COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 773	:	
	:	
	:	Case No. PERA-C-20-112-E
v.	:	
	:	
STROUD TOWNSHIP	:	

PROPOSED DECISION AND ORDER

On June 4, 2020, Teamsters Local Union 773 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Stroud Township (Township or Employer), alleging that the Township violated Section 1201(a)(1), (3), and (5) of the Public Employe Relations Act (PERA or Act) by issuing discipline to three bargaining unit members in retaliation for their protected activity and refusing to bargain in good faith to reach a collective bargaining agreement.

On July 30, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the matter to conciliation, and directing a hearing on September 17, 2020, if necessary. The hearing was continued multiple times without objection until the parties agreed to participate in a virtual hearing on January 14, 2021, in light of the ongoing Covid-19 pandemic.

The hearing ensued on January 14, 2021, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The parties each filed post-hearing briefs in support of their respective positions on March 19, 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. The Township is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)

3. The Union is the certified bargaining agent for a unit of nonprofessional employes at the Township. (N.T. 15; PERA-R-16-336-E)

4. The Union and the Township have met at least 20 times over the last four years to bargain the terms of a collective bargaining agreement (CBA). The parties have been unable to reach an agreement. (N.T. 15)

5. Donald Jennings was employed as a heavy equipment operator with the Township's road crew from 2014 until May 2020 when he was terminated. His direct supervisor was Doug Walker, the Public Works Superintendent. (N.T. 17, 33, 96, 125; Joint Exhibit 7)

6. William Unruh has been employed with the Township road crew since 2007, initially as a Laborer and now as a Laborer and small equipment operator. He also reports directly to Walker. (N.T. 55-57, 96)

7. Jennings was a member of the Union's negotiating committee during his employment with the Township and attended nearly every bargaining session where he participated on behalf of the Union. He also repeatedly expressed his support for the Union directly to Walker and during negotiations. (N.T. 36-39)

8. Unruh was also a member of the Union's negotiating committee and attended every bargaining session where he spoke up. He voiced his support for the Union sometime during the organizing drive approximately four years ago when the Township called a meeting with the entire road crew, the Board of Supervisors, and Walker. During that meeting, Ed Kramer who was one of the elected Supervisors, stated that he was taking the organizing drive personally and that the Township would take everything away if the employes unionized. Unruh questioned Kramer why he would take it personally. Unruh also repeatedly expressed his support for the Union to Walker dozens of times at work. (N.T. 77-81, 88)

8. On February 10, 2020, Unruh sustained a cut to his head from a falling tree limb while he was at work. He acknowledged that he did not have his hardhat on at the time and that he should have been wearing his hardhat. (N.T. 65-66, 98, 125-126, 144; Joint Exhibit 4, 5)

9. On February 14, 2020, Unruh had an exchange with Walker at approximately 8:00 a.m., at which time Walker asked Unruh about his alleged lack of effort earlier that morning. Since the alleged lack of effort, which involved assisting Walker with moving trucks, was prior to his shift starting at 7:00 a.m., Unruh told Walker "this is my time and I'll do what I want." During their later discussion at 8:00 a.m., Walker addressed several issues with Unruh, including his alleged lack of attention when Walker speaks to the crew, Unruh wearing a baseball cap over his eyes when Walker speaks to the crew, and Unruh's apparent sensitivity to light. Upon being told of Unruh's sensitivity to light, Walker stated that Unruh's vision was a safety issue. Unruh responded by stating "don't go there" and walking out of the room, despite Walker not being finished with the conversation. (N.T. 74, 84, 99-100, 127-130, 144; Joint Exhibit 4, 6)

10. On February 26, 2020, Township Manager Daryl Eppley conducted an investigation of Unruh's conduct by interviewing Unruh and Walker, and then recommended a written warning to the Board of Supervisors, which was approved on March 3, 2020. (N.T. 100, 155-156; Joint Exhibit 4)

11. On March 4, 2020, Unruh received a written warning from Eppley for a violation of safety policy resulting in preventable injury and acts of insubordination. (N.T. 96; Joint Exhibit 4)

12. Eppley is Walker's direct supervisor and himself reports to the Board of Supervisors. Eppley testified that Unruh's support for the Union played no role in his recommendation for discipline. (N.T. 96, 101)

13. On May 5, 2020, Jennings had a telephone conversation with Walker, during which he told Walker he had a potential exposure to Covid-19. Per Eppley's direction, Walker told Jennings not to come to work the following day while the Township discussed the matter with their labor

counsel. Jennings repeatedly questioned Walker if he would be paid, to which Walker replied that he was unsure how it would be handled, but that Jennings would receive sick pay, personal or vacation leave. Jennings eventually indicated that he was going to call Eppley and specifically stated to Walker: "you're a boss? You're a fucking asshole." (N.T. 18-19, 102-103, 131-135; Joint Exhibit 8, 9)

14. Walker reported the alleged incident to Eppley on May 5, 2020, and Eppley conducted an investigation by interviewing Jennings and Walker on May 8, 2020. (N.T. 102-103; Joint Exhibit 8)

15. Prior to the May 5, 2020 alleged incident, Jennings was issued discipline in the form of verbal and written warnings from the Township. He received a verbal warning on January 8, 2020 for using profanity towards his co-workers in a text exchange. (N.T. 29, 51, 104; Joint Exhibit 8, 11)

16. Eppley testified that he made the recommendation to terminate Jennings for insubordination or use of abusive language towards a supervisor or fellow employe, which violated the Township's policy set forth in the employe handbook. Eppley also noted an alleged pattern of abusive conduct relative to the January 8, 2020 incident, as well as an alleged March 20, 2020 incident wherein Jennings purportedly told his fellow road crew employes "If I get this virus I'm coming in and giving it to all you mother fuckers." (N.T. 104-106, 137-139; Joint Exhibit 1, 8, 10)

17. Eppley testified that Jennings' support for the Union played no role in his recommendation for discipline. (N.T. 108)

18. On May 12, 2020, the Township Board of Supervisors voted to terminate Jennings' employment due to his alleged insubordination with Walker on May 5, 2020. (N.T. 109, 153; Joint Exhibit 7)

DISCUSSION

In its charge, the Union alleged that the Township violated Section 1201(a)(1), (3), and (5) of the Act[1] by issuing discipline to three bargaining unit members in retaliation for their protected activity and refusing to bargain in good faith to reach a CBA. Specifically, the Union alleged that the Township issued written warnings to William Unruh and Randall Litts on March 4, 2020, and terminated Donald Jennings on May 15, 2020, as a result of their protected activity. During the January 14, 2021 hearing, the Union withdrew the charge as it relates to Litts. (N.T. 11). The Union also withdrew its allegation that the Township committed a bargaining violation contrary to Section 1201(a)(5) of the Act in its post-hearing brief. *See* Union brief at 1-2. The Union maintains that the Township violated Section 1201(a)(1) and (3) of the Act by retaliating against Unruh and Jennings in response to their protected activity. The Township, on the other hand,

[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...(5) 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. 43 P.S. § 1101.1201.

contends that the charge should be dismissed because there were legitimate nondiscriminatory reasons for the discipline of both Unruh and Jennings.

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 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).

The Union has sustained its burden of proving the first two elements of a Section 1201(a)(3) discrimination claim. Indeed, the record shows that both Jennings and Unruh were on the Union's negotiating committee and expressed their support for the Union directly to the Township on numerous occasions, which is clearly protected activity under the Act. Likewise, the record shows that the Township was aware of this protected activity, as Eppley conceded during the hearing. In fact, these two elements of the test are undisputed by the parties. The only remaining issue then is whether the Township was motivated by the protected activity of Unruh and Jennings when it disciplined them on March 4, 2020 and May 12, 2020, respectively.

In its post-hearing brief, the Union points to a number of factors, which allegedly support an inference of unlawful motive on behalf of the Township. With regard to Jennings, the Union argues that Jennings testified that he simply stated "what the fuck" to his direct supervisor Walker on May 5, 2020, (N.T. 24), and not "you're a fucking asshole." (N.T. 28-29). The Union contends that employes use profanity and expletives at work all the time and that the Township even permitted Jennings to do so in his text exchange with co-workers without any disciplinary consequences. (N.T. 52-53). The Union maintains that this is evidence of pretext on behalf of the Township. In the same vein, the Union argues that the Township's discipline of Unruh was pretextual in nature, given that employes regularly ignore the hardhat rule and that nobody gets disciplined for it, except for Unruh. (N.T. 66, 145-147). The Union also asserts that Unruh was not being insubordinate to Walker during the February 14, 2020 incident. Rather, the Union argues that Unruh's statement of "don't go there" during the February 14, 2020 incident was itself protected activity because it related to employe safety, and therefore, the Township's imposition of discipline for that statement is itself a violation of the Act.[2] The Union's arguments, however, are not persuasive.

First of all, the testimony of Jennings that he stated "what the fuck" to Walker on May 5, 2020, and not "you're a fucking asshole," has not been accepted as credible. Instead, the credible evidence of record shows that Jennings called his direct supervisor a "fucking asshole" on May 5, 2020. While the record does show that employes regularly use profanity at the Township, the record is devoid of any evidence whatsoever that any employe ever directly insulted his supervisor by using such language in a verbally abusive and/or threatening manner. As the Township persuasively notes, there is a significant difference between employes simply cursing in general and an employe who does so in a verbally abusive manner to his direct supervisor and/or his fellow employes. And, although the record also shows that Walker himself has allegedly berated his fellow employes and direct reports with similar language, the credible evidence demonstrates that nobody ever complained about Walker's conduct to anyone in management. (N.T. 53-54, 123). As a result, there is no evidence of pretext or disparate treatment relative to the termination of Jennings. Indeed, despite the Union's argument that the Township has allowed such conduct to occur without any discipline as it relates to Jennings' profanity-laced text exchange with his co-workers, that assertion is also unsupported by this record, which clearly demonstrates that Jennings received a verbal warning for this conduct on January 8, 2020.

Notwithstanding the Union's allegations of pretext, the Township's explanation for the termination has been accepted as credible and persuasive. Eppley convincingly testified that he made the recommendation to terminate Jennings for insubordination or use of abusive language towards a supervisor or fellow employe, which violated the Township's policy set forth in the employe handbook. Eppley and Township Supervisor Jennifer Shukaitis also noted a pattern of abusive and escalating conduct relative to the January 8, 2020 incident, as well as a March 2020 incident wherein Jennings purportedly told his fellow road crew employes "If I get this virus I'm coming in and giving it to all you mother fuckers." Eppley and Shukaitis credibly testified that Jennings' support for the Union played no role in his

[2] Specifically, Unruh testified that he made the statement because Walker was allegedly being hypocritical, as the Township had purportedly ignored safety issues for many years. (N.T. 75).

termination. (N.T. 108, 153-155).[3] Accordingly, the Union's charge as it relates to Jennings must be dismissed.

The same result must obtain with regard to Unruh. Once again, the Township's explanation for the discipline has been accepted as credible and persuasive. Eppley testified credibly that Unruh's support for the Union played no role in his recommendation for discipline. And, Shukaitis testified credibly that she voted to discipline Unruh, not because of his support for the Union, but rather because he committed a breach of the Township's safety policy contained in the employe handbook and his insubordination with Walker. (N.T. 156-157).[4] In fact, Unruh did not even dispute Walker's version of events for both the February 10 and February 14, 2020 incidents, nor did he deny the allegations. Instead, the Union argues that the discipline was pretextual because employes regularly ignore the hardhat rule and nobody ever gets disciplined. However, the record is devoid of any evidence that another employe was also injured as a result of not wearing his or her hardhat. What is more, the Union has not shown that any other employe also committed such insubordinate conduct, as evidenced by Unruh telling his supervisor "don't go there" and walking out on the conversation, despite the supervisor's indication that he was not finished talking yet. Thus, there is no evidence of pretext or disparate treatment to support an inference of unlawful motive on behalf of the Township, as it relates to Unruh either. Furthermore, to the extent Kramer's statement approximately four years ago, that he was taking the organizing drive personally, represents direct evidence of animus related to the discipline of Unruh and Jennings, the Township has demonstrated that it would have disciplined these bargaining unit members in the same manner even without the protected activity.

Finally, as set forth above, the Union maintains that Unruh's statement of "don't go there" during the February 14, 2020 incident was itself protected activity because it related to employe safety, and therefore, the Township's imposition of discipline for that statement is itself a violation of the Act. However, this argument is also unavailing. While Unruh testified that he made the statement because the Township had allegedly ignored safety issues for many years, that is not what he actually said in the moment. To the contrary, he simply stated "don't go there" in response to Walker's assertion that his vision was a safety issue. Unruh did not make a complaint to Walker about any alleged unsafe working conditions on behalf of himself or any other employes. Instead, he simply used an idiom, which in everyday vernacular is widely understood to express an unwillingness to speak about a certain topic. How this constitutes protected concerted activity is unclear.

Section 401 of the Act provides in relevant part as follows:

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[3] Notably, Shukaitis began her term as an elected Township Supervisor in January 2020 and had no involvement with the CBA negotiations. Nor did she have any knowledge of Jennings' protected activity. (N.T. 152-153). Without knowledge of the protected activity, it was impossible for Shukaitis to have been unlawfully motivated when she voted to terminate Jennings. *See* Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 (Final Order, 1992).

[4] As was the case with Jennings, Shukaitis was similarly unaware of Unruh's protected activity, as well. (N.T. 157).

> It shall be lawful for public employes to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice and such employes shall also have the right to refrain from any and all such activities...

43 P.S. § 1101.401.

The Fourth Circuit Court of Appeals has held that where an individual employe was neither attempting to enforce a collective bargaining agreement, seeking to induce group action, nor acting on behalf of a group, when he protested alleged conduct by the employer, the activity is not protected pursuant to Section 7 of the National Labor Relations Act,[5] which is nearly identical to Article IV of PERA. Blaw-Knox Foundry & Mill Machinery, Inc. v. NLRB, 646 F.2d 113 (4th Cir. 1981). In this case, Unruh was not attempting to enforce any provision of a CBA. Indeed, there is no CBA between the parties. Nor is there evidence that he was seeking to induce group action or acting on behalf of a group. In fact, he did not even make a safety complaint as it related to himself. Conversely, Walker was actually the one who arguably was making a safety complaint, about which Unruh refused to speak. To that end, it was Unruh's refusal to speak to Walker anymore that led to his discipline for insubordination, as Unruh immediately walked out of the room, despite Walker indicating that he was not finished discussing the matter yet. Therefore, it cannot be concluded on this record that the Township disciplined Unruh for his protected activity. And, in any case, the Union did not allege an independent violation of Section 1201(a)(1) in the specification of charges. As such, the charge must be dismissed in its entirety.

CONCLUSIONS

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

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 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

[5] 29 U.S.C.A. § 157.

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 22nd day of April, 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner