COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DC 47 LOCAL 2186	:	
	:	
v.	:	Case No. PERA-C-22-20-E
	:	
CITY OF PHILADELPHIA	:	

PROPOSED DECISION AND ORDER

On January 13, 2022, the American Federation of State, County, and Municipal Employees District Council 47, Local 2186 (AFSCME or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the City of Philadelphia (City or Employer), alleging that the City violated Section 1201(a)(1), (3), and (4) of the Public Employe Relations Act (PERA or Act) by denying a previously approved request for outside employment for Onye Osuji on November 15, 2021 in retaliation for her protected activity.

On March 11, 2022, the Secretary of the Board issued a Complaint and Notice of Hearing, directing a hearing on May 12, 2022, if necessary. The hearing was continued to June 30, 2022 at the City's request and over the objection of AFSCME.

The hearing ensued, as scheduled, on June 30, 2022, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.[1] AFSCME filed a post-hearing brief in support of its position on November 9, 2022. The City filed a post-hearing brief in support of its position on November 16, 2022.

The Hearing 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 City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)

3. AFSCME is the exclusive representative for a meet-and-discuss unit of first-level supervisory employes of the City, which includes Department of Human Services (DHS) employes. (Union Exhibit 5; PERA-C-20-282-E)

4. AFSCME and the City were parties to an agreement which contained a provision requiring just cause for any disciplinary actions or discharge. (Union Exhibit 2)

5. Onye Osuji became a Social Worker Supervisor with the City's DHS in 2008. (N.T. 12; Joint Exhibit 1)

[1] The hearing was held virtually by agreement of the parties.

6. The City discharged Osuji from her position on March 23, 2018. (Joint Exhibit 1)

7. AFSCME filed a grievance challenging Osuji's discharge and processed the grievance to arbitration. (Joint Exhibit 1)

8. Osuji began working part-time at Merakey Agency in August 2018 after she was discharged by the City. She made her own schedule at Merakey since they are open 8:00 a.m. to 8:00 p.m. on Saturdays. She would tell Merakey what her availability was, and they would schedule clients for her during those times. (Union Exhibit 5)

9. On October 4, 2019, Arbitrator Lawrence Coburn issued an Opinion and Award, finding that the City did not have just cause to discharge Osuji and directing the City to reinstate Osuji to her former position with full seniority, make her whole, and remove from her personnel file all references to her discharge, to be replaced by a one-week suspension without pay. (Joint Exhibit 1; Union Exhibit 2)

10. On October 28, 2019, Osuji returned to work at the City pursuant to the Arbitration Award. (N.T. 13; Union Exhibit 5; PERA-C-20-282-E)

11. Following her reinstatement with the City, Osuji continued working at Merakey on an as needed basis. (N.T. 17)

12. On November 19, 2020, AFSCME filed a charge of unfair practices with the Board, alleging that the City violated Section 1201(a)(1) and (8) of the Act by refusing to comply with the October 4, 2019 award. The charge was docketed at PERA-C-20-282-E. (Joint Exhibit 1; PERA-C-20-282-E)

13. In December 2020, Osuji received a check from the City purporting to represent the money owed to her pursuant to the October 4, 2019 award. The City took an offset for the wages Osuji earned at Merakey during her separation from the City and refused to pay for her lost overtime earnings at the City. (Union Exhibit 5)

14. On August 26, 2021, Osuji submitted a Request to Engage in Outside Employment form to her supervisor, Sharae Paris, upon advice from AFSCME, requesting to engage in outside employment with Merakey Agency. The form specifically indicated that Merakey provides intellectual and developmental disability services for adults in community living arrangements. Paris recommended approval on August 30, 2021 after an email exchange with Osuji in which Paris requested a correction on the form. (N.T. 17-18, 22; Union Exhibit 3; City Exhibit 2)

15. By Memorandum dated November 15, 2021, Vongvilay Mounelasy, the City's Deputy Commissioner of Administration and Management, indicated the following, in relevant part, to Osuji:

> Upon further review, your Request to Engage in Outside Employment for Merakey Agency has been **denied.** There is a conflict of interest in that DHS has a contract with Merakey Agency...

(N.T. 23-24; Union Exhibit 4)(Emphasis in original)

16. Osuji appealed the City's denial of her request for outside employment, but her appeal was not successful. (N.T. 80-82)

17. On November 16, 2021, the City's Department of Human Services issued a Departmental Policy Directive entitled "Updated Employee Responsibilities for Approval of Outside Employment," which was applicable to all DHS employes and which replaced a prior policy from September 17, 2010. The Policy Directive indicated the following, in relevant part:

> Outside employment without written permission is in violation of DHS policy and applicable work rules. Of particular concern is employment with private agencies that have contracts with DHS to provide services to children, youth, and families involved with DHS. Any DHS employees working for these contracted agencies in a secondary position risk creating a serious conflict of interest and are in violation of DHS policy, Civil Service Regulations, Executive Order 12-16, and the Philadelphia Home Rule Charter. This conflict is prohibited under Section 10-102 of the Charter which specifically forbids employees to profit from contracts for the supplying of services in which the city is involved...

(N.T. 25-26; Union Exhibit 9)

18. The parties proceeded to a hearing in PERA-C-20-282-E on November 17, 2021 and litigated the charge to conclusion. Osuji testified at the hearing in support of her averments. (N.T. 16; Joint Exhibit 1; Union Exhibit 5)

19. Osuji had to quit her job at Merakey as a result of the City's denial of her request for outside employment. (N.T. 27)

20. On April 14, 2022, the Board's hearing examiner issued a Proposed Decision and Order in PERA-C-20-282-E, finding that the City committed unfair practices in violation of Section 1201(a)(1) and (8) of the Act and directing the City to comply with the Award by tendering full backpay to Osuji, including her missed overtime with the City and her supplemental earnings from Merakey that the City withheld unlawfully from her payment. (Union Exhibit 5; PERA-C-20-282-E)

21. In support of its position with regard to the instant charge, the City offered the testimony of its Deputy Commissioner for DHS, Vongvilay Mounelasy, who described the secondary employment application process. Employes must initially request outside employment by completing a form before obtaining a position. Requests proceed up through the command and then to human resources, who conducts a review for performance issues or conflicts of interest. Human resources then makes a recommendation to the commissioner, who makes the final decision. (N.T. 48-50)

22. Mounelasy explained that the process typically takes a couple weeks. She testified that there was a delay in Osuji's request because Mounelasy's secretary, who handles the requests, was out of the office for several periods, taking care of a sick family member who eventually passed away. She indicated that other employe requests during that time were delayed as well. (N.T. 50-51)

23. Mounelasy testified that DHS is governed by the City's Home Rule Charter, Civil Service Regulations, and department policy in deciding whether to approve requests for secondary employment. (N.T. 52-53)

24. Mounelasy identified Section 10-102 of the City's Home Rule Charter, which provides, in relevant part, as follows:

> As provided by statute, the Mayor, the Managing Director, the Director of Finance, the Personnel Director, any department head, any City employee, and any other governmental officer or employee whose salary is paid out of the City Treasury shall not benefit from and shall not be interested directly or indirectly in any contract for the purchase of property of any kind nor shall they be interested directly or indirectly in any contract for the erection of any structure or the supplying of any services to be paid for out of the City Treasury; nor shall they solicit any contract in which they may have any such direct or indirect interest.

(N.T. 53-54; Union Exhibit 7)

25. Mounelasy testified that the November 16, 2021 DHS Policy Directive entitled "Updated Employee Responsibilities for Approval of Outside Employment" was not in effect when Osuji's request was evaluated. She explained that the policy was being drafted as part of a periodic update to the City's policies when the Covid-19 pandemic began and was delayed as a result. (N.T. 55-57)

26. Mounelasy testified that the policy in effect at the time of Osuji's request was dated September 17, 2010 and provided in relevant part as follows:

> Outside employment without written permission is in violation of DHS policy and applicable work rules. Of particular concern is employment with private agencies that have contracts with DHS to provide services to children, youth, and families involved with DHS. Any DHS employees working for these contracted agencies in a secondary position risk creating a serious conflict of interest and are in violation of DHS Policy, Civil Services Regulations, and the Philadelphia Home Rule Charter. This conflict is prohibited under Section 10-102 of the Charter which specifically forbids employees to profit from contracts for the supplying of services in which the city is involved...

(N.T. 59-60; City Exhibit 3)

27. Mounelasy testified that the City has a contract with Merakey for court-ordered supervised visitation and placement services, which normally involve children. (N.T. 61-62)

28. Mounelasy testified that, pursuant to the City's process, the direct supervisor makes a recommendation regarding whether to approve outside employment requests because the supervisor is closer to the employe and the work. Then, once the request is submitted to human resources, Mounelasy's secretary compares it to a contracted list to determine whether there is a contract and submits it to the commissioner. (N.T. 63-64)

29. Mounelasy testified that Osuji's prior unfair practices charge docketed at PERA-C-20-282-E did not play any role in the department's decision to deny her outside employment application. She described how the department will consider an employe's opinion regarding the secondary

employment in reaching the decision, but the department does not have any flexibility with regard to contracted agencies. (N.T. 73-74)

30. On cross-examination, Mounelasy acknowledged that Osuji requested copies of the contracts, which the City provided to her and which were all expired as of June 2021. She also conceded that, at the time Osuji's request was denied, there was no active contract between the City and Merakey. She testified that, despite there being no active contract, the Fiscal Year 22 contract was in the process of being finalized, and Merakey was still providing services under the Fiscal Year 21 contract. (N.T. 75-76)

DISCUSSION

AFSCME has alleged that the City violated Section 1201(a)(1), (3), and (4) of the Act[2] by denying a previously approved request for outside employment for Onye Osuji on November 15, 2021 in retaliation for her protected activity. The City, for its part, contends that AFSCME has not met its burden of proving a prima facie case of discrimination under the Act and that it had legitimate, nondiscriminatory reasons for its actions.

It is well settled that the analysis for proving discrimination under Section 1201(a)(3) is the same as it is under Section 1201(a)(4) of the Act. Teamsters Local 429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000). In a Section 1201(a)(3) or (4) 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).

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

[2] 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. (4) Discharging or otherwise discriminating against an employe because he has signed an affidavit, petition or complaint or given any information or testimony under this act. 43 P.S. § 1101.1201.

Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities-for example, whether leading organizers have been eliminated; the extent to which the adversely affected employes engaged in union activities; and whether the action complained of was "inherently destructive" of employe rights. City of Philadelphia, *supra*, *citing* PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, Teamsters Local 764 v. Montour County, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employe engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. Berks Heim County Home, 13 PPER ¶ 13277 (Final Order, 1982).

In this case, the Union has sustained its burden of proving the first two elements of the Board's discrimination test. The record shows that Osuji engaged in several different protected activities, including her 2018 grievance, which was processed to arbitration, along with her decision to involve the Union when the City failed to comply with the October 4, 2019 arbitration award. Likewise, Osuji caused the Union to file a charge of unfair practices with the Board in PERA-C-20-282-E and testified in support of the same, which ultimately lead to the April 14, 2022 Proposed Decision and Order, finding the City in violation of the Act and directing the City to make Osuji whole with the payment of additional money, plus interest. Similarly, the record shows that the City knew of Osuji's protected activity, as the City litigated both the grievance and the unfair practices charge to conclusion. Indeed, Mounelasy testified at the Board's November 17, 2021 hearing in PERA-C-20-282-E, for which Osuji also provided testimony in support of her averments. In fact, the City does not dispute the first two elements of the discrimination test in its post-hearing brief. (*See* City Brief at p.5). As usual then, the issue depends on the third element of the test, i.e. whether the City was unlawfully motivated when it denied Osuji's request for outside employment. The Union has not sustained its burden of proving this final element.

In support of its argument that the City was unlawfully motivated, the Union points to two factors which allegedly give rise to an inference of anti-union animus. The Union argues that the City's failure to adequately explain why it denied Osuji's request for outside employment, combined with the timing of the denial, should yield an inference of discrimination on behalf of the City. Specifically, the Union contends that the City's proffered explanation for its conduct, i.e. that the City had a contract with Merakey, is pretextual and unable to withstand scrutiny. According to the Union, the City did not have an active contract with Merakey at the time of Osuji's request in August 2021 or when the City denied the request in November 2021.

However, Mounelasy credibly explained that, while this fact was technically true, the Fiscal Year 22 contract was in the process of being finalized, and Merakey was still providing services under the Fiscal Year 21 contract. Indeed, Mounelasy credibly and persuasively testified that Osuji's protected activity played no role in the denial of her outside employment request. Nor does it matter that Osuji's request was to work with adults, while the City's contract with Merakey was for services related to children.

On this point, Mounelasy convincingly described how DHS does not have any flexibility with regard to contracted agencies. To that end, she testified that in her 20-plus year career, the City has never approved an outside employer that has a contract with the City, nor has the City ever made an exception to allow an employe to work for a contracted employer. (N.T. 73, 87). Her testimony in this regard was supported by Section 10-102 of the Charter, along with the 2010 department policy, which both specifically and categorically forbid an employe to even have an indirect interest in contracts for the supplying of services to be paid for out of the City treasury.[3] As such, the City has credibly and persuasively explained the reasons for its conduct, i.e. that Osuji's request for outside employment was denied due to the City's contract with Merakey and not because of her protected concerted activity, and the Union has failed to demonstrate that the City's proffered reasons were pretextual in nature. Accordingly, the only remaining factor allegedly supporting an inference of anti-union animus is the timing of Osuji's denial, which occurred just two days prior to her testimony at the November 17, 2021 hearing in PERA-C-20-282-E. However, the Board has long held that timing alone is not sufficient to support a basis for discrimination, and therefore, the charge under Section 1201(a)(3) and (4) must be dismissed.[4]

Finally, the Union alleged in its charge that the City committed an independent violation of Section 1201(a)(1) of the Act by denying Osuji's previously approved request for outside employment just two days prior to the hearing in her unfair practices charge docketed at PERA-C-20-282-E, which alleged a refusal to comply with the October 4, 2019 arbitration award. 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

[3] The record shows that the 2010 department policy was updated on November 16, 2021, as part of a regular periodic update to the City's policies. However, the updated policy language prohibiting employes from working for contracted agencies remained virtually identical to the 2010 language. In any event, Mounelasy credibly testified that Osuji's request was evaluated under the 2010 policy, and not the updated 2021 language. What is more, she convincingly explained that the update began prior to the onset of the Covid-19 pandemic and was delayed as a result of the virus. Thus, the timing of the implementation of the updated policy, which occurred just one day prior to the hearing in PERA-C-20-282-E, was merely coincidental and does not yield an inference of unlawful motive on behalf of the City.

[4] There is no evidence that anyone from the City knew Osuji had continued working for Merakey after returning to her job at the City on October 28, 2019 until she testified to this fact during the November 17, 2021 hearing in PERA-C-20-282-E. By this point, however, the City had already denied her request for outside employment due to its contract with Merakey. As a result, I am unable to conclude that the City knowingly allowed Osuji to continue working for Merakey and then decided to conveniently enforce its rule prohibiting such conflicts when the opportunity arose. Of course, if the City should impose discipline on Osuji for allegedly violating its policy regarding outside employment following the issuance of this proposed decision and order, the same result may not obtain, as such an adverse action would potentially be subject to a new charge of unfair practices.

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 the instant matter, the record does not support a finding that the City has independently violated Section 1201(a)(1) of the Act. As previously set forth above, the City clearly had a legitimate reason for denying Osuji's previously approved request for outside employment, namely that her outside employment with Merakey would cause a conflict of interest due to Merakey's contract with the City. In addition, the City's legitimate reason justifiably outweighs concerns over any alleged interference with employe rights to file grievances or unfair practice charges, especially considering that the City's Charter and DHS policy specifically and categorically forbid employes to even have an indirect interest in contracts for the supplying of services paid for out of the City's treasury. Furthermore, I am unable to conclude that the City's actions would have the tendency to coerce any employes, given that the City has no flexibility with regard to contracted agencies and that the City does not make any exceptions for employes to work for contracted employers. To the contrary, the record shows that the City routinely and consistently denies such requests. As such, the charge under Section 1201(a)(1) will also be dismissed.

CONCLUSIONS

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

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

2. AFSCME is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties hereto.

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

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner

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 10th day of January, 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner