

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING :
ENGINEERS, LOCAL 66 :
 : Case No. PERA-C-10-414-E
 v. :
 :
FRANKLIN TOWNSHIP :

PROPOSED DECISION AND ORDER

On November 12, 2010, the International Union of Operating Engineers, Local 66, (Union or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Franklin Township (Township or Respondent) alleging that the Township violated Sections 1201(a)(1),(3) and (4) of the Public Employe Relations Act (PERA).

On November 30, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing in which the case was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and March 23, 2011, in Pittsburgh was scheduled as the time and place of hearing if necessary.

A hearing was necessary but was changed to March 15, 2011, on the motion of the Respondent without objection from the Complainant. The hearing was then continued to April 20, 2011, the motion of the Respondent without objection from the Complainant.

The hearing was held on the rescheduled date. The parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. Franklin Township is a public employer within the meaning of Section 301(1) of PERA.
2. The International Union of Operating Engineers, Local 66 an employe organization within the meaning of Section 301(3) of PERA.
3. On October 23, 2008, the Board certified the Union as the exclusive representative of a unit of the Township's employes comprised of all full-time and regular part-time nonprofessional employes including but not limited to clerical workers, assistant secretary, road department workers, mechanics, equipment operators and laborers; and excluding Township Secretary, Township Code Enforcement Officer, management level employes, supervisors, first level supervisors, confidential employes, and guards as defined in the Act. At PERA-R-08-347-W (N.T. 9, Board Exhibit 1)
4. The Union and the Township have been bargaining for their first collective bargaining agreement for over two years and are still without an agreement. (N.T. 175, 194, Exhibit 8)
5. At the time of the PLRB certification, there were two full-time road department employes and two full-time office employes. (N.T.132)

6. By the time of the hearing in this charge, the road department had only one full-time employe, Tom Shefton. The other full-time employe, John Cihonski, retired in April, 2010. The Township did not fill his position. (N.T. 32-33, 51)
7. The two office employes are Kathy Raabe Jesteadt and Deborah Zbuckvich. Jesteadt serves as the Township Secretary-Treasurer and also the zoning officer under the second class township code. Zbuckvich serves as her assistant in both positions. (N.T. 9, 11, 14, 15, 175, Township Exhibit 1)
8. Since November 1, 2010, when the Township reduced her from full-time to part-time, Zbuckvich has been a 24 hour a week employe. (N.T. 112)
9. In 1996, shortly after Zbuckvich began with the Township as a part-time clerical employe, she was promoted to the full-time assistant township secretary-treasurer/zoning and has worked as a full-time employe since that time. (N.T. 105)
10. Jesteadt's position is a management level employe under Section 301(16) of PERA and is excluded from the unit. Zbuckvich's position is in the certified unit. She is a member of the union and serves as its steward. (N.T. 13-14)
11. During the contract negotiations the Township's Board of Supervisors questioned the need for two full-time employes in the road department and two full-time employes in the office. Supervisor Bob Thompson stated on more than one occasion during negotiations that the Township, in his opinion, based on its population, was only big enough to have one and one-half persons in the office and one and one-half persons in the road department. (N.T. 120, Township Exhibits 1, 2, 3 and 4)
12. Thompson's observations of the office convinced him that the office work could be completed with one full-time and one part-time clerical employe. (N.T. 134)
13. During the negotiations, the Township proposed an "opt-out" provision for health insurance for Zbuckvich by which the Township would pay her \$300 a month as a waiver payment for her to opt-out of the Township's insurance plan rather than pay the \$1,032.41 per month to continue her under the Township's plan. (N.T. 54, 73, Township Exhibit 6, at pp20-21)
14. On August 19, 2010, the Union requested that the Pennsylvania Labor Relations Board appoint a fact-finding panel pursuant to Section 802 of PERA to help resolve the impasse in negotiations. (N.T. 57, 79, Township Exhibit 8)
15. On September 20, 2010, the Pennsylvania Labor Relations Board appointed a fact-finding panel. (N.T. 113, Union Exhibit 3)
16. Zbuckvich participated in the fact-finding hearing by giving testimony on several matters in dispute. (N.T. 113-114)
17. Zbuckvich testified that she was not interested in the Township's "opt-out" contract proposal for health insurance. She testified in favor of the Union's proposal that employes participate in the Union's central pension fund by contributing 20 cents of their own money into the fund. She also testified about shifting vacation days and holidays. (N.T. 55, 113-114)
18. On September 28, 2010, the fact-finding panel issued its recommendations. The panel did not recommend the Township's "opt-out" provision and it recommended that the Township accept the Union's pension proposal. (N.T. 58, 79, Township Exhibit 9)
19. On September 30, 2010 the Township received the report. On October 4, 2010, at the next regular Board meeting, the Township supervisors rejected the fact-finder's report. (N.T. 58)

20. On October 20, 2010, Jesteadt sent an e-mail to the supervisors that set forth a plan for allocating the office work between her and Zbuckvich that would accommodate the reduction of Zbuckvich's hours and the closing of the office on Fridays. The plan was in response to Supervisor Herman Bauer's request. (N.T. 60, 79, Township Exhibit 10)

21. On November 1, 2010, the Township supervisors announced to Zbuckvich that her hours were being reduced to part-time, from 40 hours to 24 hours a week. (N.T. 75, 79, Township Exhibit 15)

22. Township Supervisor Bauer testified that he and the other two supervisors, Janet Gray and Bob Thompson, made the decision as a consensus manner to reduce Zbuckvich's hours from 40 hours to 24 hours and to eliminate her health insurance benefits. (N.T. 10)

23. The supervisors first began formal discussions about reducing Zbuckvich's hours and eliminating benefits at the budget meetings of September and October, 2010. (N.T. 10)

24. The supervisors' discussions involved the relative need for two full-time clerical employes, given the Township's population and area. Also, the supervisors noted a drop in building permit activity and septic permit activity. Building permits decreased of 27% from 2001-2005 to 2006-2010. Septic permits decreased 52% from the 2001- 2005 to 2006-2010. Also, the work to complete the 2010 census had been completed. (N.T. 10, 63, 79, Township Exhibit 11)

25. Zbuckvich is responsible for approving building permits. She verifies that the plans conform to the Township's building code which came into effect in 2004. This involves her spending time with township residents talking with them about the permit process. (N.T. 106-107)

26. Zbuckvich is also responsible for answering the phone and doing the Township's payroll. (N.T. 107)

27. Zbuckvich backs up Jesteadt if she cannot do either the quarterly payroll tax reports or Right to Know requests. (N.T. 107)

28. Beginning in 2008, the Supervisors began reducing the duplication of work done by the two clerical employes. For example, the Supervisors directed Zbuckvich to no longer attend the Supervisors' monthly meetings. (N.T. 10, 117)

29. From 2008 to 2010, the Township revenues have been trending downward. In those years, there was a net decrease in revenue of \$38,089. Earned income tax revenue decreased by \$25,973; liquid fuels fund decreased by \$6,573 and DEP reimbursement decreased by \$9,242 from 2008 to 2010. (N.T. 71, 79, Township Exhibit 14)

30. From 2008-09 to 2010-11, the Township saw an increase in expenditures for employe health insurance costs. For that period, the cost increases for the four kinds of insurance coverage were:

Single (S)	\$3,600 to \$4,776	33%
Parent and child (PC)	7,164 to 9,588	34%
Husband and Wife (HW)	9,852 to 11,868	29%
Family (F)	10,752 to 13,308	24%

(N.T. 68-70, Township Exhibit 13)

31. In recent years, the Township saw an increase in expenditures for diesel fuel, road materials and winter maintenance materials. (N.T. 70), Township Exhibit 13)

32. The Township's reduction of Zbuckvich's status from full-time to part-time provided the Township with an estimated cost savings of \$29,000. (N.T. 100-101)

33. In addition to reducing Zbuckvich's hours, the supervisors also reduced the public hours of the township offices, closing the office on Friday. The new hours were Monday through Thursday, 9 a.m. to 4 p.m., a change from Monday through Friday, 8 a.m to 4 p.m. (N.T. 31)

34. All three supervisors, Herman Bauer, Bob Thompson and Janet Gray, testified at the unfair practice hearing that Zbuckvich's participation in the fact-finding and negotiations had no bearing on their decision to reduce her to a part-time employe. (N.T. 74, 135-36, 150)

DISCUSSION

The Union alleges that the Township committed unfair practices in violation of Section 1201(a)(1), (3) and (4) of the Public Employee Relations Act when it retaliated against its steward, Deborah Zbuckvich.

The Union's specification of charges alleges,

Since on or about November 1, 2010 and all times thereafter, Respondent has retaliated against Local 66, steward Deborah Zbuckvich, because of her choice to have Union Representation; because she testified at a PLRB fact-finding hearing; and because Local 66 rejected Respondent's proposal made during contract negotiation that Deborah Zbuckvich opt-out of receiving health insurance from Respondent. This retaliation includes, but is not limited to the following: Respondent reducing Deborah's hours from full-time to part-time and reducing her benefits.

The Section 1201(a)(3) and 1201(a)(4) charges will be discussed first, because for the complainant to successfully make a case under both sections, the complainants must prove unlawful employer motivation. For a Section 1201(a)(3) allegation, the complainant must prove that the Township was motivated to take the adverse action against Zbuckvich because of her union activity as manifested in various ways. For a Section 1201(a)(4) allegation, the complainant must prove that the Township was motivated to take the adverse action specifically because of her use of a PLRB process, in this case, fact-finding. The complainant has the burden of proving the legal elements for each charge by substantial and legally credible evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

Section 1201(a)(3) Allegation

Section 1201(a)(3) of PERA prohibits "public employers, their agents or representatives from ... [D]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization." 43 P.S. 1101.1201(a)(3). In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must prove that the employe engaged in protected activity, that the employer was aware of that protected activity, and that but for the protected activity the adverse action would not have been taken against the employe. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The complainant must establish these three elements by substantial and legally credible evidence. Shive, supra. and St. Joseph's Hospital, supra.

The Union proved the first two elements of the St. Joseph's Hospital test. There is no dispute about these two elements. Zbuckvich engaged in protected activity by serving as the union steward, by participating in negotiations for the collective bargaining agreement and by attending and testifying at the fact-finding hearing to

resolve the contract. The employer was aware of her protected activity. From the very beginning, she made no secret of her union involvement.

The dispute in this case is whether the union has proven the third element of the St. Joseph's Hospital test, that the Township was motivated by anti-union animus in reducing Zbuckvich's hours.

In a charge of discrimination it is the employer's motivation which creates the offense. Perry County v. PLRB, 364 A.2d 898 (Pa. Cmwlth. 1994). Since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. PLRB v. Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982); St. Joseph's Hospital, *supra*. However, an inference of anti-union animus must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." Shive, *supra* at 313.

In Child Development Council of Centre County (Small World Day Care Center), 9 PPER ¶ 9188 (Final Order, 1978), the Board stated:

There are a number of factors the Board considers in determining whether anti-union animus was a factor in the layoff of the Complainant: the entire background of the case, including any anti-union activities by the employer; statements by the discharging supervisor tending to show the supervisor's state of mind; the failure of the employer to adequately explain the discharge, or layoff, of the adversely affected employe, the effect of the discharge on unionization efforts-for example, whether leading organizers have been eliminated; the extent to which the discharged or laid-off employe engaged in union activities; and whether the action complained of was "inherently destructive" of important employe rights.

9 PPER 9188, at 380.

The Board has also noted that the timing of the adverse action against the employes would be a factor that could be used to infer that anti-union animus was the motivation for the employer action. PLRB v. Berks County (Berks Heim County Home), 13 PPER ¶ 13277 (Final Order, 1982).

The Union, as the complainant, bears the burden of proving the elements of the alleged violations by substantial and legally credible evidence. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A. 2d 1069 (1977). Substantial evidence means evidence that does more than just create a suspicion of the existence of the fact necessary to establish each element of the unfair practice charge. Township of Upper Makefield, 10 PPER ¶ 10299 (Nisi Order of Dismissal, 1979).

The first basis for inferring animus is the close timing factor. The Union argues that the timing of the Township's reduction of Zbuckvich's hours on November 1, 2010, is suspicious because of its proximity to the date of her appearance at the fact-finding hearing on September 20 and the fact finder's report received by the Township on September 30. Timing, when considered with other factors, may be considered as a factor from which to infer anti-union animus. See Berks Heim County Home, 13 PPER ¶13277 (Final Order, 1982), *aff'd* 14 PPER ¶14106 (Berks CCP, 1983).

On August 19, 2010, the Union filed a request to the PLRB to appoint a fact-finding panel to resolve the impasse over the terms of the first collective bargaining agreement with the Union as the certified representative. When the Union presented its case to the fact-finding panel it called Zbuckvich to give testimony. Zbuckvich testified that she

was not interested in the Township's "opt-out" contract proposal for health insurance. She testified in favor of the proposal of the employees' participation in the Union's central pension fund by contributing 20 cents of their own money into the central pension fund. She also testified about shifting vacation days and holidays. On September 28, the fact finder issued his report. On September 30, the Township received the report. The fact-finding report did not recommend the Township's "opt-out" provision and it recommended that the Township accept the Union's pension proposal. On October 4, 2010, at the next regular Board meeting, the Township supervisors rejected the fact-finder's report. On November 1, the Township informed Zbuckvich that her hours were being reduced.

In answer to the close timing argument, the decision to reduce Zbuckvich's hours was actually related to the mandatory schedule for preparation of the Township's annual budget which happened to coincide with the fact-finding schedule. The Township's witnesses provided credible testimony that the timing of the announcement of the reduction in Zbuckvich's hours was caused by the annual budget preparation schedule and not the issuance of the fact-finding report. Also, it should be noted that the Township's interest in reducing hours was not brought up for the first time at either the budget making or the fact-finding. Throughout the negotiations, the Township's negotiators had mentioned their interest in reducing the workforce. Accordingly, the factor to close timing will not be given weight in inferring that anti-union animus motivated the supervisors in their decision to reduce Zbuckvich's hours

Even if timing was found as a valid basis to infer that animus motivated the decision to reduce hours, the Union must present additional evidence to make a prima facie case because timing alone is insufficient basis to infer anti-union animus. 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).

The Union advances a second basis for inferring animus, that the Township has failed to "adequately explain" the adverse action of the reduction of Zbuckvich's hours. The Union contends that Supervisors' decision was done without a study of the office operations and actual employe workload. The Union contends that the decision was a mere formality for a decision that had been arrived at long before. Supervisor Bauer admitted that he had not spent a lot of time in the office. The Union contends that Zbuckvich's permit work alone would justify maintaining her full-time status, since the other clerical employe, Jesteadt, did not perform that work.

Having listened to and observed the witnesses and having reviewed the written documents, the evidence is not that clear that the supervisors failed to "adequately explain" the reduction of the clerical hours. Despite Supervisor Bauer's admission that he had not spent a lot of time in the office, he had the benefit of the two other Supervisors' observations from their more frequent visits. He and the other two supervisors reached a consensus, based on observations and data, that the Township office could function with only one full-time and one part-time employe. In addition, the Township showed that these reductions were also caused by reductions in revenue. On this record, it is difficult to conclude that the supervisors did not adequately explain the decision. Accordingly, this factor will not be accorded weight to infer that the decision was based on animus.

Section 1201(a)(4) Allegation

The Union alleges that the Township violated Section 1201(a)(4) for retaliating against Zbuckvich for testifying at a PLRB fact-finding hearing. Section 1201(a)(4) of PERA that "public employers, their agents or representatives are prohibited from...discharging 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." 43 P.S. 1101.1201(a)(4). The Board has long held that Section 1201(a)(4) protects an employe from discrimination because the employe has participated in a Board proceeding such as a representation petition, an unfair practice case. PLRB v. Beaver County, 10 PPER ¶ 10056 (Final Order, 1979). In this case, the Union alleges that the

discriminatory treatment was motivated by Zbuckvich's testimony before a fact-finding panel appointed by the Board pursuant to Section 802 of PERA, a procedure that falls under the protected activity listed in Section 1201(a)(4) of PERA.

In order to sustain a charge of discrimination under Section 1201(a)(4) of PERA, the complainant must prove that the employee engaged in one of the activities mentioned in the statute, that the employer was aware of that protected activity, and that but for the protected activity the adverse action would not have been taken against the employee. The Board requires proof similar to that required to prove anti-union discrimination under Section 1201(a)(3) of PERA. Mayview State Hospital, 17 PPER ¶ 17221 (Proposed Decision and Order, 1986), 18 PPER ¶ 18086 (Final Order, 1987), closely follows the analysis in St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The complainant must establish these three elements by substantial and legally credible evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). St. Joseph's Hospital, *supra*.

The Union proved the first two elements of the Section 1201(a)(4) charge. Zbuckvich testified before the fact-finding panel in September, 2010. The fact finding panel is one of the impasse resolution processes under Section 802 of PERA. The Township was aware of her testimony before the fact-finding panel because township supervisors also attended the fact-finding hearing.

The issue is whether the Township was motivated by Zbuckvich's testimony given at the fact-finding panel. The Board will permit the complainant to make its case based on inferences from the facts of record. PLRB v. Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982); St. Joseph's Hospital, *supra*.

As explained in the discussion of the Section 1201(a)(3) allegation, the evidence reveals that the Supervisors' decision to reduce Zbuckvich to part-time status was motivated by their concept of an economical way to deliver services and not by their desire to retaliate against Zbuckvich for her union activities in general or her testifying at the fact-finding hearing in particular. The supervisors would have reached the same decision whether there was fact-finding or no fact-finding. Without proof of illegal motivation, the Section 1201(a)(4) allegation will be dismissed.

Section 1201(a)(1) Allegation

Section 1201(a)(1) of PERA prohibits public employers from "interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act." 43 P.S. 1101.1201(a)(1). An independent violation of Section 1201(a)(1) of PERA occurs, "where in light of the totality of the circumstances the employer's actions have a tendency to coerce a reasonable employee in the exercise of protected rights." Fink v. Clarion County, 32 PPER ¶ 32165 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employees have in fact been coerced. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985); Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER ¶ 97 (Final Order, 2004).

"If the complainant carries its burden of establishing a prima facie case of a Section 1201(a)(1) violation, the burden shifts to the respondent to establish a legitimate reason for the action it took and that the need for such action justified any interference with the employees' exercise of their statutory rights. Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989)." Bethel Park Custodial/Maintenance Educational Personnel Association v. Bethel Park Sch. Dist., 27 PPER ¶ 27033 (Proposed Decision and Order, 1995). In Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER ¶ 26155 (Final Order, 1995), the Board held that an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employee rights. Id. at 360.

As discussed above, the Township witnesses explained that the reduction of Zbuckvich's hours was necessitated by fiscal concerns of declining revenues and

increasing expenditures and their belief that the Township could function with one full-time and one part-time office employee. Considering these facts, the Township has set forth legitimate reasons that would outweigh concerns that the decision interfered with employe rights guaranteed in PERA.

Section 1201(a)(5) Allegation

Finally, the Union in its brief alleges, for the first time, that the Township violated Section 1201(a)(5) of PERA when it reduced Zbuckvich's hours and benefits. The Township's action unilaterally changed the terms and conditions of employment which were mandatory subjects of bargaining in the middle of the parties' negotiations over their first collective bargaining agreement. An employer must maintain the status quo as to mandatory subjects of bargaining during negotiations for an initial contract with a newly-certified union. Moshannon Valley Education Support Professionals v. Moshannon Valley School District, 41 PPER 81 (Final Order, 2010). However, the Union did not charge this in its specification of charges and the Township, in its brief, properly objected to the Board considering the Union's Section 1201(a)(5) charge. Accordingly, there will be no discussion of this allegation.

CONCLUSIONS

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

1. That Franklin Township is a public employer within the meaning of Section 301(1) of PERA.
2. That the International Union of Operating Engineers, Local 66, is an employe organization within the meaning of Section 301(3) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That Franklin Township has not committed unfair practices in violation of Sections 1201(a)(1), (3) and (4) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge of unfair practices is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this twentieth day of January, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner