

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 538 :
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 :
 v. : CASE NO. PERA-C-11-332-W
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 ARMSTRONG COUNTY :
 :

PROPOSED DECISION AND ORDER

On October 5, 2011, Teamsters Local 538 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Armstrong County (County) violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA). The Union specifically alleged that the County unlawfully retaliated against Corrections Officer Richard Riffer for filing a grievance when the Warden issued a memo, on July 25, 2011, requiring shift supervisors to ensure that officers were not assigned to the same post on two consecutive days, unless required by operational needs.

On October 27, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on May 30, 2012, in Pittsburgh. During the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties timely filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4).
3. David Hogue is the Warden of the Armstrong County Jail (Jail). He became the Warden on January 19, 2006. (N.T. 78, 92).
4. Richard Riffer has been a corrections officer at the Jail for almost twenty-eight years. For three-to-four years prior to May 2011, Officer Riffer regularly worked the B-pod tower as an accommodation for his hearing disability. (N.T. 55-57).
5. The new Jail opened on August 9, 2003. (N.T. 103).
6. The Jail contains approximately 150-170 inmates. (N.T. 9-10, 102).
7. The Jail has two pods, one at each end of the building, called A-pod and B-pod. Each pod contains five housing units. Each pod has a corrections officer assigned as a pod rover and another officer assigned as a pod tower operator, on each shift. The Tower operator remains in the tower, operates the doors in the pod and watches the rover. (N.T. 9-10, 12, 96).
8. The tower assignment is considered to be better than the rover assignment because of less walking and prisoner contact. (N.T. 11, 27).
9. Central control is in the middle of the Jail. Two officers are assigned to control on both the eight-to-four shift and the four-to-twelve shift. Only one officer is assigned to control on the midnight shift. (N.T. 10, 94).
10. Officers assigned to control operate non-pod doors throughout the Jail, answer telephones, check and register visitors entering the Jail, perform head counts and complete shift reports. (N.T. 10).

11. There are two intake officers assigned to the booking area who document the arrival and departure of inmates. Utility officers work throughout the Jail delivering medicine, retrieving food trays and performing other assigned tasks as necessary. (N.T. 10, 97).
12. All officers begin their employment as a rover. There is no job or post bidding at the Jail. Only shifts are bid based on seniority. During bargaining in 2006, the Union proposed to include a job bidding provision in the collective bargaining agreement. The contract, however, did not include a job bidding provision. Officers do not receive additional compensation based on post assignments. (N.T. 11-12, 27, 52, 85, 161-162).
13. Matthew Hassa is the Union steward. He has worked at the Jail for eight years. When Officer Hassa worked as a rover, he worked that post every day. When he was assigned to B-pod tower, he worked there every day. He has been assigned to control for the past several years, and has worked in control every shift. Other officers rotated post assignments. (N.T. 9, 12-13, 15, 29-33, 38, 48-49).
14. A Deputy Warden prepares the schedules. Post assignments were formerly included on the posted schedules some years ago, but not anymore. Officer Hassa did not consult the schedule for his post assignment because it was always the same and he knew where to go. Assignment changes were rare and resulted from coverage necessitated by vacations and call-offs. (N.T. 12-14, 37).
15. In 2006 or 2007, shortly after becoming Warden, Warden Hogue changed the entire schedule to address complaints that some officers received more weekends off in an eight-week period than others. Warden Hogue changed to a sixteen-week scheduling cycle thereby ensuring that all officers received five weekends off in that period. (N.T. 92-93).
16. In 2009, Warden Hogue received complaints of favoritism. At that time, he ordered the lieutenants to rotate all the officers. Since that time, the lieutenants reported to the Warden that they were complying with that directive and rotating their personnel when, in fact, they were not rotating all their personnel. (N.T. 81-82, 86, 108, 110, 117, 138-139).
17. On May 6, 2011, Corrections Officer Mark Kellar retired. Officer Kellar worked in central control at the new Jail on the eight-to-four shift for eight years, since it opened in 2003. He worked in control every shift he worked except for a few times to cover another posting when it was necessary to fulfill operational requirements. (N.T. 41-44, 47-49).
18. Officer Riffer asked Warden Hogue to be permanently moved to central control to fill the post vacated by Officer Kellar. The Warden denied Officer Riffer's request. (N.T. 36, 57; Union Exhibit 1).
19. On May 16, 2011, Officer Riffer filed a grievance alleging that the Warden denied Riffer a permanent assignment to central control to retaliate against him for past legal issues. Officer Riffer has filed approximately four grievances in the past and has had some disability accommodations. He also alleged that the daylight shift operates on seniority and that, as the most senior officer, he should be given the chance to work in control. (N.T. 55, 58; Union Exhibit 1).
20. On May 19, 2011, Warden Hogue denied Officer Riffer's grievance. (N.T. 36; Union Exhibit 2).
21. The Union filed a Right-to-Know request with the Jail for post assignments from January 1, 2011, through June 30, 2011, to process Officer Riffer's grievance. Warden Hogue ordered his secretary to collect the information. He then ordered his Deputy Warden to analyze the collected information. The Deputy Warden reported his

conclusions to the Warden on July 25, 2011, the day the Warden issued the rotation memo. (N.T. 79-80, 118).

22. On July 25, 2011, the Deputy Warden informed Warden Hogue of the following: On the eight-to-four shift, five full-time officers were assigned to the same posts every shift they worked during the time period and that Officer Riffer had the same post due to his hearing disability; on the four-to-twelve shift, three full-time officers were assigned to the same posts every shift they worked; and on the twelve-to-eight shift, one full-time officer was assigned to the same post every shift he worked. Eight of thirty-two officers worked the same post every shift. The remaining officers in the jail rotated posts. (N.T. 80-82).

23. Also on July 25, 2011, upon learning that eight officers were not being rotated, Warden Hogue issued a memo to all officers, which was placed in the officers' mailboxes, stating as follows:

Effective on the 4-12 shift on today's date the following procedure will be implemented to ensure fair and equitable rotation of full time officers at the Armstrong County Jail: When posting officers for their shift, the Shift Supervisor will look at the prior day's posting sheet. The Lieutenant will not post an officer in the same post that he/she worked the day prior. This will apply to full time officers only. The only exception to this procedure will be in those cases where the posting would adversely impact the operation of the facility. If a Lieutenant must utilize an officer in the same post on consecutive days, an Incident Report will be submitted to the Warden detailing why it was necessary to do so.

(N.T. 17-18, 38, 60, 69, 81-85, 124; Union Exhibit 4).

24. As a result of the Warden's rotation policy, Officer Riffer now works in central control and the B-pod tower every other day, switching between the two. The other officers rotate between utility, intake, central control, A-pod and B-pod towers and pod rover. (N.T. 60-61, 68).

25. In the Warden's experience, when officers work with the same inmates every day, they become too friendly. The Warden believes that rotating officers keeps them "fresh" in the different areas of prison operation and post assignments. Rotating officers avoids complacency in performing duties and procrastination in completing paperwork for the shift. All officers must be able to cover any post on short notice for emergencies and to cover call-offs. (N.T. 83-84, 89, 99, 132-136).

26. Warden Hogue credibly and categorically denied ever telling anyone that the reason for the July 25, 2011 memo was because of Officer Riffer's grievance. (N.T. 87-88).

DISCUSSION

In its charge, the Union alleges that the County, through its authorized agents, i.e., Warden Hogue, "retaliated against Officer Richard Riffer for the filing of a grievance protesting Respondent's failure to assign him to a particular post in accordance with a long standing practice." (Specification of Charges). In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew that the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981).

In **Teamsters, Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order 1992), the Board stated that, under **Wright Line**, "once a **prima facie** showing is established that the

protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity." **Perry County**, 23 PPER at 514. Upon the employer's offering of such evidence, "the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual." **Teamsters Local #429 v. Lebanon County**, 32 PPER ¶ 32006 at 23 (Final Order, 2000). "The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct." **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 at 64 (Final Order, 1992).

The Board will give weight to several factors upon which an inference of unlawful motive may be drawn. In **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether anti-union animus was a factor in the [adverse action against] the Complainant." **Id.** at 380. These factors include the entire background of the case, including any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employee, the effect of the employer's adverse action on other employees and protected activities, and whether the action complained of was "inherently destructive" of important employee rights. **Centre County**, 9 PPER at 380.

In this case, the Union established that Officer Riffer was engaged in protected activity by filing the May 16, 2011 grievance, as well as four prior grievances, and that the Warden was aware of those activities. However, the Union did not establish that the Warden's denial of Officer Riffer's May 16, 2011 grievance was motivated by anti-union animus or that Warden Hogue refused to assign Officer Riffer to control on a daily basis due to his filing of the grievance. I credit Warden Hogue's testimony that he did not tell anyone that the reason for the July 25, 2011, memo was because of Officer Riffer's grievance. Accordingly, the record does not contain any anti-union statements or pretextual or shifting reasons on behalf of the employer from which to infer unlawful motive. The fact that the Warden denied the May 16, 2011 grievance on May 19, 2011, is not in itself evidence of animus. Further, the close timing between the May 6, 2011 grievance and the July 25, 2011 memo alone is insufficient to support an inference of animus. **Teamsters Local No. 764 v. Montour County**, 35 PPER 12 (Final Order, 2004); **AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry**, 16 PPER ¶ 16020 (Final Order, 1984). Accordingly, the Union did not establish a **prima facie** case of discrimination and the burden did not shift to the County to prove that it had legitimate business reasons for denying Officer Riffer a daily post assignment in control.

For purposes of Board review, if the Union files exceptions, I also conclude that, had the burden shifted to the County, the County established that the Warden was motivated by lawful and legitimate reasons when he denied Officer Riffer a permanent daily assignment in control. First, the record establishes that Warden Hogue was motivated by fairness since he became the Warden in 2006. At that time, the Warden received complaints that some officers were unfairly receiving more weekends off during the eight-week schedule cycle than others. Warden Hogue endeavored to correct the unfairness and created a sixteen-week schedule ensuring that all officers equally and fairly received five weekends off in the sixteen-week cycle.

Also, in 2009, the Warden learned of complaints of favoritism among officers in the Jail. Again, Warden Hogue addressed the unfairness by ordering his lieutenants, who are the shift supervisors, to constantly rotate post assignments of all officers. Since that time, the lieutenants reported to the Warden that they were complying with the rotation directive. However, on July 25, 2011, the Warden learned that the lieutenants were not complying with the 2009 rotation policy with respect to eight officers. Upon receiving this information, Warden Hogue immediately wrote the policy in a memo and caused it to be delivered to all the officers.

Warden Hogue credibly testified that he was unaware that eight officers were permanently assigned to certain posts in the Jail. He did not investigate the post

assignment rotations until the Union filed a right to know request seeking post assignments from January through June of 2011. Upon collecting that information for the Union, the Warden decided to analyze the information contained therein to process the grievance. It was only then that he discovered that eight of thirty-two officers were receiving permanent assignments. Because the eight officers and the shift supervisors were not in compliance with the Warden's 2009 rotation policy, he immediately issued a written memo to correct the behavior. The Warden's motivation to issue the July 25, 2011 memo was the discovery that supervisors were not following his 2009 rotation policy, not Riffer's grievance.

Indeed, the timing of the July 25, 2011 memo also supports an inference that Warden Hogue was motivated by redirecting his workforce to comply with his 2009 directive and not Officer Riffer's grievance. Officer Riffer filed his grievance on May 16, 2011 and the Warden denied it on May 19, 2011. Warden Hogue did not issue the memo until two months later because during this time, between May 16, 2011 and July 25, 2011, he was operating under the assumption that all officers rotated, which was also the reason for denying Officer Riffer's grievance. Warden Hogue issued the memo the same day that he discovered that eight of thirty-two officers were receiving permanent post assignments. The immediacy of his action upon discovering the operational error supports the inference that he was motivated to correct the operational error more than he was concerned with Officer Riffer's grievance.

Moreover, Warden Hogue credibly testified that, in addition to his original motivation in 2009 to implement the rotating post assignment policy to provide more fairness among officers in the Jail, he has since realized other benefits to a system where all the officers rotate. In the Warden's experience, when officers work with the same inmates every day, they become too friendly. Rotating officers may not completely cure that problem, but it helps reduce the tendency to be too friendly with inmates. Also, rotating officers prevents complacency that results from performing the same routine duties every day, and keeps officers "fresh." The Warden testified that rotating officers has the effect of limiting the procrastination of completing paperwork due at the end of a shift when the officer knows that he/she will not be reporting back to the post assignment the next day. More significantly, however, the Warden credibly testified that the rotation system facilitates the ability of officers to effectively cover any post on short notice in emergencies or to cover call-offs.

The Union spent time at the hearing attempting to establish a "long standing practice" of permanent post assignments. However, this case is not a bargaining violation case. Accordingly, the question of whether the Warden violated a past practice of permanently assigning senior officers is not before me. The only question here is whether Officer Riffer was denied a permanent assignment in control because of his grievance filings, and I answer that question in the negative.

To the extent that the Union's long-standing-practice argument is that a binding past practice entitled Officer Riffer to a permanent assignment in control and therefore the denial of that assignment yields an inference of animus against Officer Riffer, I also conclude that no such inference can be drawn here. In **Fraternal Order of Police, Lodge No. 7 v. City of Erie**, 41 PPER 149 (Final Order, 2008), the Board affirmed the Hearing Examiner's conclusion that the chief of police discriminated against a sergeant who won a grievance arbitration award placing him in a position for which the chief had previously selected another officer. When the other officer initially received the position, he was promoted to the rank of lieutenant. At that time, the chief informed union officials and the grievant that he had no choice but to promote the selected officer to the rank of lieutenant because it had been a past practice that a lieutenant occupy the position, thereby entitling the individual in that position to the rank of lieutenant. However, when the grievant was given the position pursuant to the award, he was not promoted to lieutenant, which constituted discrimination. **City of Erie, supra.**

However, unlike the grievant in **City of Erie, supra**, Officer Riffer was not entitled to a permanent assignment in control because there was no past practice that officers were entitled such assignments. In **Pennsylvania State Troopers Ass'n v.**

Commonwealth of Pennsylvania, Pennsylvania State Police, 43 PPER 53 (Final Order, 2011), the Board held that, for a policy or practice to constitute a binding past practice, it must be consistently applied bargaining unit wide. The record in this case, however, shows that only eight of thirty-two full-time officers received permanent assignments and that the practice of rotating officers was the dominant practice. Thus, there was no past practice entitling Officer Riffer to a permanent assignment in control or requiring Warden Hogue to grant such an assignment, and Warden Hogue's refusal to grant Officer Riffer or anyone else a permanent assignment, consistent with his 2009 policy, does not yield or support an inference of animus.

Accordingly, I conclude that the Warden was not motivated by Officer's Riffer's Union or protected activity when he denied him a permanent assignment in control. Rather, Warden Hogue was motivated by his desire to correct an operational error and a failure of his lieutenants to comply with his 2009 rotation policy, which he reiterated in his July 25, 2011 memo. Furthermore, the Warden's rotation policy is supported by legitimate business reasons based on his vast experience with the dangers and effective protocols related to the operation of a Jail where, as the Warden stated, there are inmates "that will kill you." (N.T. 84).

CONCLUSIONS

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

1. The County is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The County has **not** committed unfair practices within the meaning of Section 1201(a)(1) or (3).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this nineteenth day of October, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner