

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

FRATERNAL ORDER OF TRANSIT POLICE :
 :
 v. : Case No. PERA-C-20-72-E
 :
 SEPTA :

PROPOSED DECISION AND ORDER

On March 13, 2020, the Fraternal Order of Transit Police (FOTP or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Southeastern Pennsylvania Transportation Authority (SEPTA or Authority), alleging that SEPTA violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA or Act) by reassigning Officer Omari Bervine from his regular patrol duties to administrative desk duty for the period of December 1, 2019, through December 8, 2019, in retaliation for his protected activity.

On July 22, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on September 28, 2020, if necessary.¹ The hearing was continued to April 5, 2021 at SEPTA's request and without objection from the FOTP. The hearing ensued on April 5, 2021, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.² The parties each filed separate post-hearing briefs in support of their respective positions on July 13, 2021.

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. 6)
2. The FOTP is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)
3. The FOTP is the exclusive bargaining representative for a unit of police employes working at SEPTA. (Joint Exhibit 1)
4. The FOTP and SEPTA are parties to a Collective Bargaining Agreement (CBA) effective March 31, 2019 through March 31, 2023. (Joint Exhibit 1)
5. Omari Bervine has been employed as a police officer with SEPTA since August 2006. He has also been President of the FOTP since August 2016. (N.T. 11)
6. On November 1, 2019, Bervine represented SEPTA Officer Kady Ann Cox during an investigatory interview with SEPTA's internal affairs

¹ The processing of the charge was initially delayed as a result of the covid-19 pandemic.

² The parties agreed to a virtual hearing in light of the pandemic.

department regarding an allegation that she had used excessive force against a suspect. (N.T. 16-17)

7. Just prior to that interview, Bervine met with Cox in a waiting room on the sixth floor of SEPTA's police headquarters. The meeting occurred in a room with a closed door, which has an observation window where people outside can see into the room. Bervine testified that nobody else was present during this meeting. (N.T. 18)

8. The Cox interview with internal affairs then ensued without incident. Afterwards, Bervine received an email from Sergeant Devon Isaac of internal affairs indicating that SEPTA had received an allegation that Bervine instructed Cox to lie during her interview and ordering him to return for his own interview. SEPTA received that allegation from Detective Andrew Intihar, who has a cubicle near the waiting room and claimed to overhear part of the conversation between Bervine and Cox. (N.T. 19-20, 116-117; SEPTA Exhibit 1)

9. By email dated November 1, 2019, Bervine responded to Isaac and indicated, in relevant part, the following:

This email serves as a formal objection, on behalf of the [FOTP], to the Authority's attempt to dominate and/or interfere with the administration of FOTP activities by coercing a member of this Union Board, Union President Omari Bervine, to discuss conversations he may or may not have had with members of this bargaining unit while serving in his capacity as a duly recognized representative of this Union, and by compelling him to be interviewed or be subject to discipline for not complying with this order by the Authority. As indicated in previous correspondence from this Union, this is not only improper but is a violation of state and federal labor law. It also violates our Memorandum of Agreement with the Authority. After consulting with our legal counsel, we respectfully offer the following resolution:

Sergeant Isaac, on behalf of the Authority, should rescind his order requiring Union President Omari Bervine to attend a formal investigative interview.

Sergeant Isaac should submit a written inquiry, via email or any other means, to the [FOTP] regarding any questions and/or concerns he may have relating to the FOTP providing counsel to one of its members.

The [FOTP] will, after consulting with it's legal counsel, respond in writing to the Authority's inquiry.

This would effectively resolve the issue.

Thank you for your consideration on this matter and we look forward to your response...

(N.T. 21-24; Union Exhibit 1)

10. Bervine testified that he also sent Isaac another email that day, asking if he would be subject to discipline if he did not comply with the

order to be interviewed. Isaac eventually replied, indicating that Bervine would be subject to discipline if he did not comply. (N.T. 25-26)

11. On November 19, 2019, Isaac conducted an investigatory interview of Bervine, who was accompanied by his Union representative, Vice President Troy Parham. The only question Isaac asked Bervine regarding any of his communications between him and Cox was the following:

Did you at that time, prior to Officer Cox's interview with me, advise her that she could potentially be untruthful with [internal affairs] in her interview?

(N.T. 26, 29-32, 71-75; SEPTA Exhibit 1)

12. Bervine replied to Isaac's question as follows: "I did not." (SEPTA Exhibit 1)

13. On November 19, 2019, Isaac also interviewed Cox and asked "did Union President Bervine tell you [on November 1, 2019] to potentially be untruthful to internal affairs during an interview," to which Cox replied "[n]o sir." That was the only question Isaac asked Cox regarding any of the communications between her and Bervine. (SEPTA Exhibit 1)

14. Approximately one week after his November 19, 2019 interview, SEPTA reassigned Bervine from his normal patrol duties to an administrative desk assignment where he was responsible for conducting virtual patrols. Bervine remained in this administrative assignment for approximately one week before he returned to his regular shift and patrol duties. (N.T. 32-36)

15. Jahlee Hatchett is an Inspector for the SEPTA police department, who is responsible for overseeing and assisting with internal affairs investigations. After Intihar made his complaint about Bervine, Hatchett assigned Isaac to conduct an investigation because lying during an internal affairs investigation is a policy violation, as well as a dischargeable offense. (N.T. 113-114, 117-118)

16. Hatchett testified that Bervine was reassigned to administrative duties because SEPTA's policy requires the same when SEPTA receives a complaint and there is a preponderance of the evidence that the allegation actually occurred, especially if the allegation involves something that could lead to discharge. Hatchett also testified that lying or telling someone to lie is a dischargeable offense. For the most part, the officer being reassigned maintains his or her normal schedule, as well as firearms and credentials; he or she simply does not patrol the streets for the time being. (N.T. 118-119, 123-124)

17. On December 2, 2019, Isaac conducted a hearing test with the other Sergeant assigned to the internal affairs department, during which they took turns sitting in the waiting room on the sixth floor across from Intihar's cubicle reading from a book in normal conversational tones, while the other stood outside listening from three different points. The results indicated that, although they could hear speaking, neither sergeant could clearly hear what was being said. As a result, Isaac indicated that the preponderance of the evidence suggested an inconclusive finding relative to the allegation against Bervine. (SEPTA Exhibit 1)

DISCUSSION

The FOTP filed a charge alleging that SEPTA violated Section 1201(a)(1) of the Act³ by reassigning Officer Omari Bervine from his regular patrol duties to administrative desk duty for the period of December 1, 2019 through December 8, 2019 in retaliation for his protected activity. The FOTP withdrew its allegation under Section 1201(a)(3) in its post-hearing brief. (See Union brief at p. 1). Thus, the only remaining averment by the FOTP is that SEPTA committed an independent violation of Section 1201(a)(1) by reassigning Bervine in late 2019. SEPTA, on the other hand, contends that the charge should be dismissed because it had legitimate business reasons for its conduct, which did not have any tendency to coerce employees or interfere with the exercise of their rights under 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 employees 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 employee 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 sustained its burden of proving that SEPTA committed an independent violation of Section 1201(a)(1) of the Act. First of all, the record shows that SEPTA clearly had a legitimate reason for initiating an investigation into Bervine and reassigning him from his regular patrol duties to administrative desk duty. Indeed, SEPTA had received an unsolicited complaint, not from a supervisor or anyone in management, but rather from a bargaining unit member, that Bervine had instructed another bargaining unit member to potentially be untruthful during her investigatory interview with internal affairs. The record also shows that this allegation represented a serious violation of SEPTA's policy, as lying or telling someone to lie during an internal affairs investigation is a dischargeable offense. As such, SEPTA actually had an obligation to conduct an investigation into the alleged November 1, 2019 incident. Moreover, SEPTA's investigation in this regard was significantly limited, as Isaac simply asked one question of Bervine and Cox, which was whether Bervine advised Cox that she could potentially be untruthful during her investigatory interview with internal affairs. Isaac did not ask any other questions whatsoever regarding the content or circumstances of the communications between Bervine and Cox. Furthermore, Hatchett credibly testified that Bervine's reassignment was necessary, as it comports with SEPTA's policy requiring the same if there is a preponderance of the evidence that the allegation actually occurred and if the allegation involves something that could lead to discharge. And, Bervine's reassignment to administrative desk duty was also limited, as it

³ Section 1201(a) of the Act provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act... 43 P.S. § 1101.1201.

only lasted for one week. As a result, it must be concluded that SEPTA's legitimate reasons justifiably outweigh concerns over the potential interference with employe rights to consult their union.

In addition, I am unable to conclude that SEPTA's conduct would have the tendency to coerce or interfere with employe rights at all under these circumstances. In this regard, the Union offered the testimony of Officer David Riggs for the purpose of showing that SEPTA's conduct had a chilling effect on the bargaining unit members' willingness to engage in protected activity.⁴ However, Riggs testified that his understanding of the investigation was that Bervine had allegedly lied during the course of representing Cox.⁵ As previously set forth above, SEPTA has a clear policy against lying during an internal affairs investigation. Thus, the bargaining unit members should not have been coerced at all given that they had some understanding of the actual reasons why SEPTA was investigating Bervine, and not simply because he and another employe engaged in Article 4 rights under the Act. Accordingly, the charge under Section 1201(a)(1) must be dismissed.

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. The FOTP is an employe organization within the meaning of Section 301(3) 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) 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.

⁴ SEPTA objected to this testimony on the basis of relevance, after which the testimony was conditionally received pending arguments by each side in the post-hearing briefs. (N.T. 97-100). SEPTA's objection is now overruled.

⁵ This testimony was admitted for the limited purpose of effect on listener after SEPTA's hearsay objection. (N.T. 95-96).

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 10th day of August, 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner