then discharge. (N.T. 123; SEPTA Exhibit 2)

12. On March 1, 2019, Jenkins was terminated from SEPTA by her direct supervisor, Jacqueline Price, who is an Assistant Director of Transportation. Price recommended the discharge because Jenkins violated her Last Chance Agreement by opening the doors on the wrong side of the train on February 9, 2019. (N.T. 46-48, 158-163; SEPTA Exhibit 4)

12. Local 234 filed a grievance challenging the discharge as lacking just cause, which was denied during the processing steps by SEPTA's Senior Director for Station Operations, Darryl Wade, and Labor Relations Manager, Heather Morris, because the discipline was warranted and Jenkins violated her Last Chance Agreement. (N.T. 120-121, 141, 186, 190-194; SEPTA Exhibit 5, 7)

13. By letter dated April 10, 2019, the Union notified Jenkins that it would not process her grievance to arbitration. (Complainant Exhibit 8)

DISCUSSION

The Complainant has alleged that SEPTA violated Section 1201(a)(1) and (3) of the Act[4] by terminating her employment to thwart her future plans to run for President of the Transport Workers Local Union 234. SEPTA contends that the charge should be dismissed because the Complainant has failed to sustain her burden of proof, and because SEPTA had a legitimate nondiscriminatory reason for the discharge.

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,

[4] 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.

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 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 Complainant has met her burden of establishing the first two prongs of the Section 1201(a)(3) test. The record shows that Jenkins told several managerial employes at SEPTA in November 2018 that she was going to run for Union office. This is clearly protected activity under the Act. Likewise, the record shows that SEPTA had knowledge of Complainant's protected activity, given that she directly told managerial employes about the same. As a result, the issue in this case depends on whether SEPTA was motivated by Complainant's protected activity in connection with her discharge in March 2019.

On this record, the Complainant has not sustained her burden of proving the third element of the Section 1201(a)(3) discrimination test, i.e. that SEPTA was unlawfully motivated when it discharged her in March 2019. In her post-hearing brief, Complainant points to several factors, which allegedly support an inference of unlawful motive, including her multiple commendations she received from SEPTA for being a good employe, an alleged ongoing relationship between her direct supervisor Price and the Union's business agent, Jaydean Daye,[5] and a lack of just cause for the discipline. However, the Board has long held that an employer's lack of just cause as an arbitrator might define the term will not support a finding of discriminatory motivation. Utility Workers Union of America, AFL-CIO v. Hempfield Township Municipal Authority, 41 PPER 11 (Proposed Decision and Order, 2010) (citing

[5]In this regard, the Complainant posits that SEPTA and the Union essentially conspired to discharge her to eliminate her candidacy in the upcoming Union elections and thereby preserve their alleged symbiotic relationship. However, Price credibly denied any such relationship with Daye. (N.T. 174-175).

Bucks County Community College, 36 PPER 84 (Final Order, 2005)). Likewise, I have credited the testimony of SEPTA's multiple witnesses that SEPTA discharged the Complainant, not because of any protected activity under the Act, but rather because she committed an offense warranting the next step in discipline by opening the doors on the wrong side of the train on February 9, 2019, which violated her Last Chance Agreement. Therefore, the charge must be dismissed under Section 1201(a)(3) of the Act.

To the extent, the Complainant may have alleged an independent violation of Section 1201(a)(1) of the Act, the charge must also be dismissed. 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 Complainant has not established an independent violation of Section 1201(a)(1) of PERA. The record shows that SEPTA had legitimate reasons for the discharge. Indeed, the record shows that Complainant committed an offense, for which discipline is justified while she was subject to the terms of a Last Chance Agreement. Thus, SEPTA's discharge of Complainant would not have a tendency to coerce employes. Furthermore, SEPTA clearly has safety and potential liability concerns surrounding its rule requiring train operators to only open doors on the platform side of trains, (N.T. 131-134), which outweigh concerns over potential interference with employe rights to run for office in Union elections. As a result, SEPTA has not committed any independent violation of Section 1201(a)(1) of PERA.

CONCLUSIONS

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

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

2. Angelique Jenkins was a public employe within the meaning of Section 301(2) of PERA.

3. The Board has jurisdiction over the parties hereto.

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

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 third day of December, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner