

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 87 :
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 v. : CASE NO. PERA-C-20-225-E
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 TIOGA/BRADFORD COUNTY HOUSING AND :
 TIOGA COUNTY REDEVELOPMENT AUTHORITY :

PROPOSED DECISION AND ORDER

On September 17, 2020, AFSCME District Council 87 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Tioga/Bradford County Housing and Tioga County Redevelopment Authority (Authority) violated Section 1201(a) (1), (3) and (5) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that the Authority terminated Maintenance Foreman Dan Jones in retaliation for his protected activities and unilaterally transferred his bargaining unit work to non-unit personnel within the Authority.

On October 8, 2020, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of November 25, 2020, in Harrisburg. The hearing was continued by mutual agreement of the parties because of the inability to assemble necessary witnesses for the hearing the day before the Thanksgiving Holiday. The hearing was rescheduled for January 15, 2021. Due to the closure of Commonwealth property to the public as a result of the COVID pandemic, the parties agreed to conduct the hearing by video conference. During the video hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On March 24, 2021, the Union filed its post-hearing brief. On May 28, 2021, the Authority filed its post-hearing brief.

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

FINDINGS OF FACT

1. The Authority 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. Dan Jones was a bargaining unit Maintenance Foreman at AMP-3 Bradford for the Authority for almost 5 years. There are 3 AMPs in Tioga County and 3 AMPs in Bradford County. An AMP is a geographical area that contains certain housing units. AMP-3 contains the Paige Manor facility and the Keystone facility and contains the most tenants, with approximately 200 apartments. Karen Whyte is the Building Manager for Paige Manor and Keystone. She manages the tenants, interviews applicants and places work orders for vacancy turnovers. (N.T. 12-13, 41, 91, 108-109, 197, 264, 284; Employer Exhibit 1)

4. Sean Sember has been the Authority's Executive Director since June 30, 2020. Prior to that date, he was the Deputy Executive Director. The prior Executive Director left in late April 2020, at which time Mr. Sember assumed her duties. Director Sember attends collective bargaining sessions with the Authority's solicitor. Mr. Jones does not attend bargaining sessions. (N.T. 298-299, 313)

5. As Foreman of AMP-3, Mr. Jones oversaw four employees (laborers, housekeepers and custodians), vendors and contractors; he initiated and processed work orders and purchase orders. During his employment with the Authority, Mr. Jones did preventative maintenance on boilers, water heaters, ventilation systems, trash compactors and lawn equipment. He conducted building inspections ensuring that the buildings were clean and that the security systems were activated. Recently, the pumps and air handlers that Mr. Jones worked on were upgraded. Since that time, contracted specialists work on that equipment. (N.T. 13, 34, 213, 243-244; Union Exhibit 1)

6. Mr. Jones organized, prioritized and scheduled daily tasks for his AMP-3 employees based on work orders ensuring that plumbing and electrical work was prioritized. He organized and held fire safety meetings, and he was in charge of building security. Mr. Jones oversaw his employees' work hours, verified their payroll and hours worked and forwarded that information to the central office on a weekly basis. He worked on apartments during turnovers and inspected them for bed bugs. (N.T. 34-35, 205-206)

7. Mr. Jones was responsible for all purchase orders in AMP-3 up to \$500 without approval. He retrieved written work orders from the tenants, entered them into the computer system, initiated the work orders and assigned the work to his employees based on priority. He was the only person to enter work orders into the computer for AMP-3, except for apartment vacancy turnover work orders, which have to be initiated by the Building Manager, Ms. Whyte. He did work that the laborers could not perform and that was not performed by contractors. When Mr. Jones was absent on vacation, work orders piled up because no one else working at AMP-3 could initiate and assign the work in the AMP. Except for ordering snow removal, Maintenance Supervisors did not open work orders or close them out upon work completion. (N.T. 13-16, 34-44, 79-80, 83-87, 142-144)

8. At no time during Mr. Jones' tenure did other maintenance foremen from other AMPs fill in for Mr. Jones at his buildings, and Mr. Jones did not fill in for other foremen. (N.T. 89-90)

9. Work orders must be entered into the "Horizon" system upon receipt to track the work orders and to ensure that the work is completed without being lost. Foremen enter purchase orders into the computer system for their buildings. Work orders exceeding \$500 are sent to and approved by the Maintenance Superintendent. The purchase orders include the date, vendor name, vendor number and foreman's initials. Mr. Jones entered purchase orders for AMP-3. Purchase orders for large outside contracts, such as paving, must be originated by a manager. (N.T. 130, 141-145, 160; Union Exhibit 4)

10. Ms. Whyte is excluded from the bargaining unit. For a vacancy turnover in AMP-3 (i.e., Keystone or Paige Manor), Ms. Whyte has to be the requester/initiator for the work order. On January 19, 2020, Ms. Whyte initiated such a work order for a unit turn and Mr. Jones ensured that the work and reports were completed with materials and billing information. Mr. Jones designated which employees entered the unit to complete the work and

determined the amount of work and materials. A maintenance supervisor had not ever entered a work order for AMP-3 while Mr. Jones worked there. (N.T. 80, 83-87, 95-97)

11. Jeremy Peffer was the Maintenance Superintendent who made a purchase for AMP-3 on March 31, 2020, while Mr. Jones was still the Maintenance Foreman for AMP-3 because the purchase was for a heating and plumbing contractor in excess of \$500, which is above the Maintenance Foreman's authority. At times during 2020, Superintendent Peffer temporarily took over purchasing for Foreman Jim Bailey because Mr. Bailey was on extended leave due to health reasons. On June 5, 2020, Chris Grant was hired at the Authority to replace Jeremy Peffer as the Maintenance Superintendent. On June 9, 2020, Nichole Baumgarner, Human Resources Director, sent an email to staff welcoming Chris Grant as the Maintenance Supervisor. The Maintenance Superintendent monitors the work order system to ensure that work orders are completed and closed out. In July 2020, Superintendent Grant entered work orders for Mr. Bailey while he was on extended leave. Superintendent Grant only enters work orders for foreman while out for some time. Mr. Bailey resumed his work order duties when he returned. (N.T. 122, 125-129, 146, 160-161, 176-177, 190-194; Union Exhibit 3)

12. Mr. Jones, as with other Maintenance Foreman, reported directly to the Maintenance Superintendent. The Maintenance Superintendent is an administrative position that is not in the bargaining unit. Mr. Jones submitted weekly maintenance reports to his supervisor but otherwise operated without much oversight. (31-33)

13. Mr. Jones accepted the Authority's offer of a temporary layoff due to COVID and his exposure to tenants. Mr. Jones' last day of work was April 3, 2020. On Monday, April 6, 2020, Ms. Baumgarner called Mr. Jones to tell him that he was an "essential" employe, that he had to return to work and that he may not be able to receive unemployment benefits. Mr. Jones credibly testified that the same "essential" work was available on Friday when the Authority accepted his layoff that was available on the following Monday when Ms. Baumgarner called him to tell him there was work to do. Mr. Jones testified that he took the voluntary layoff due to safety concerns caused by COVID and not for a lack of work or the unemployment compensation. On April 16, 2020, Ms. Baumgarner sent a letter to Mr. Jones acknowledging his temporary layoff. (N.T. 18-20, 60, 62-66, 94; Authority Exhibit 3)

14. Ms. Baumgarner's April 16, 2020 letter provided, in relevant part, as follows:

As per our previous communications, you informed me that you wished to be laid off so you could apply for Unemployment. The Authority, as required by law, will legally and accurately fill out the required forms. The Authority does not intend to challenge your unemployment if you are initially denied.

At its April 16, 2020 meeting, the Bradford County Board of Directors approved your layoff. Your duties have been assigned to other employees. Please make arrangements immediately to provide us your keys and access card. These will be needed to make sure that there is continuity of coverage.

As I mentioned previously, during this difficult time, the Authority will maintain you[r] healthcare through April 30, 2020, provided

the insurance carrier does not invoke a stop loss provision. We have no reason to believe this will happen.

(Authority Exhibit 3)

15. Mr. Jones credibly testified that he understood that Ms. Baumgarner was conveying, during her Monday, April 6, 2020 phone call, that the layoff was still okay but that Mr. Jones may not receive unemployment benefits. (N.T. 67-68)

16. Mr. Jones returned to work on Friday, May 1, 2020, at the end of his accepted layoff period. The Authority did not communicate with Mr. Jones between April 16, 2020, and May 1, 2020. Upon his return, Mr. Jones was unable to log into his computer. He contacted the main office and spoke with Sean Sember, at the time the Authority's Deputy Executive Director. During this conversation, Mr. Sember told Mr. Jones to go home because the Authority did not ask him to return. (N.T. 20-21, 23, 60, 62-66, 94, 309)

17. Fifteen maintenance employees, including Mr. Jones, signed a letter to the Authority. The letter stated as follows:

On March 31, 2020 Nichole [Baumgarner] contacted all maintenance staff regarding if we felt safe at [] work due to the Covid-19 outbreak. Response varied from employee to employee. For those who felt unsafe she pushed the idea of going home and signing up for unemployment benefits and needed a response almost immediately. If we chose to do so she offered to pay medical, dental, life insurance, etc. and hold our position until the date of April 30, 2020 set by The President. At that time she said it would be looked at again to see if more time off was needed. However, a new order was signed April 5th to provide safety measures to combat Covid-19. She then called employees who agreed to accept her offer of signing up for unemployment benefits and stated she would have to deny it due to work being available and informed them to cancel the claim they filed. The same work that was already being done since March 13th and at the time the offer was made to go home and sign up for unemployment benefits. She then went on to state that her offer was "to SEEK" unemployment. That is a false statement. Who would risk going home knowing they may not get unemployment benefits. There is a difference between going home and "signing up" for unemployment benefits and having to "SEEK" it knowing work was available. This has put several employees in a bad situation by trying to protect themselves and their families. Matt Rightmire was told he couldn't work due to a cough. He got a return to work note from his doctor and was told he could not come back. Nic[h]ole then advanced (2) PTO sick days he has to use to cover his time off. Scott Canfield and Glenn Vargeson took the offer of signing up for unemployment benefits but then had to come back and use PTO for the time they were off. Dan Jones took the offer of signing up for unemployment benefits and has chosen to stay off work. Veronica Gardner took the offer of signing up for unemployment benefits and still had to stay home due to lack of childcare. She was then offered the FMLA option and Nic[h]ole dated it back to April 1st. We feel we were intentionally misled during these troubled times and should not be forced to use PTO to feel safe during this Covid-19 pandemic.

(Board Exhibit 1)¹

18. During the layoff period, Mr. Jones received text messages and phone calls from AMP-3 employees. In Mr. Jones' words, he was "running the place from home," for approximately 3 weeks. Employees asked Mr. Jones how to silence alarms, reset elevators and reset the breakers for the air handling system. Afterward, Director Sember ordered all employees to stop communicating with Mr. Jones. (N.T. 28-30, 57, 73-75, 112)

19. Also during Mr. Jones' absence, AMP-3 Housing Manager Whyte requested a work order that she had not previously requested. Brian Burkett, who is also excluded from the bargaining unit and oversees building managers, requested a work order that he had not previously requested for the AMP. (N.T. 45-47, 80, 108-109)

20. On May 27, 2020, Ms. Baumgarner sent a letter to Mr. Jones that provided, in relevant part, as follows:

As you are aware, you requested a layoff from your position with the Authority. On April 16, 2020, you were sent a letter notifying you that the Authority approved your request and agreed to continue your healthcare coverage through April 30, 2020. Please keep in mind that there was no agreement with regard to when you would return to work. We do not have an anticipated return to work date for you at this time.

As a courtesy, the Authority extended your health insurance coverage through May 31, 2020. The Authority will not extend your health coverage beyond this date. Please see the attached COBRA notice with information on continuing your coverage. We will notify you once a decision is made regarding your return to work.

(Authority Exhibit 3)

21. On July 7, 2020, the Authority sent a termination letter to Mr. Jones, which provided, in relevant part, as follows:

The Bradford County Housing Authority has made the decision not to fill the vacant AMP III foreman position. Subsequently, your employment with the Bradford Housing Authority will end effective July 10, 2020.

Please note the following:

With your final paycheck, you will also receive a cash payout of any accrued and unused vacation time in accordance with the provisions of our Agency personnel policy. Please keep in mind per company policy that Vacation and PTO is accrued and if you have not

¹ The letter marked as Board Exhibit 1 was attached to the charge and was introduced through the Authority's Attorney's cross-examination of Mr. Jones, but it was not marked as an exhibit by either party or specifically offered for admission into the record by either party. I have admitted the exhibit into the record as Board Exhibit 1, as a veritable document that was relied on by both parties without challenge, pursuant to 34 Pa. Code § 95.91(h).

completed your full anniversary year, you may not be entitled to all time displaying on your paystub;

You will be eligible to request distribution of your pension funds after all/any remaining contributions have been credited to your account. Enclosed/Attached is a form #150 "Request for Benefit Payment" Form to request distribution or rollover of your pension funds. Please complete the form and return it to the Housing Authority. Do NOT submit the distribution form directly to HART [the pension manager] (See Attached);

Because you have not reached the 10 years of service requirement, you are ineligible to continue your life insurance coverage. Your life insurance coverage will terminate 30 days after your termination date;

You and your dependents' health care benefits were terminated on June 1st. You and your dependent(s) are entitled to continuation of this coverage at your expense under [COBRA] for a period of 18 months. This paperwork should have already been received by you in the mail. Please note that you have only 60 days from the date your eligibility ends to make a decision, which is July 30th

Also, please keep in mind that, on August 10, 2015, you signed a confidentiality agreement prohibiting you from divulging confidential information.

(N.T. 25-26; Employer Exhibit 3)

22. Since the beginning of Mr. Jones' absence on April 3, 2020, Ms. Whyte has asked the Authority to rehire a Maintenance Foreman for AMP-3 because it has made her job more difficult without a Maintenance Foreman in the AMP. She did not take on Mr. Jones' responsibilities, although she was asked to do so. She has observed the Maintenance Superintendent performing Maintenance Foreman duties within the AMP. Ms. Whyte did a set of annual inspections with Superintendent Grant. The annual inspections are supposed to be done with the Maintenance Foreman. (N.T. 110-112)

23. Greg Yaggie is a non-bargaining-unit Maintenance Manager who does foreman duties at the Hillcrest Building. He is the only Maintenance Manager who does foreman duties, and it is only at his building. At all other buildings, the work is bargaining unit work. (N.T. 117, 125, 157)

24. When entering work orders into the computer, the initiator can alter the request date and completion date. Superintendent Grant is currently entering work orders and purchase orders for AMP-3 that Mr. Jones did. Although Superintendent Grant did not begin working for the Authority as Maintenance Superintendent until June 5, 2020, he entered work orders back dated to March 2020. On February 22, 2019, Mr. Peffer, Mr. Grant's predecessor as Maintenance Superintendent, emailed Mr. Yaggie and the maintenance foremen for the other buildings requesting that the foreman review open work orders and close out the completed ones. Although managers have the ability to open work orders, bargaining unit foremen and maintenance mechanics mainly perform those duties, except for Mr. Yaggie at Hillcrest. (N.T. 123-124, 127-129, 176-177, 203, 214-216, 223-225, 239, 255; Union Exhibit 3)

25. The dates that work orders are entered into the computer system are the dates that the tenant submitted the initial work order paperwork so the Authority can track the date of submission as compared to the date of completion. There are 3 dates for work orders: the request date, the start date and the completion date. Due to COVID, non-emergency maintenance was on hold for the apartments so there was a long time between the work order date and the completion date. Work orders piled up in AMP-3 in Mr. Jones' absence. Superintendent Grant has done approximately 200 work orders for AMP-3 that Mr. Jones would have entered had he been employed at the Authority. After Mr. Jones was terminated, Superintendent Grant had to make up for the work order back log. (N.T. 178-182, 184-186, 187-189, 237-238, 263-264)

26. Foremen take supply inventories at their buildings. During Mr. Jones's absence, no one did inventories at AMP-3. Superintendent Grant entered 3 purchase orders, dated June 30, 2020, for AMP-3 for local hardware and lumber stores that would have been done by Mr. Jones had he been working at the Authority. Maintenance Foremen are authorized to go offsite to local hardware and lumber stores to purchase supplies. (N.T. 136, 148-149)

27. During July 2020, Superintendent Grant originated purchase orders for AMP-3 for inexpensive, everyday items that normally would have been originated by Foreman Jones. These purchase orders were originated by Mr. Grant because there was not a foreman at AMP-3. (N.T. 148-149, 220, 223-225; Union Exhibit 4)

28. On September 1, 2020, Superintendent Grant originated purchase orders for AMP-3 for hardware and cleaning supplies, which are items Foreman Jones would have purchased had he been employed at the Authority at the time. (N.T. 149-150; Union Exhibit 4)

29. Between September 22, 2020 and September 30, 2020, Superintendent Grant purchased hardware and janitorial supplies for AMP-3 which would have been purchased by Foreman Jones had he been working at the Authority.² Between October 1, 2020 and October 15, 2020; between October 16, 2020 and October 31, 2020; and between November 1, 2020 and November 30, 2020, Superintendent Grant again purchased several hardware and janitorial items that Foreman Jones would have purchased had he been employed at the Authority. (N.T. 150-151; Union Exhibit 4)

30. There was a mailbox removal and renovation project at AMP-3, Paige Manor. Superintendent Grant and Capital Improvements Manager, Nelson Wise, directed and completed the project because the contractor engaged by the Authority refused to return to complete the work. Once in-house, the project was the type of work that a foreman, laborer or maintenance mechanic would perform. The direction over the mailbox removal and renovation would normally have been overseen by the AMP-3 Foreman, Mr. Jones. (N.T. 228-234; Union Exhibit 5)

² I have relied on post-charge evidence for the limited purpose of showing an ongoing pattern of management performing foreman work at AMP-3 in Mr. Jones' absence. The post-charge work, however, is not specifically relied on to sustain the cause of action, alleging that the Authority removed bargaining unit work, in the absence of an amended charge adding the conduct to the cause of action.

31. Currently at AMP-3, there are 2 laborers, 1 custodian and 1 housekeeper for 200 apartments. Director Sember is aware that Superintendent Grant is doing the purchase orders and work orders for AMP-3 and that, if Mr. Jones were still employed at the Authority, he would have been doing the bulk of the purchase orders and work orders for AMP-3 that Superintendent Grant is now doing. Director Sember admitted that, had Mr. Jones not taken voluntary unemployment, he would probably still be working at the Authority. (N.T. 320-321, 327-329)

DISCUSSION

The Union argues that Mr. Jones was terminated for engaging in concerted activities for mutual aid and protection. (Union Brief at 2). At the end of March 2020, Human Resources Director Baumgarner offered employes a voluntary layoff due to safety concerns over COVID-19. Mr. Jones and other employes accepted the offer. (Union Brief at 2). Several days after Mr. Jones was on voluntary layoff approved by the Authority, Ms. Baumgarner contacted Mr. Jones to inform him that his duties were essential and that he may not receive unemployment benefits. (Union Brief at 2). Mr. Jones took the leave for safety reasons, and not the money, so he remained on voluntary layoff for three weeks. (Union Brief at 2). The Union maintains that the Authority subsequently terminated Mr. Jones for these protected activities. (Union Brief at 2). The Union further contends that, as a result of the Foreman vacancy in AMP-3, the only AMP without a Foreman, Superintendent Grant began performing the bargaining unit work formerly done by Foreman Jones. (Union Brief at 3-4). The Union also posits that I should not credit the testimony of Director Sember that AMP-3 employes conveyed to him that the AMP was operating fine without Foreman Jones. (Union Brief at 4).

In a discrimination claim, the complainant has the burden of establishing that the employe(s) engaged in protected activity, that the employer knew of that activity and that the employer took adverse employment action that was motivated by the employe's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employees Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Other factors include: any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to explain its action against the adversely affected employe(s), and the effect of the employer's adverse action on other employes and their protected activities. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing of an employer's adverse action alone is not enough to infer animus, when combined with other factors, close timing can give rise to the inference of anti-union animus. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984).

The Authority asserts that the Union did not establish that Mr. Jones was involved in any protected activities of which the Authority management was aware. There is no evidence that he was a Union organizer; he did not

attend the representation petition hearing, during which the Authority disputed the inclusion of the foreman position in the bargaining unit; and Mr. Jones does not appear at negotiation sessions. (Authority Brief at 15). The Authority also argues that the Union failed to establish that management had the requisite knowledge that Mr. Jones attended Union meetings, signed an authorization card or organized employees. (Authority Brief at 15-16). Moreover, the Authority contends that the record lacks evidence of unlawful motive. To the contrary, contends the Authority, the record establishes that the Authority's legitimate motive was the efficient operations of the Authority, without the need for an AMP-3 Foreman. (Authority Brief at 15-16). The Authority posits that there are no anti-union statements and that timing alone is insufficient from which to infer unlawful motive. (Authority Brief at 16-17, 20). The Authority also contends that Mr. Jones' position simply became unnecessary, and that his employees found it difficult to work with him. The Authority asserts that his coworkers asked that he not be returned to work, and the Authority listened to those concerns. (Authority Brief at 20).

The Authority additionally contends that it did not unlawfully remove bargaining unit work. (Authority Brief at 17-18). The Authority asserts that Mr. Jones' duties were reassigned when he left. Ms. Baumgarner told Mr. Jones in her April 16, 2020 letter that his duties were being reassigned to other employees and at the hearing Mr. Jones testified that it was not his concern who undertook his duties in his brief absence. (Authority Brief at 18). Moreover, the Authority maintains that the inputting of work orders and purchase orders were negligible duties that took Superintendent Grant less than 1.5 hours per week. (Authority Brief at 18-19). Furthermore, the Authority contends that there is nothing in the record indicating that Mr. Grant took over those duties in response to any Union activities. Mr. Grant simply saw a need for work to be done after he began his own employment at the Authority after the departure of Mr. Jones. (Authority Brief at 19). Also, that work has always been done by a Superintendent in the absence of a foreman.

Contrary to the Authority's argument, however, the record in this case establishes that the Authority knew of Mr. Jones' protected activity. The Authority offered Mr. Jones and other maintenance employees a voluntary layoff due to safety concerns over exposure to COVID, where employees came into contact with hundreds of tenants. The record shows that she even "pushed the idea." (F.F. 17). Mr. Jones and other employees sought mutual aid and protection by asserting their safety concerns and by taking the voluntary layoff. This concerted action over safety concerns which was approved of by the Authority, and not in defiance of the Authority, was protected activity regardless of whether Mr. Jones was known to be involved in Union organizing or bargaining with the Authority. Authority management certainly knew that Mr. Jones took the layoff offered to him and that it was for safety concerns over COVID. Also, Mr. Jones engaged in mutual aid and protection when he signed a letter, with 14 other employees, complaining about the Authority's revocation of support for the voluntary layoffs, which was also known to the Authority. Therefore, the Union has met its burden of establishing the first two elements of its prima facie discrimination claim.

I further conclude that the Authority was unlawfully motivated when they terminated Mr. Jones. The record as a whole contains substantial, competent evidence that the Authority retaliated against Mr. Jones for remaining on voluntary layoff, for the full duration of the Authority's offer, after being told by Ms. Baumgarner that his duties were essential. As

of April 6, 2020, the Authority wanted Mr. Jones to return immediately. After being contacted by Ms. Baumgarner, other employees on layoff did return. The fact that none of the other returning employees suffered adverse action demonstrates the disparate treatment of Mr. Jones for remaining on layoff for the agreed upon three weeks. Also, the Authority's shifting reasons, inadequate explanations and close timing support an inference that the Authority's proffered reasons for terminating Mr. Jones are pretextual, further supporting an inference of unlawful motive.

After allowing Mr. Jones to exercise his protected right to mutual aid and protection by taking the voluntary layoff that they offered him, the Authority attempted to rescind that agreement by telling Mr. Jones that he and his duties were essential and that there was essential work to be done at the Authority. As Mr. Jones credibly stated during his testimony, his duties on Monday, April 6, 2020, were no more essential than they were on Friday, April 3, 2020, when the Authority approved his voluntary layoff. Then, after remaining on layoff for the duration of the agreed upon time period, the Authority sent Mr. Jones a letter, dated April 16, 2020, stating that his duties were transferred to other employees, undermining the Authority's original position that Mr. Jones was an essential employee. In her May 27, 2020 letter, Ms. Baumgarner stated to Mr. Jones that there was no agreement regarding when he would return to work. This assertion is belied by the credible testimony of Mr. Jones who said that he and the Authority agreed that the voluntary layoff would end April 31, 2020, and that Mr. Jones would return to work on or about that date, which he attempted to do on May 1, 2020.

Additionally, the letter signed by 15 maintenance employees demonstrates that Mr. Jones was treated differently than the other employees who, in response to Ms. Baumgarner's assertion that the Authority would not support their unemployment benefits, came back to work after a few days knowing they could not endure without the benefits as promised. As a result, some of those employees were forced to return and to use accrued PTO time when they returned from the brief layoff. Only one other employee besides Mr. Jones remained off work but she applied for FMLA protection due to childcare issues. None of the other employees who returned to work without taking the unemployment benefits were terminated or suffered any adverse employment action, like Mr. Jones who remained off work. The patent disparate treatment of Mr. Jones supports an inference of unlawful motive.

The Authority defends by positing that they no longer needed Mr. Jones to fulfill his foreman duties at AMP-3 because the laborers, custodians and housekeepers were running the AMP without Mr. Jones and those employees did not want Mr. Jones to return. The record, however, tells a different story. For some time after Mr. Jones took the layoff, employees in AMP-3 were calling and texting Mr. Jones for advice and leadership on how to perform certain duties at the AMP, until those employees were directed not to talk to Mr. Jones. The communications from these employees clearly establishes that Mr. Jones' leadership in the AMP was necessary and the fact that employees were instructed not to reach out to Mr. Jones demonstrates management's distaste for Mr. Jones' taking the layoff and their plans to terminate him. The admissible, non-hearsay part of Mr. Jones' testimony in this regard is that the employees gave Mr. Jones notice that they needed help and direction and that he personally gave those employees instructions and directions on resetting the elevators and the breakers on the air handlers, etc. Mr. Jones was, in effect, "running the place from home."

Moreover, AMP-3 Housing Manager Whyte credibly testified that she requested that the AMP-3 foreman position be refilled because it has made her job more difficult not to have a foreman. In fact, Ms. Whyte was asked by management to perform foreman duties, demonstrating that there were necessary foreman duties that were not being properly covered. She also credibly testified that the Superintendent has been performing foreman duties at AMP-3 demonstrating the removal of bargaining unit work and the need for someone to perform foreman duties in the AMP. Her credible testimony contradicts the testimony of Director Sember who testified that, in his opinion, AMP-3 is fine without a foreman.

Director Sember wrote a summary memo, dated April 29, 2020 (County Exhibit 2), and testified to the effect that employes in AMP-3 stated that they were fine without Mr. Jones. The written summary and the testimony are hearsay and inadmissible. To the extent that the testimony is offered to relay the understanding of Director Sember, I do not give much weight to that understanding because, absent direct corroborating testimony from those employes, it is too self-serving, it contradicts the credible testimony of Ms. Whyte, that AMP-3 needed a foreman, and it contradicts the credible testimony of Mr. Jones, that the employes constantly asked him for direction while he was away, until those employes were directed not to do so anymore. Therefore, I conclude that the record lacks substantial, competent evidence to support the conclusion that AMP-3 was running effectively without a foreman in April 2020, before Superintendent Grant took over the bargaining unit work of foreman, or that the employes in AMP-3 do not want the return of Mr. Jones. As a result of the hearsay being unreliable and inconsistent with other credible evidence, I conclude that the hearsay assertion that AMP-3 employes are happier without Mr. Jones is pretextual and further supports an inference of unlawful motive.

I also conclude that the Authority diverted the bargaining unit work of the foreman at AMP-3 to management. To the extent that operations at AMP-3 may be running effectively now, it is because management is performing the work. The Authority maintains that the work orders and purchase orders are de minimis. However, the Board does not have a de minimis standard. Indeed, the Board will find an unfair practice if ANY bargaining unit work is removed or diverted because drawing the line at what constitutes de minimis would yield arbitrary and inconsistent results among neutrals in decision making regarding the quantity or character of work that qualifies as de minimis. Moreover, the Authority's argument (that work orders and purchase orders, which were done by Mr. Jones, and are now being done by Superintendent Grant, are de minimis) is flawed because of the leadership and assignment responsibilities that flow from those duties, which have also been taken over by Superintendent Grant.

Mr. Jones credibly testified that he prioritizes the work orders and assigns the work to the employes in AMP-3 based on those priorities. The lack of leadership and direction during the early months of COVID, when Mr. Jones first left, was demonstrated by employes' constant communication with Mr. Jones seeking his technical and supervisory advice and leadership. Assigning the work and ensuring that projects are timely completed are the primary responsibilities of the foreman, flowing from the work orders and purchase orders, all of which duties have been assumed by management. Therefore, it is immaterial that upgrades to plumbing, HVAC equipment and other technology have reduced some of the foreman duties in AMP-3, when the leadership, assignment of duties and completion of other work projects remain with the foreman, and those duties have been taken over by management.

Mr. Jones determined which employees would enter units to complete work, ensured the work was completed in a timely manner and determined which materials and how much material was required to complete projects in and around his buildings. Moreover, the Authority has not rebutted Mr. Jones' credible testimony that he still has the ability to maintain the trash compactors and lawn equipment and to conduct building inspections, which Ms. Whyte credibly testified were taken over by managers. Certainly, the verification of employees' work hours in AMP-3 for payroll purposes remain within the expertise of a foreman as does conducting bed bug inspections, arming and maintaining the security systems, resetting the breakers on the air handlers, resetting the elevators and directing renovation projects in the units and for projects like the mailbox renovation in the common areas. All of these duties must remain in the bargaining unit by filling the foreman vacancy at AMP-3. The fact that management briefly assumed foreman duties when a foreman had a medical or other extended leave of absence is not comparable to the facts here. In this case, Foreman Jones was permanently eliminated and his duties and responsibilities have been permanently assumed by Superintendent Grant.

CONCLUSIONS

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

1. The Authority 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 Authority has committed unfair practices in violation of Section 1201(a)(1), (3) and (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the Authority 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. Cease and desist from 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.
4. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Immediately reinstate Dan Jones to the position of Maintenance Foreman of AMP-3; immediately return the bargaining unit work of initiating, tracking and closing purchase orders and the purchase of materials under \$500; immediately reinstate the work of initiating, tracking and closing work orders and the prioritizing and assigning of work that flows from those duties, immediately return the work of maintaining trash compactors and lawn equipment, conducting building inspections and bed bug inspections; immediately return the work of directing and assigning the renovation of apartment units, mailboxes and other common area projects; immediately return to the bargaining unit any other maintenance work taken over by management since Mr. Jones' termination;

(b) Immediately make whole Dan Jones by paying him backpay from May 1, 2020, until the date he is paid; immediately reinstate Mr. Jones' pay, seniority and any pay increases to Mr. Jones that bargaining unit employees received during the backpay period; immediately make any and all pension contributions on behalf of Dan Jones during the backpay period and credit him for service during the backpay period for pension purposes; immediately reinstate any vacation, sick leave and/or PTO that would have accrued during the backpay period, as well as any increases thereof during the backpay period; immediately pay Mr. Jones any out-of-pocket medical expenses including COBRA and other interim medical insurance expenses, office visits and hospital expenses. Any withholdings from backpay shall be calculated on a pay-period basis and not on the lump sum;

(c) Immediately pay Dan Jones interest at the rate of six percent per annum on the outstanding backpay owed to him as a result of the Authority's retaliatory discharge of Mr. Jones from May 1, 2020, until he is paid his backpay;

(d) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employees and have the same remain so posted for a period of ten (10) consecutive days; and

(e) 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.

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 twenty-first day of July 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 87 :
 :
 :
 v. : CASE NO. PERA-C-20-225-E
 :
 TIOGA/BRADFORD COUNTY HOUSING AND :
 TIOGA COUNTY REDEVELOPMENT AUTHORITY :

AFFIDAVIT OF COMPLIANCE

The Authority hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1), (3) and (5); that it has immediately reinstated Dan Jones to the position of Maintenance Foreman of AMP-3; that it has immediately returned the bargaining unit work referenced in the Order; that it has immediately made whole Dan Jones by paying him backpay from May 1, 2020, until the date he is paid; that it has immediately reinstated Mr. Jones' seniority and any pay increases to Mr. Jones that employees received during the backpay period; that it has immediately made any and all pension contributions on behalf of Dan Jones during the backpay period and credited him for service during the backpay period for pension purposes; that it has immediately reinstated any vacation, sick leave and/or PTO that would have accrued during the backpay period, as well as any increases thereof during the backpay period; that it has immediately paid Mr. Jones any out-of-pocket medical expenses including COBRA and other interim medical insurance expenses, office visits and hospital expenses; that it has calculated any withholdings from backpay on a pay-period basis and not on the lump sum; that it has immediately paid Dan Jones interest at the rate of six percent per annum on the outstanding backpay owed to him as a result of the Authority's retaliatory discharge of Mr. Jones from May 1, 2020, until he is paid his backpay; that it has posted a copy of this decision and order as directed therein; and that it has served a 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