COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TARA FEARS	:	
	:	
v.	:	Case No. PERA-C-09-298-E
	:	
PHILADELPHIA REDEVELOPMENT AUTHORITY	:	

PROPOSED DECISION AND ORDER

On July 27, 2009, Tara Fears filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Redevelopment Authority of the City of Philadelphia (Authority)[1] violated sections 1201(a)(1) and (3) of the Public Employe Relations Act (PERA)[2] by retaliating against her "for filing Grievances and standing up to Management."[3] On August 21, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on December 18, 2009, if conciliation did not resolve the charge by then. On September 8, 2009, the Authority filed an answer and new matter averring that the charge should be dismissed for a host of reasons, including that "[a]ny action taken by the [Authority] relevant to this case was limited in nature and taken for sound business reasons."[4]

On September 17, 2009, the Secretary issued an amended complaint and notice of hearing directing that a hearing be held on December 15, 2009, if conciliation did not resolve the charge by then.[5] On September 30, 2009, the Authority filed an answer and new

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[1] Ms. Fears also filed the charge against David Thomas and Roderick Lyles, who she identified as representatives of the Authority, but they would not be personally liable for any unfair practices they may have committed as representatives of the Authority. See Wilson School District, 24 PPER ¶ 24068 (Final Order 1993)(only the principal is liable for unfair practices committed by its agents).

[2] Ms. Fears also filed the charge under section 1201(a)(4) of the PERA, which prohibits employers from "discriminating against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act." Ms. Fears has not alleged any discrimination of that sort, however, so the charge does not state a cause of action under that section.

[3] Ms. Fears also alleged that the Authority committed unfair practices by failing to treat her "with Dignity and Respect as called for in the Labor Agreement" and by "failing to maintain a harmonious relationship with the Union." The Board, however, has no jurisdiction to find a violation of a collective bargaining agreement, Parents Union for Public Schools in Philadelphia, infra, so whether or not the Authority treated her "with Dignity and Respect as called for in the Labor Agreement" is not for the Board to decide. Moreover, an individual employe has no standing to assert the rights of an employe organization, cf. New Brighton Education Association, 19 PPER ¶ 19096 (Proposed Decision and Order 1988)(individual school board members had no standing to file a charge on behalf of the school district), so Ms. Fears may not prosecute the charge to the extent that she alleges that the Authority "fail[ed] to maintain a harmonious relationship with the Union."
In addition, Ms. Fears alleged that Deborah Whitehead, who she identified as a representative of AFSCME Local 1971, committed an unfair labor practice under section 1201(b)(1) by not properly representing Amos Porter when he was terminated by the Authority. The Board separately docketed to Case No. PERA-C-09-299-E the charge as to Ms. Whitehead, so the charge as to her is not before the Board here.

[4] The Authority also requested costs and attorneys fees, but the Board lacks the statutory authority to grant such a request. City of Reading, 26 PPER ¶ 26082 (Final Order 1995). The Authority's request is, therefore, denied.

[5] The Secretary referenced an amended charge filed by Mr. Fears on September 16, 2009, but a review of the Board's file discloses no such amendment.

matter averring that the amended charge should be dismissed for a host of reasons, including that "[a]ny action taken by the [Authority] relevant to this case was limited in nature and taken for sound business reasons."

On December 4, 2009, Hearing Examiner Timothy Tietze, upon the request of Ms. Fears and without objection by the Authority, continued the hearing to March 22, 2010.

On March 11, 2010, Ms. Fears filed an amended charge alleging that the Authority committed additional unfair practices by, among other things, harassing her. On March 12, 2010, the Secretary directed Ms. Fears to file an amendment "to specify the exact subsection ((a) or (b)) and clauses ((1)-(9)) of PERA that you believe were violated. Further, please state specifically how the Authority has harassed you."

On March 23, 2010, Hearing Examiner Tietze, upon the request of Ms. Fears and without objection by the Authority, continued the hearing to July 9, 2010.

On March 31, 2010, Ms. Fears filed an amended charge alleging that the Authority violated sections 1201(a)(1), (3) and (4) of the PERA by "discriminat[ing] against [her] and treat[ing her] unfairly," by "humiliat[ing] and badger[ing her] in front of [her] peers," by lying to her and setting her up to fail, by giving her new job assignments without the proper training to perform them, by suspending her for two days and by "entic[ing] or otherwise coerc[ing] fellow employees into participating in this plot of harassment." On April 13, 2010, the Secretary issued an amended complaint and notice of hearing directing that a hearing on the amended charge be heard at a date and time to be determined.

On June 25, 2010, Hearing Examiner Tietze scheduled a hearing for November 1, 2010. On October 13, 2010, Hearing Examiner Tietze continued the hearing. On October 27, 2010, Hearing Examiner Tietze rescheduled the hearing to November 10, 2010. On November 10, 2010, Hearing Examiner Tietze, upon the request of the Authority and without objection by Ms. Fears, continued the hearing. On December 1, 2010, the undersigned hearing examiner rescheduled the hearing to April 6, 2011. On April 6, 2011, the parties agreed to attempt to amicably resolve the charge. On June 20, 2011, the hearing examiner held the hearing and afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On September 15, 2011, the hearing examiner, upon the agreement of the parties, extended the deadline for filing briefs by one month to October 16, 2011. On October 14, 2011, the Authority filed a brief by deposit in the U.S. Mail. Ms. Fears has not filed a brief.

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

FINDINGS OF FACT

1. Since 2008, Ms. Fears has been employed by the Authority as an accountant I. (N.T. 134, 154, 181)

2. Over the same time period, Ms. Fears has been a steward for AFSCME Local 1971, which is the exclusive representative of a bargaining unit that includes employes of the Authority, and AFSCME Local 1971 has filed on an annual basis 8-10 grievances, the vast majority of which the Authority and AFSCME Local 1971 have settled short of arbitration. (N.T. 52-53, 55-56, 87, 133-135; Complainant Exhibit 33)

3. On May 9, 2009, Ms. Fears sent to the Authority's deputy director of finance (Roderick Lyles) an email alleging that a non-member of the bargaining unit (Howard Brown) was performing bargaining unit work (Darren Williams'') in violation of a collective bargaining agreement between the Authority and AFSCME Local 1971. (N.T. 9-10, 73-74, 180; Complainant Exhibit 3)

4. On May 21, 2009, Ms. Fears sent to Mr. Lyles an email "to set up a meeting for Step I Grievance concerning Exempt Employee doing Bargaining Unit work." (N.T. 11, 73-74, 83, 112; Complainant Exhibit 4)

5. On June 10, 2009, Ms. Fears sent to Mr. Lyles an email to "set up another meeting for step I Exempt doing Bargaining Unit work, preferably by Friday, June 12, 2009. (N.T. 12-13, 73-74; Complainant Exhibit 5)

6. On June 12, 2009, Mr. Lyles emailed Ms. Fears that he was unable to meet with her that day and that "Tuesday, June 16 @ 2:30 p.m. is good for me." (N.T. 12-13; Complainant Exhibit 5)

7. On a weekly basis, the Authority disciplines employes for not clocking (swiping) in and out for lunch using an electronic system monitored by human resources. (N.T. 141, 160-161)

8. On June 12, 2009, the Authority's deputy executive director of operations (David Thomas), after having been informed by human resources that Ms. Fears "continuously" had not been swiping in and out for lunch, met with her to give her a verbal warning. At the outset of the meeting, he told her that he was waiting for AFSCME Local 1971's chief steward (Deborah Whitehead) to arrive. She asked him if the meeting was disciplinary. He told her that she had not been swiping out for lunch and that he was going to give her "an infraction" for that. She told him that "because of the way the clock was working" she had not swiped out for a period of several months. She asked him how is it that he was deciding to give her the infraction now. He said he could do whatever he wanted to do. She said, "go ahead," and left his office before Chief Steward Whitehead arrived. (N.T. 14-15, 74-76, 132-133, 140-142, 158)

9. On June 15, 2009, Mr. Thomas, with a steward for AFSCME Local 1971 (Kimberly Malone) present, told Ms. Fears that he was suspending her flex time for two weeks. She told him that "according to our contract" a written warning should result from a first violation of the Authority's flex time policy, with a two week suspension of flex time resulting from a second violation of the policy. Without regard for her grievance activity, he gave her a memorandum providing as follows:

> "On Friday June 12th I attempted to provide a verbal warning, however in an act of insubordination you walked out of my office therefore this memo shall serve as disciplinary notice for your failure to comply with the swipe procedure. On Tuesday, Thursday and Friday June 9, 11, and 12th respectively you failed to swipe during your lunch break as required under Article III R 5 d of the collective bargaining agreement. In addition an email that I forwarded to all staff the morning of the 9th specifically stated that all employees were to swipe in and out for lunch and no exceptions would be granted.
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> Article III R 5)a. of the collective bargaining agreement requires Human Resources to be notified of missed swipe within 2 hours. Failure to do so will be considered an infraction.
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> Therefore flextime privileges shall be suspended for the following two weeks beginning Tuesday, June 16, 2009 through June 30, 2009 in accordance with Article III R5a(2). During this period your hours of work will be 8:45 a.m to 4:30 p.m.
>
> Please be advised that failure to comply and/or future occurrences of this type will result in further disciplinary action."

(N.T. 15-17, 76-77, 137; Complainant Exhibit 6)

10. On July 8, 2009, Mr. Lyles met with employes of the finance department, including Ms. Fears, to change their work assignments in order to achieve the level of services needed to support the Authority's operations and to match her responsibilities with those of an accountant I. "Without regard for her "union activity," he assigned to her the additional duty of bank account reconciliations. (N.T. 65-67, 118, 182, 185-190, 197; Employer Exhibit 1)

11. On July 15, 2009, Mr. Lyles met with Ms. Fears to follow-up on any questions she might have about the change to her work assignments. At the outset of the meeting, she accused him of "harassing" her and referenced a heart condition. He suggested that she might want to take some time off. She abruptly left the meeting without raising any questions about the change to her job assignments. Later, upon looking for her to check on a work related matter, he discovered that she was gone. She had left work sick without telling him or human resources. (N.T. 21-23, 68, 72, 187-188, 191-192, 195-196)

12. By memo dated July 15, 2009, Mr. Lyles, without regard for Ms. Fears' "union activity," wrote to her as follows:

> "As a follow up to a meeting held on Wednesday, July 8, 2009 I call[ed] a meeting with you this morning. Also Ken Demby, Accounting Coordinator was present at the meeting. The initial meeting on July 8 was to review and discuss some changes in work assignments that involve you and two other employees. After some discussion, I indicated that if additional time was needed to review the information provided I would schedule a follow up meeting. You stated that you wanted additional time to review the information. In the meeting this morning I asked if you had any concerns and you indicated that you had not had time to complete your review but that you saw a problem with one of the assignments. After my attempt to further clarify your concern you stated that if I did not want your opinion then do what I wanted to[]. I reminded you that this meeting was to accommodate your request for additional time to review the information and address any concerns you might have and not for you to tell me what I can and can not do. You then started accusing me of harassing you and that there is something going on with your heart (you were escorted to the hospital on Monday morning by a co-worker), that you are having personal problems at home and that you were not going to take being harassed by me. I asked you to explain to me how I am harassing you and that I am only trying to move forward with work related matters. I also suggested that maybe you should consider taking some additional time off if you are not feeling well enough to return to work. You abruptly stood up and said that you did not have to take this. I advised you that the meeting was not over and your response was that it was for you. You then left my office.
>
> This kind of behavior and total lack of respect will not be condoned by me. This is a second occurrence of your abrupt exit from an official meeting within the past 45 days and warrants further disciplinary action.
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> You are therefore being placed on a one (1) day suspension without pay. The date of the suspension will be Wednesday, July 22, 2009."

(N.T. 21, 187, 192, 197; Complainant Exhibit 10)

13. By memo dated July 21, 2009, Mr. Lyles, without regard for Ms. Fears' "union activity," wrote to her as follows:

> "At approximately 2:45 p.m. on Wednesday, July 15, 2009 I went to your office only to discover that you had already left work for the day. After checking further I discovered that you had clocked out at 2:31 p.m. This is 29 minutes earlier than the required time in order for you to complete your normal work day. You failed to submit a leave slip, or notify any supervisor or myself of your need to leave work early. As a consequence, one half hour will be leave without pay.
>
> Any continued infractions and disregard of the rules in the workplace could lead to further disciplinary action.
>
> If you have any questions regarding this matter, please do not hesitate to contact me."

(N.T. 23, 197; Complainant Exhibit 11)

14. On July 29, 2009, Ms. Fears requested sick leave from 2:45 p.m. to 3:15 p.m. for July 15, 2009. Mr. Lyles did not approve her request. (N.T. 22-24; Complainant Exhibit 12)

15. On December 11, 2009, Mr. Lyles met with Ms. Fears to discuss a job assignment (notes inventory) for which she was responsible. She brought Steward Malone with her and claimed harassment. He said that the meeting was not disciplinary and questioned her right to union representation. She left the room to obtain a copy of an AFSCME Local 1971 handbook reciting the right to union representation. Upon her return, he asked her for a copy of the notes inventory. She told him to print out his own copy.[6] Without regard for her "union activity," he decided to discipline her for insubordination. (N.T. 34, 61-64, 198, 200-205, 214)

16. By memorandum dated December 30, 2009, Mr. Lyles, without regard for her "union activity" or "union position," wrote to Ms. Fears as follows:

> "On Friday, December 11, 2009 at approximately 11:30 a.m., I e-mailed you that I wanted to meet with you at 1:30 p.m. to review the updated information which I requested in my e-mail to you dated November 2, 2009. In a previous meeting with you, Marla Clark and myself we determined that some of the notes were duplicated on the initial schedule probably as a result of duplicated folders, one representing the note and another folder representing individual mortgages for the same properties. As a result, I requested in my e-mail that you review the notes inventory schedule for the purpose of deleting the duplicate listings and where appropriate to adjust (decrease) the developer's note amount accordingly. I had asked that you have this completed by November 30, 2009. As I had indicated, this revised schedule would be the document used for any adjustments to our records for fiscal year 2010.
>
> When you arrived at my office for the meeting you were accompanied by Kimberly Malone as Steward of Local 1971. I asked why was Kim present at a meeting to review what I considered to be routine work and did not consider this meeting to involve anything that would warrant her presence as steward. You stated that you wanted her present and that it was your right under the 'Weingarten' ruling. I indicated that I did not agree with you and that it was not necessary for Kim to be present. However, I did ask if Kim was present because you had not completed the assignment or for some other reason; but, you did not respond. Kim started to speak and I asked if she was speaking for you. She attempted to explain and you stated to Kim that she did not have to explain anything to me. Without saying anything you abruptly got up and left my office and returned with a document and proceeded to make reference to the "Weingarten" ruling and read it aloud. Afterwards, I indicated that the key to whether Kim's presence was necessary was the first word in the ruling – '**IF**'. At that point it appeared to me that you had a different purpose for the meeting so I stated that the meeting was over. As you got up to leave my office I did request that you leave the copy of the notes inventory you brought to the meeting for review. To my amazement, you refused to leave the copy and stated that I could print my own copy.
>
> Your insubordinate behavior and total lack of respect will not be tolerated. This is the third occurrence where you have exhibited similar behavior since May 2009 and warrants further disciplinary action.
>
> You are therefore being placed on a two (2) day suspension without pay. The dates of the suspension will be Tuesday, January 5, 2010 and Thursday, January 7, 2010."

(N.T. 204-205; Complainant Exhibit 16)

[6] The parties presented conflicting testimony as to whether or not Ms. Fears told Mr. Lyles to print out his own copy of the notes inventory. Ms. Fears testified that she did not (N.T. 61), while Mr. Lyles testified that she did (N.T. 204). Mr. Lyles' testimony has been credited over Ms. Fears' because he presented as the more credible witness.

17. On January 6, 2010, AFSCME Local 1971 held an election for president. Mr. Council won. Ms. Fears had campaigned for him. Afterwards, he and Mr. Thomas settled the grievance involving Mr. Brown and negotiated a change in the procedure for notifying human resources of a missed swipe. (N.T. 35, 55-56, 102-103, 112, 137, 163-166)

18. On January 29, 2010, an employe in payroll (Mindy Sklaraw) emailed Ms. Fears that "[y]our LWOP for the period of 1/4-1/17 = **14.0 HRS** . . . will be . . . docked from your paycheck of 2/4/10." Docking of pay typically occurs in the next pay period. (N.T. 37, 149-150; Complainant Exhibit 18)

19. By May 12, 2010, the Authority had provided Ms. Fears with training on bank account reconciliations using a trainer requested by her (Latisha Moore). On one occasion, over her objection, the training took place in a small boardroom without a computer. A steward for AFSCME Local 1971 (Angela Tillman) and Mr. Thomas were present at another training session. Mr. Thomas decided to be there because Steward Tillman was there. (N.T. 38-40, 68-70, 105, 121, 123, 174-175, 193-195)

20. On May 12, 2010, without regard for Ms. Fears' "union activity" or "union position," Mr. Lyles as the reviewing officer signed a performance evaluation rating her unsatisfactory. He referenced her one-day and two-day suspensions. (N.T. 40, 205-207; Complainant Exhibit 19)

21. On July 30, 2010, President Council grieved Ms. Fears' unsatisfactory performance evaluation. (N.T. 42, 57-58, 110; Complainant Exhibit 20)

22. By memorandum dated August 16, 2010, Mr. Thomas wrote to President Council as follows:

> 'A Step II grievance was held on Monday August 09, 2009 regarding the unsatisfactory evaluation of Tara Fears.
>
> After serious consideration and subsequent discussion with the supervisors in Finance it was determined that the evaluation prepared and presented to Ms. Fears reflected her performance for the year. During this period Ms. Fears received several written notices of unsatisfactory performances and as a result was suspended 3 days to which very little effort and improvement was made thereafter.
>
> While her immediate supervisors noted improvement in recent weeks unfortunately this initiative and effort was not exhibited prior to completion of the evaluation. As discussed in the step II meeting, management has offered to assess Ms. Fears' progress on a quarterly basis to assist in her progression with her newly appointed responsibilities.
> The grievance is therefore denied."

(N.T. 43, 102; Complainant Exhibit 21)

23. On April 11, 2010, the Authority posted notice of a job opening for an accountant II position. (N.T. 45, 150; Complainant Exhibit 22)

24. Ms. Fears and another accountant I (Joseph Galdo) applied for the position. Mr. Galdo had five years of experience as an accountant I and had passed all tests to be a certified public accountant. Ms. Fears had 13 years experience with the Authority, including three as an accountant I. Upon reviewing their experience, knowledge and abilities, Mr. Thomas concluded that Mr. Galdo qualified for the position and that Ms. Fears did not. Mr. Thomas reached that conclusion without regard to Ms. Fears' "union position." (N.T. 45, 48-49, 151-152)

25. By memorandum dated October 5, 2010, Mr. Thomas wrote to President Council that only Joseph Galdo met the requirements for the position. (N.T. 45, 151-152; Complainant Exhibit 23)

26. By the end of October 2010, President Council filed a grievance regarding Ms. Fears' non-ranking for the position. (N.T. 48, 57-58, 110)

27. By memorandum dated March 9, 2011, Mr. Thomas wrote to President Council as follows:

> "A Step II grievance was held on February 16, 2011 regarding the non ranking of Tara Fears for the promotional opportunity of Accountant II.
>
> In accordance with Article III E. 5 d of the collective bargaining agreement an Employee 'who meets the requirements of the Minimum Qualifications section of the posted job description, shall [have] his or her name placed on a promotion list for the posted class'.
>
> The Accountant II specification requires that a candidate possess considerable knowledge of accounting principles, practices and procedures; considerable knowledge of office equipment, methods, and principles as applied to accounting procedures. Ability to analyze and interpret fiscal records and to prepare accurate and complete financial statements; ability to advise, supervise and train others in accounting work; ability to establish and maintain effective working relationships with others.
>
> After thorough review and discussion of Ms. Fears[']s qualifications it was determined that Ms. Fears has not effectively demonstrated in her capacity as an accountant I the necessary knowledge, ability and skills to be considered for promotion to Accountant II.
>
> The grievance is therefore denied."

(N.T. 48; Complainant Exhibit 24)

DISCUSSION

Ms. Fears has charged that the Authority committed unfair practices under sections 1201(a)(1) and (3) of the PERA by retaliating against her "for filing Grievances and standing up to Management." As set forth in the specification of charges, she alleges that the retaliation occurred on June 15, 2009, when the Authority's deputy executive director of operations (Mr. Thomas) suspended her use of flex time for two weeks, on July 8, 2009, when the Authority's deputy director of finance (Mr. Lyles) changed her job assignments, on July 17, 2009, when Mr. Lyles suspended her for one day and on July 21, 2009, when Mr. Lyles cited her "for an unexcused absence for leaving work early without putting in a leave slip."

In an amended charge, Ms. Fears has alleged that the Authority committed additional unfair practices under sections 1201(a)(1) and (3) of the PERA as well as an unfair practice under section 1201(a)(4) of the PERA by "discriminat[ing] against [her] and treat[ing her] unfairly," by "humiliat[ing] and badger[ing her] in front of [her] peers," by lying to her and setting her up to fail, by giving her new job assignments without the proper training to perform them, by suspending her for two days and by "entic[ing] or otherwise coerc[ing] fellow employees into participating in this plot of harassment."

The Authority contends that the charge should be dismissed because Ms. Fears did not present a prima facie case during her case-in-chief. The Authority alternatively contends that the charge should be dismissed because any actions it took against her were for sound business reasons.

An employer commits an unfair practice under section 1201(a)(3) of the PERA if it discriminates against an employe 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 derivatively violates section 1201(a)(1) of the PERA 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 takes an action against an employe for a non-discriminatory reason. 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 employe engaged in a protected activity, (2) that the employer knew that the employe 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). "[T]he isolated conduct of a single employe for her own benefit" is not a protected activity, Coatesville Area School District, 20 PPER ¶ 20186 (Final Order 1989), but the filing of a grievance is. Commonwealth of Pennsylvania, Department of Public Welfare, Somerset State Hospital, 27 PPER ¶ 27086 (Final Order 1996). An overt display of anti-union animus will support a finding of a discriminatory intent on the part of the employer. City of Erie, 29 PPER ¶ 29001 (Final Order 1997). The timing of events coupled with an insubstantial explanation for an adverse employment action by the employer will support the same finding. Lehighton Area School District v. PLRB, 632 A.2d 439 (Pa. Cmwlth. 1996). So will the timing of events coupled with the employer's disparate treatment of similarly situated employes. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). 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). Evidence of post-charge conduct may be relied upon to shed light on the true character of the events set forth in a charge. PLRB v. General Braddock Area School District, 380 A.2d 946 (Pa. Cmwlth. 1977). 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 employe 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).

An employer commits unfair practices under sections 1201(a)(1) and (4) of the PERA if it discriminates against an employe for having filed a charge with the Board. Eastern Lancaster County School District, 40 PPER 11 (Final Order 2009). The analysis to be employed in disposing of a charge under section 1201(a)(4) mirrors the analysis to be employed in disposing of a charge under section 1201(a)(3). Lebanon County, 32 PPER ¶ 32006 (Final Order 2000). Again, discriminatory motivation creates the offense. Id.

As to the charge that the Authority committed unfair practices under sections 1201(a)(1) and (3) of the PERA by retaliating against her "for filing Grievances and standing up to Management," a close review of the record shows that Ms. Fears did not present a prima facie case during her case-in-chief. She established that in May and June 2009 she engaged in a protected activity by prosecuting a grievance involving Mr. Brown (findings of fact 3-5)[7] and that by June 12, 2009, the Authority knew that she had done so (finding of fact 6). She also established that on June 15, 2009, the Authority suspended

[7] By the end of Ms. Fears' case-in-chief, the record showed that she also engaged in protected activity by "pushing" AFSCME Local 1971 to file a grievance for Mr. Porter, who had been terminated by the Authority, and by "stepp[ing] in to handle" Darren Den, who had been having "problems" in the Authority's finance department (N.T. 73, 87-90, 113). The record, however, did not show when she did so. Nor did the record show that the Authority was aware that she had done so. Thus, the fact that she engaged in additional protected activity provides no support for the charge. See Montour County, infra (discrimination charge dismissed where the record did not show that the employer had been aware of the alleged discriminatee's protected activity).

her flex time for two weeks (finding of fact 9), that on July 8, 2009, the Authority changed her job assignments (finding of fact 10), that on July 15, 2009, the Authority suspended her for one day (finding of fact 12) and that on July 21, 2009, the Authority docked her one-half hour pay for an unexcused absence (finding of fact 13).[8] She did not establish, however, that the Authority's actions were discriminatorily motivated. Indeed, noticeably absent from the record is any evidence of an overt display of anti-union animus by the Authority, of an insubstantial explanation for the Authority's actions or of any disparate treatment of her by the Authority. Accordingly, the charge must be dismissed. See Perry County, supra (discrimination charge to be dismissed if the charging party does not present a prima facie case during its case-in-chief).

In support of the charge relating to the Authority's two week suspension of her flex time, Ms. Fears testified that the suspension was in violation of a collective bargaining agreement between the Authority and AFSCME Local 1971 providing for a written warning for a first infraction of the Authority's flex time policy (N.T. 16). The Board, however, has no jurisdiction to find an employer in violation of a collective bargaining agreement. Parents Union for Public Schools in Philadelphia v. Board of Education of the School District of Philadelphia, 480 Pa. 194, 389 A.2d 577 (1978). Moreover, simply because an employer violated a collective bargaining agreement does not mean that it must have been discriminatorily motivated when it did so. Furthermore, prior to the Authority's suspension of her flex time, Ms. Fears admitted that she had not been swiping in and out for lunch for a period of months (N.T. 15). Thus, even assuming without deciding that the Authority's two week suspension of her flex time was in violation of a collective bargaining agreement, Ms. Fears' testimony provides no basis for finding that the Authority was retaliating against her "for filing Grievances and standing up to Management."

In support of the charge relating to the Authority's change to her job assignments, Ms. Fears testified that the Authority was "harassing" her at the time (N.T. 32). Her testimony was conclusory, however, and as such not substantial evidence that the Authority was retaliating against her "for filing Grievances and standing up to Management." As Hearing Examiner Tietze explained in dismissing a substantially similar charge in Southern Tioga School District, 39 PPER 118 (Proposed Decision and Order 2008):

> "The Union also alleges that the principle's 'attitude and demeanor of unfriendliness' are further proof of her 'retaliatory conduct.' While the principal might not be as gregarious as Barrett and Haase might wish her to be, there is no

[8] At the hearing, Ms. Fears also established that the Authority did not process her leave slips in the same way it processed the leave slips of other employes (N.T. 86-87), but a close review of the specification of charges does not show that she charged that the Authority retaliated against her in the processing of her leave slips. The Board, of course, only has jurisdiction to decide the unfair practices alleged in a charge. Iroquois School District, 37 PPER 167 (Final Order 2006); Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974). Thus, to the extent that Ms. Fears contends that the Authority committed unfair practices as to the processing of her leave slips, no such unfair practices may be found. Even if the Board had jurisdiction to find that the Authority committed unfair practices as to the processing of her leave slips, no such unfair practices may be found as the record shows that the Authority eventually processed her leave slips (N.T. 87). There is, therefore, no basis for finding that the Authority took any adverse action against her in the processing of her leave slips. To the extent that Ms. Fears contends that the Authority's processing of her leave slips reflects anti-union animus on its part, the record provides no better support for her contention. Notably, the record does not show that she and the other employes were similarly situated, so there is no basis for finding that the Authority subjected her to disparate treatment in the processing of her leave slips. See Erie City School District, 40 PPER 12 (Final Order 2009)(discrimination charge alleging disparate treatment dismissed where there was no showing that the employer treated the alleged discriminatee any differently from any similarly situated employe).

evidence that her perceived standoffishness is in any way related to the prior year's grievances.

* * *

Assertions about whether the principal was 'unfriendly' or 'unsmiling' or 'unpleasant' or 'unresponsive,' are so conclusory and subjective as to be of little use in revealing any motive. Even if the principal were the Xanthippe the Union argues her to be, it is her motive that matters in a Section 1201(a)(3) charge. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981)."

Id. at 407. Moreover, she admitted that the job assignments of other employes were changed along with hers (N.T. 65-68, 70), which undercuts any basis for finding that the Authority changed hers in retaliation "for [her] filing Grievances and standing up to Management."

In support of the charge relating to the Authority's one day suspension of her, Ms. Fears testified that she walked out of a meeting because the Authority was "badgering," harassing" and "bothering" her "for filing Grievances and standing up to Management" (N.T. 21-22). Again, however, her testimony was conclusory and as such not substantial evidence that the Authority suspended her "for filing Grievances and standing up to Management," id, especially since she admittedly walked out of the meeting.

In support of the charge relating to the Authority's docking of her pay, Ms. Fears testified that the collective bargaining agreement between the Authority and AFSCME Local 1971 provides that sick leave is not to be "unduly withheld" (N.T. 30). She also presented doctors' excuses supporting her use of sick leave on the day in question (Complainant Exhibits 12 and 15). Again, however, the Board has no jurisdiction to find an employer in violation of a collective bargaining agreement. Parents Union for Public Schools in Philadelphia, supra. Moreover, as noted above, simply because an employer may have violated a collective bargaining agreement does not mean that it must have been discriminatorily motivated when it did so. Furthermore, she did not establish that she ever presented the doctors' excuses to the Authority before it docked her pay, so there is no basis for finding that the Authority docked her pay in retaliation "for [her] filing Grievances and standing up to Management."

In further support of the charge, Ms. Fears presented testimony by AFSCME Local 1971's president (Mr. Council) that the Authority began "harassing" him after he became president (N.T. 91-92, 97-98). She also established that the Authority referenced his activity as AFSCME Local 1971's president when it expressed its concern that he had "shown a lack of attention to [his] responsibilities as Account Clerk II in the Finance Department" (N.T. 94-95; Complainant Exhibit 28). The timing of events alone will not support the finding of an unfair practice, however. Pennsylvania State Park Officers Association, supra. Moreover, President Council's testimony, like Ms. Fears,' was conclusory and, therefore, not substantial evidence that the Authority was retaliating against him, much less against her "for filing Grievances and standing up to Management." Furthermore, the Authority's reference to President Council's activity as AFSCME Local 1971's president was non-coercively phrased. As a matter of free speech, a non-coercively phrased statement by an employer is not evidence of anti-union animus, City of Williamsport, 26 PPER ¶ 26202 (Final Order 1998); City of Easton, 9 PPER ¶ 9109 (Nisi Decision and Order 1978), so the Authority's reference to President Council's activity as AFSCME Local 1971's president provides no better support for finding that the Authority was retaliating against her "for filing Grievances and standing up to Management."

Ms. Fears also presented her own testimony about post-charge events (an unsatisfactory performance evaluation of her (finding of fact 20) and a non-ranking of her for a promotion (findings of fact 23-25)). According to her, the Authority improperly referenced her suspensions in evaluating her performance as unsatisfactory and thereby evidenced a continuing pattern of retaliating against her "for filing Grievances and standing up to Management" that began with its suspension of her flex time (N.T. 43). She posits that her non-ranking for the promotion reflects a continuation of the same pattern because she had more experience (13 years) than the employe (Mr. Galdo) who was ranked

for promotion (five years) (N.T. 48). As noted above, however, there is no basis for finding that the Authority retaliated against her in the past. Moreover, the fact that the Authority referenced her suspensions in evaluating her performance as unsatisfactory is unremarkable in that an employer may properly consider an employe's overall conduct in evaluating their performance. Furthermore, she did not establish that experience was the determining factor for promotions, so the fact that she had more experience than Mr. Galdo is equally unremarkable. Thus, the post-charge events provide no support for a finding that the Authority retaliated against her "for filing Grievances and standing up to Management" when it suspended her flex time, changed her work assignments, suspended her for one day and docked her pay.

Even if Ms. Fears had presented a prima facie case during her case-in-chief, the result would be the same. In rebuttal to her case-in-chief, the Authority presented credible testimony that it suspended her flex-time, assigned her new duties, suspended her for one day and docked her pay for non-discriminatory reasons (findings of fact 9, 10, 12 and 13). The Authority also established that AFSCME Local 1971 has filed on an annual basis 8-10 grievances, the vast majority of which the Authority and AFSCME Local 1971 have settled short of arbitration (finding of fact 3), and that after President Council became president he and Mr. Thomas settled the grievance involving Mr. Brown and negotiated a change in the procedure for notifying human resources of a missed swipe (finding of fact 17). The Authority further established that it rated her performance as unsatisfactory for non-discriminatory reasons (finding of fact 20) and that Mr. Galdo had more experience as an accountant I than she did and was more qualified than she was (finding of fact 24). In addition, the Authority established that it processed in due course grievances President Council filed over her unsatisfactory performance evaluation and non-ranking for promotion to accountant II (findings of fact 21, 22, 26 and 27). Although she testified that AFSCME Local 1971 has been filing fewer grievances because Chief Steward "Deborah Whitehead and some of the other stewards appear to be in collusion with management" (N.T. 56), no anti-union animus on the part of the Authority is apparent on that record. Thus, it is apparent that the Authority would have taken the same actions against her even if she had not engaged in protected activity.

As to the amended charge alleging that the Authority committed unfair practices under sections 1201(a)(1), (3) and (4) of the PERA by "discriminat[ing] against [her] and treat[ing her] unfairly," by "humiliat[ing] and badger[ing her] in front of [her] peers," by lying to her and setting her up to fail, by giving her new job assignments without the proper training to perform them, by suspending her for two days and by "entic[ing] or otherwise coerc[ing] fellow employees into participating in this plot of harassment," a close review of the record likewise shows that Ms. Fears did not present a prima facie case during her case-in-chief. Accordingly, the amended charge also must be dismissed. See Perry County, supra (discrimination charge to be dismissed if the charging party does not present a prima facie case during its case-in-chief).

In support of the amended charge, Ms. Fears presented testimony that the Authority set her up to fail by not providing her with proper training after it changed her work assignments (N.T. 38-40) and that Mr. Thomas attended one of her training sessions (N.T. 39). She admitted, however, that the Authority provided her with training by the trainer of her choice (Ms. Moore) (N.T. 69-70) and that a steward for AFSCME Local 1971 (Ms. Tillman) attended the training session that Mr. Thomas attended (N.T. 39). No discriminatory conduct on the part of the Authority is apparent on that record.

Ms. Fears also established that the Authority suspended her for two days after she campaigned for Mr. Council to be president of AFSCME Local 1971 (findings of fact 16-17), but she did not establish that the Authority knew that she had campaigned for him. Thus, there is no basis for finding that the Authority suspended her for having been involved in "the election of Executive Board Members of AFSCME Local 1971" as she specifies in the amended charge. See Montour County, 35 PPER 147 (Final Order 2004) (discrimination charge dismissed where the record did not show that the employer had been aware of the alleged discriminatee's protected activity).

Ms. Fears further established that President Council's election as president occurred immediately in between her two days of suspension (findings of fact 16-17) and

that an employe in payroll (Ms. Sklaraw) emailed her that "[y]our LWOP for the period of 1/4-1/17 = **14.0 HRS** . . . will be . . . docked from your paycheck of 2/4/10" (finding of fact 18). She posits that the timing of her two days of suspension makes them suspicious under the circumstances (N.T. 38). She also would have the Board find that the docking of her pay would have occurred earlier "if personnel was doing their job" (N.T. 37). Suspicion is not a substitute for substantial evidence, however. Shive, supra. Even if it were, nothing in the timing of her suspension is suspicious since she did not establish that the Authority knew that the election was to be held, much less when it was to be held. The timing of her docked pay is no more suspicious.

Even if Ms. Fears had presented a prima facie case during her case-in-chief, the result would be the same. In rebuttal to her case-in-chief, the Authority presented credible testimony that it suspended her for two days for non-discriminatory reasons (finding of fact 20) and that it typically docks pay in the next pay period (finding of fact 18). Thus, it is apparent that the Authority would have taken the same actions against her even if she had not engaged in protected activity or filed the charge.

CONCLUSIONS

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

1. The Authority is a public employer under section 301(1) of the PERA.

2. Ms. Fears is a public employe under section 301(2) of the PERA.

3. The Board has jurisdiction over the parties.

4. The Authority 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 complaints are rescinded and the charges 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 tenth day of November 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner