

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PETER GLASSER :
 :
 v. : Case No. PERA-C-10-269-E
 :
 PENNSYLVANIA STATE SYSTEM OF HIGHER EDUCATION :
 CALIFORNIA UNIVERSITY¹ :

PROPOSED DECISION AND ORDER

On July 26, 2010, Peter Glasser filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that California University of Pennsylvania (California University) violated sections 1201(a)(1) and (3) of the Public Employee Relations Act (PERA) by terminating him because he sought to be represented.² On August 12, 2010, the Secretary of the Board, construing the charge as having been filed against the State System of Higher Education (PASSHE), issued a complaint and notice of hearing directing that a hearing be held on December 1, 2010. The hearing examiner thereafter twice continued the hearing without objection, once upon the request of PASSHE and once upon the request of Mr. Glasser. On March 11, 2011, the hearing examiner held the hearing and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of Mr. Glasser's case-in-chief, PASSHE moved to dismiss the charge on the ground that Mr. Glasser had not presented a prima facie case (N.T. 106). The hearing examiner took the motion under advisement (N.T. 107). On April 21, 2011, PASSHE filed a brief by hand-delivery. On April 24, 2011, Mr. Glasser filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing, makes the following:

FINDINGS OF FACT

1. On September 8, 2008, Mr. Glasser began working for PASSHE as a manager of research and prospect management in the university development department at California University. (N.T. 10, 66, 117)

2. Mr. Glasser initially worked under the immediate supervision of a senior associate vice president of resource development (John Fisler), who never had cause to discipline him and considered him to be among the upper half of all of the employees he has ever supervised. Mr. Glasser also received praise for his work from a variety of sources. (N.T. 10, 12-24, 28-29, 31-38, 68-69, 71-72, 117, 193-194; Plaintiff's Exhibits A-B, D-H).

3. On January 12, 2010, after a reorganization of the university development department by a newly-hired vice president for university development and alumni relations at California University (Ronald Huiatt), Mr. Glasser began working under the immediate supervision of a newly-named associate vice president for development (Sharon Navoney). Mr. Glasser had previously expressed to Mr. Huiatt reservations about working under Ms. Navoney's supervision. (N.T. 12, 116-120, 193-194; Respondent Exhibit 3)

4. On March 4, 2010, Ms. Navoney held a counseling session with Mr. Glasser about his work performance. (N.T. 42-44, 170-171)

¹ The caption appears as amended by the hearing examiner to reflect the name currently used by the respondent. The previous caption identified the respondent as the State System of Higher Education.

² Mr. Glasser also filed the charge under section 1201(a)(4) of the PERA, which prohibits employers from "[d]ischarging or otherwise discriminating against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act." Mr. Glasser has not alleged that PASSHE discriminated against him for any of those reasons, however, so the charge does not state a cause of action under section 1201(a)(4). Accordingly, that portion of the charge is dismissed at the outset.

5. On April 1, 2010, Mr. Glasser sent an email to a member of the student affairs office at California University (Nancy Skobel) about a potential donor (Colonel Patricia McDaniel) as follows:

"Hi, Nancy. I've been asked to do some research on Colonel McDaniel from the point of view of University Development (mostly financial and family info). Do you have information that goes beyond the one-page bio supplied to me by Amy Lombard today? (Copy attached for your reference). Thanks, Pete."

(N.T. 49-51, 127-128, 148-149)

6. In early April 2010, a representative of human resources at California University (Pam Murphy) held a pre-disciplinary conference with Mr. Glasser about his conduct at the counseling session with Ms. Navoney in March. (N.T. 123)

7. Based on a pre-disciplinary conference report by Ms. Murphy that Mr. Glasser had been abusive toward Ms. Navoney at the counseling session in March and that Ms. Navoney had feared for her own safety at the time, Mr. Huiatt recommended to the president of California University (Dr. Angelo Armenti, Jr.) that, among other things, Mr. Glasser be suspended for one day. (N.T. 123-124, 184)

8. On April 19, 2010, Mr. Huiatt presented Mr. Glasser with a letter suspending him for one day (April 20, 2010) for his conduct at the counseling session with Ms. Navoney in March and informing him that similar incidents of insubordination or inappropriate behavior would be met more harshly, up to and including termination. (N.T. 25, 41, 45, 124, 126)

9. On April 20 or 21, 2010, Mr. Glasser contacted the State College and University Professional Association (SCUPA) about joining. SCUPA is the exclusive representative of non-faculty professional employees of PASSHE. (N.T. 39-40, 46, 89-90, 92, 94-95)

10. On April 22, 2010, a representative of SCUPA (Marc Kornfeld) spoke with PASSHE's assistant vice chancellor for labor relations (Michael Mottola) about representing PASSHE's university development employees. Mr. Mottola questioned whether the impetus for Mr. Kornfeld's request was Mr. Glasser. Mr. Kornfeld indicated that Mr. Glasser was. Mr. Mottola knew about Mr. Glasser because Mr. Huiatt and the director of the office of social equity at California University (Dr. Lisa McBride) had told him that Mr. Glasser's work performance was deteriorating and had sought his advice in dealing with Mr. Glasser. Mr. Mottola told Mr. Huiatt of Mr. Kornfeld's inquiry. Upon hearing of Mr. Kornfeld's inquiry, Mr. Huiatt had no personal opinion about Mr. Glasser being represented. Mr. Kornfeld never petitioned to include Mr. Glasser's position in SCUPA's bargaining unit. (N.T. 77-78, 93, 95-97, 103, 107-112, 124-125, 168)

11. On June 9, 2010, pursuant to a counseling performance report by Ms. Navoney, Mr. Huiatt and Ms. Murphy met with Mr. Glasser to counsel him about the manner in which he had approached Ms. Skobel in his April email to her. Mr. Huiatt thought that the email was abrupt, perfunctory and unprofessional because Mr. Glasser had not explained to Ms. Skobel his reason for approaching her or his role within the university development program. Mr. Huiatt denied a request by Mr. Glasser for union representation at the meeting, saying that "[s]ince you're not currently a member of the Union, it would not be appropriate to have a Union representative in the meeting." (N.T. 48-51, 127-130, 148-152, 163, 165-166)

12. Later in the day on June 9, 2010, Mr. Huiatt received a pre-disciplinary conference report from human resources that Mr. Glasser had been abusive toward a faculty member at California University (Dr. Tony Rodi), that the faculty member had feared for his own safety at the time and that the faculty member believed that Mr. Glasser had demeaned the reputation of the university development program. (N.T. 126-127, 130, 143, 145-146, 151-152, 166)

13. Based on Mr. Glasser's prior discipline for being abusive toward Ms. Navoney, the manner in which Mr. Glasser had approached Ms. Skobel and the pre-disciplinary conference report by human resources that Mr. Glasser had been abusive toward Dr. Rodi, Mr. Huiatt recommended to President Armenti that Mr. Glasser be terminated. (N.T. 130, 138-139, 151-152)

14. Based on Ms. Navoney's expressed fear for her own safety when she counseled Mr. Glasser, an email by Mr. Glasser referencing a shooting of faculty members at a university in Alabama, Dr. Rodi's complaint about Mr. Glasser, the manner in which Mr. Glasser approached Ms. Skobel and personal knowledge that Ms. Skobel was deeply offended by Ms. Glasser's approach, President Armenti accepted Mr. Huiatt's recommendation. In accepting the recommendation, President Armenti had no concern about Mr. Glasser's attempt to join SCUPA. (N.T. 134, 185-190)

15. On June 11, 2009, Dr. McBride presented Mr. Glasser with a letter terminating him that day. (N.T. 53, 140, 152, 176)

16. PASSHE employs 930 employees at California University, all but 80 of whom are represented. SCUPA has an amicable relationship with PASSHE. (N.T. 99-101, 184-185)

17. Ms. Navoney was not involved in President Armenti's decision to terminate Mr. Glasser. (N.T. 205-206)

DISCUSSION

Mr. Glasser has charged that PASSHE committed unfair practices under sections 1201(a)(1) and (3) by terminating him because he sought to be represented. He filed the charge after he contacted the exclusive representative of non-faculty professional employees of PASSHE (SCUPA) to join (finding of fact 9) and was subsequently terminated by PASSHE (finding of fact 15). According to Mr. Glasser, the timing of events and anti-union animus on the part of PASSHE support his charge.

PASSHE has moved to dismiss the charge on the ground that Mr. Glasser did not present a prima facie case during his case-in-chief. PASSHE alternatively contends that the charge should be dismissed because it terminated him for legitimate business reasons.

An employer commits an unfair practice under section 1201(a)(3) if it terminates an employee for having engaged in an activity protected by the PERA. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). An employer also violates section 1201(a)(1) if it violates section 1201(a)(3). PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). An employer does not violate section 1201(a)(3), however, if it terminates an employee for legitimate business reasons. Indiana Area School District, 34 PPER 133 (Final Order 2003).

In order to prevail on a charge under section 1201(a)(3), the charging party must show by substantial evidence during its case-in-chief (1) that an employee engaged in a protected activity, (2) that the employer knew that the employee had engaged in the protected activity and (3) that the employer discriminated against the employer for having engaged in the protected activity. Perry County, 634 A.2d 808 (Pa. Cmwlth. 1994). "The motive creates the offense." PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), quoting PLRB v. Ficon, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). An overt display of anti-union animus will support a finding of a discriminatory intent on the part of an employer. Brentwood Borough, 35 PPER 112 (Final Order 2004). An insubstantial explanation for an employment action will, too. Lehigh Area School District v. PLRB, 632 A.2d 439 (Pa. Cmwlth. 1996). The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005). Nor will the lack of just cause as an arbitrator might define the term. Bucks County Community College, 36 PPER 84 (Final Order 2005). Speculation is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

If the charging party presents a prima facie case during its case-in-chief, the charge is to be sustained unless the employer in rebuttal shows that it would have taken the same action even if the employee had not engaged in the protected activity. Perry County, supra. If the charging party does not present a prima facie case during its case-in-chief, the charge is to be dismissed. Id. Evidence introduced after the charging party rests its case-in-chief may not be relied upon to find that the charging party presented a prima facie case during its case-in-chief. Erie City School District, 39 PPER 8 (Final Order 2008).

A close review of the record does not show that Mr. Glasser presented a prima facie case during his case-in-chief. Although he established that he engaged in a protected activity by contacting SCUPA to join (finding of fact 9) and that PASSHE knew that he had done so before it terminated him (findings of fact 10 and 15), he did not establish by substantial evidence that PASSHE terminated him because he contacted SCUPA to join. Accordingly, PASSHE's motion to dismiss on the ground that he did not present a prima facie case during his case-in-chief must be granted.

In support of his charge, Mr. Glasser first posits that proof of anti-union animus on the part of PASSHE may be found in the fact that "although Mr. Glasser never communicated with University officials regarding his interest in the Union, the word spread and the University actually reached out to inform the Vice-Chancellor (Tr. 108-110)." Brief at 3. According to Mr. Glasser, "[i]nasmuch as the University purports to be indifferent as to its employees' union activities, this seems a curious step." *Id.* The testimony he references, however, was only presented after he rested his case-in-chief, so it may not be relied upon to find that he presented a prima facie case during his case-in-chief. See Erie City School District, supra. Moreover, even if the referenced testimony could be relied upon to find that he presented a prima facie case during his case-in-chief, it does not support his contention. To the contrary, it shows that the word spread by California University to the vice chancellor (Mr. Mottola) was that Mr. Glasser's work performance was deteriorating (finding of fact 10), which is hardly evidence that PASSHE was motivated by anti-union animus when it terminated him.

Mr. Glasser next posits that proof of anti-union animus on the part of PASSHE may be found in the fact that it denied him requested union representation at a counseling session. Noting that PASSHE's stated reason for denying his request was that he was "not currently a member of the Union" (finding of fact 11), he would have the Board find that reason to be specious because "there was work underway to bring the position into the union and under the defined bargaining unit Mr. Glasser's position should have been included." Brief at 3. In Mr. Glasser's view, "[i]f there were no animus, the University would presumably have erred on the side of caution and allowed the representation." *Id.* The record shows, however, that SCUPA never petitioned to include his position in its bargaining unit (finding of fact 10). Under the circumstances, PASSHE's stated reason for denying him requested union representation provides an insubstantial basis for finding that it was motivated by anti-union animus when it terminated him.

Mr. Glasser lastly posits that proof of anti-union animus on the part of PASSHE may be found in the fact "that Ms. Navoney, Mr. Glasser's supervisor, had previously expressed her distaste for and animus toward public employee unions. (Tr. 54-55)[.]" Brief at 4. Notably, however, he only established that she subjected him to a counseling session in March 2010 (findings of fact 3-4);³ he did not establish that she was involved in his termination. Moreover, by his own testimony, he only contacted SCUPA to join on April 20 or 21, 2010 (finding of fact 9), which is after she counseled him. As a matter of timing, then, there is no basis for finding that his contacting SCUPA to join influenced her thinking about him. Thus, whatever distaste for and animus toward public employe unions she may have had provides no basis for finding that PASSHE was motivated by anti-union animus when it terminated him.

Absent proof of anti-union animus on the part of PASSHE, Mr. Glasser is left with the timing of events as the only support for his charge. The timing of events alone, however, will not support a discrimination charge. Pennsylvania State Park Officers Association, supra. Accordingly, there is no basis for finding that Mr. Glasser presented a prima facie case during his case-in-chief.

³ Although Mr. Glasser does not argue the point, he presented evidence that his previous supervisor (Mr. Fisler) and others thought that he was a good employe when he first began working for PASSHE (finding of fact 2). As noted above, however, Ms. Navoney as his then current supervisor counseled him about his work performance, so she obviously did not think the same of him. Given the change in supervision, the difference in Mr. Fisler's and Ms. Navoney's thinking about him is unremarkable in and of itself. See Montour County, 35 PPER 12 (Final Order 2004) (no anti-union animus found where a new supervisor was more critical of an employe's work performance than his previous supervisor was).

Even if Mr. Glasser had presented a prima facie case during his case-in-chief, the result would be the same. In rebuttal to Mr. Glasser's case-in-chief, PASSHE presented credible testimony by Mr. Huiatt that he recommended to the president of California University (Dr. Armenti) that Mr. Glasser be terminated for three reasons unrelated to Mr. Glasser's contacting SCUPA to join: (1) Mr. Glasser's prior discipline for being abusive toward Ms. Navoney, the manner in which Mr. Glasser had approached a member of the student affairs office at California University (Ms. Skobel) about a potential donor and (3) a pre-disciplinary conference report by human resources that Mr. Glasser had been abusive toward a faculty member at California University (Dr. Rodi) (finding of fact 13). PASSHE also presented credible testimony by President Armenti that he accepted Mr. Huiatt's recommendation for five reasons unrelated to Mr. Glasser's contacting SCUPA to join: (1) Ms. Navoney's expressed fear for her own safety when she counseled Mr. Glasser, (2) an email by Mr. Glasser referencing a shooting of faculty members at a university in Alabama, (3) Dr. Rodi's complaint about Mr. Glasser, (4) the manner in which Mr. Glasser had approached Ms. Skobel and (5) his personal knowledge that Ms. Skobel was deeply offended by Ms. Glasser's approach (finding of fact 14). Thus, it is apparent that PASSHE would have terminated Mr. Glasser even if he had not engaged in protected activity by contacting SCUPA to join. The charge, therefore, must be dismissed for that reason as well.

Mr. Glasser contends that two of the reasons PASSHE gave for terminating him--his contact with Ms. Skobel and his contact with Dr. Rodi--were pretextual and thus support a finding that PASSHE terminated him because he contacted SCUPA to join. According to Mr. Glasser, his contact with Ms. Skobel "was common within the University in the context of development efforts." Brief at 6. He also points out that his contact with Ms. Skobel occurred on April 1, 2010 (finding of fact 5), yet he was not counseled by Mr. Huiatt until June 9, 2010 (finding of fact 11), which was after he contacted SCUPA to join on April 20 or 21, 2010 (finding of fact 9). He submits that, given Dr. Rodi's larger physical size (N.T. 143-145), it strains credulity to suggest that he caused Dr. Rodi to fear for his own safety. He further submits that because Ms. Skobel and Dr. Rodi never complained to him personally it strains credulity to suggest that they complained to anyone else at PASSHE, making Mr. Huiatt's and Dr. Armenti's testimony to the contrary suspect.

The record shows, however, that PASSHE counseled Mr. Glasser about his work performance (finding of fact 4) and suspended him for abusive conduct toward Ms. Navoney (finding of fact 8) before he even contacted SCUPA to join (finding of fact 9). Thus, the timing of events militates against rather than in favor of a finding that PASSHE's subsequent termination of him was because he contacted SCUPA to join. See Delaware County, 28 PPER ¶ 28005 (Final Order 1996) (no discriminatory intent found where the genesis of the employer's course of conduct predated protected activity on the part of employees). Moreover, by his own admission, his previous development efforts included sending a form letter telling department faculty heads that he would like to meet with them to talk about what he did and how what he did benefitted California University and asking them for their assistance with any information they might have about particularly successful graduates with whom they were still in touch (N.T. 52). By contrast, his contact with Ms. Skobel was abrupt and perfunctory (finding of fact 5), which undermines any contention that PASSHE treated him differently after he contacted SCUPA to join. Furthermore, a disparity in physical size is not a prerequisite for one to fear for one's own safety. Mr. Huiatt and President Armenti, therefore, could reasonably believe that Dr. Rodi feared for his own safety when Mr. Glasser contacted him. In addition, the lack of a personal complaint by Ms. Skobel and Dr. Rodi to Mr. Glasser does not necessarily mean that they never complained at all. Beyond that, Mr. Huiatt's and President Armenti's testimony that Ms. Skobel and Dr. Rodi complained about Mr. Glasser was un rebutted. The hearing examiner has credited their testimony accordingly. Finally, in light of the fact that the vast majority of PASSHE's employees at California University are organized (finding of fact 16) and the fact that SCUPA has an amicable relationship with PASSHE, *id.*, President Armenti's testimony that he had no concern about Mr. Glasser seeking union representation (N.T. 185) is wholly believable and has been credited by the hearing examiner as well. That being the case, the record does not support Mr. Glasser's contention.

CONCLUSIONS

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

1. The PASSHE is a public employer under section 301(1) of the PERA.
2. Mr. Glasser was a public employe under section 301(2) of the PERA.
3. The Board has jurisdiction over the parties.

4. PASSHE has not committed unfair practices under sections 1201(a)(1), (3) and (4) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this second day of May 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner