

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL NO. 773 :  
:  
:  
:  
v. : Case No. PERA-C-99-530-E  
:  
:  
:  
LOWER MACUNGIE TOWNSHIP :

**FINAL ORDER**

On December 20, 2000, Lower Macungie Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) to the Proposed Decision and Order (PDO), dated November 30, 2000. On January 5, 2001, the Teamsters Local No. 773 (Union) timely filed a brief in response to the Township's exceptions. In the PDO, the Hearing Examiner found that the Township engaged in unfair practices in violation of Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA) by ordering its road crew to collect and remove leaves from the Township Campus by using hand rakes only without the use of power equipment, as alleged by the Union.

After a thorough review of the exceptions and the record, the Board makes the following:

**AMENDED AND ADDITIONAL FINDINGS OF FACT**

14. The Township's public works coordinator, Margaret Szulborski, issued a written order stating that the leaf collection and removal job at the Township Campus would involve the use of hand rakes as a part of the job. Her order did not state that the road crew employees were required to complete the entire leaf collection project at the Campus by using hand rakes only without the use of the Township's power equipment. When Ms. Szulborski delivered the work order to her crew chiefs, she did not discuss the contents of the order or the nature and extent of the leaf collection assignment with any of the crew chiefs or the workers in the public works department. (N.T. 30-33).

15. On Tuesday, November 23, 1999, Robert E. Lee, Chairman of the Board of Supervisors and Director of Public Works, directed Ms. Szulborski to issue an order directing the employees of the public works department to collect and remove the leaves on the grounds of the Township Campus. Mr. Lee approved the wording of the work order that Ms. Szulborski drafted. Mr. Lee did not order the road crew, either through Ms. Szulborski or anyone else, to perform the leaf collection at the Township Campus with hand rakes only. (N.T. 34-40).

20. Stephen Majerich, a public works employe who testified on behalf of the Union, corroborated the testimony of Ms. Szulborski and

Mr. Lee by testifying that Ms. Szulborski's work order stated that "there will be hand raking involved." (N.T. 10).

21. At no time did Ms. Szulborski order or instruct the workers not to use the power equipment for the leaf collection project at the Township Campus on November 24, 1999. (N.T. 13-14).

#### DISCUSSION

The Township and the Union are parties to a three-year collective bargaining agreement effective from January 1, 1999, through December 31, 2001 (CBA). The bargaining unit consists of all full-time and regular part-time blue collar non-professional employees including but not limited to public works employees. There are four crews among the public works employees. These crews are the following: the road crew, the parks and grounds crew, the facilities crew, and the sewers crew. These divisions are not recognized by the CBA nor are the duties of these crews delineated in the CBA. In the fall of 1999, the Township hired temporary part-time non-union personnel to assist the Township's full-time bargaining unit employees with leaf collection. On November 3, 1999, the Union filed a grievance with the Township alleging that the Township violated Article 5 of the CBA by allowing non-union supervisory employees to perform work that had been done by bargaining unit employees in the past. On November 5, 1999, the Union filed a second grievance alleging that the Township violated Article 7 of the CBA by using seasonal temporary employees to do bargaining unit work other than leaf collection. On November 23, 1999, near the end of the regular shift, the Union filed a verbal grievance with one of the crew chiefs regarding the Township's use of seasonal workers. A verbal grievance is the first step in the grievance procedure.

The Township building and administrative offices are located on extensive landscaped grounds known as the Campus. This site was previously owned by the Brookside Country Club. During the month of November 1999, Robert E. Lee, the Chairman of the Township's Board of Supervisors, observed that leaves had accumulated on the Campus and should be removed. On Tuesday, November 23, 1999, Mr. Lee directed Margaret Szulborski, the Township's public works coordinator, to draft a work order requiring the road crew to collect and remove the leaves on the Campus on Wednesday, November 24, 1999, the day before the Thanksgiving Holiday. Mr. Lee directed the road crew to perform the leaf collection at the Campus because the facilities crew was already involved in another project and the road crew regularly performs leaf collection throughout the Township. After Ms. Szulborski drafted the work order, Mr. Lee reviewed and approved its language. The order stated that rakes would be required for the job; it did not state that only rakes were permitted to perform the leaf collection at the Campus without any power equipment. On that Wednesday, Ms. Szulborski delivered the work order to the road crew chiefs ordering the road crew workers to collect and remove the leaves on the Township Campus grounds and around the Township building. Ms. Szulborski did not discuss any part of the assignment with any of the crew chiefs or the employees.

On December 9, 1999, the Union filed a charge of unfair practices specifically alleging that the Township violated Section 1201(a)(1) and (3) by retaliating against the employees for filing a grievance over the seasonal workers by "forcing them to work without proper and readily

available equipment."<sup>1</sup> The Union claimed that the Township forced the road crew of the public works department to collect and remove the leaves at the Campus by using hand rakes only and without the use of the Township's power equipment. The Hearing Examiner sustained the charge. In its exceptions the Township objects to the Hearing Examiner's findings and conclusions that the Township ordered or forced the road crew to collect and remove leaves from the Township Campus by using hand rakes only without the aid of the Township's power equipment, which is the factual predicate for the charge. Therefore, establishing that the Township forced the road crew to use only hand rakes to collect the leaves at the Campus is necessary to sustain the charge. The Township argues that there was no substantial, legally competent evidence to support such a finding of fact or a legal conclusion. The Township specifically challenges Findings of Fact numbers 14 and 15 as well as the conclusion that the road crew workers were forced to use hand rakes only or were prevented from using the power equipment for leaf collecting at the Campus on November 24, 1999.

In Pennsylvania Labor Relations Board v. Kaufmann Department Stores, Inc., 345 Pa. 398, 29 A.2d 90, 92 (1942), the Supreme Court of Pennsylvania stated the rule that all orders of administrative boards and commissions must be supported by substantial evidence. Id. The Court further stated that "[s]ubstantial evidence is more than a mere scintilla. It means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" Id. (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)). Substantial evidence, opined the Court, "must do more than create a suspicion of the existence of the fact to be established.'" Id. (quoting National Labor Relations Board v. Columbian Enameling & Stamping Co., 306 U.S. 292, 300, 59 S.Ct. 501, 505 (1939)). Suspicion is not a substitute for evidence. Id. "The rule of substantial evidence is one of fundamental importance and is the dividing line between law and arbitrary power.'" Id. (quoting National Labor Relations Board v. Thompson Products, Inc., 97 F.2d 13, 15 (6th Cir. 1938)).

In Findings of Fact numbers 14 and 15 of the PDO, the Hearing Examiner stated the following:

14. Ms. Szulborski's order stated that the leaf removal was to be done by hand raking. (N.T. 32-33).

15. That Ms. Szulborski's order was caused by a directive from her superior, Robert E. Lee, Chairman of the Board of Supervisors and also Director of Public Works, who directed her to see that leaves were removed from the grounds of the Township campus. He also directed her that the job be done by hand raking. (N.T. 34-35, 40).

Findings of Fact numbers 14 and 15 are the only two factual findings that the Township's order for November 24, 1999 at the Township Campus

---

<sup>1</sup> The Union subsequently filed two amendments to the charge because it twice failed to designate the correct subsection of Section 1201 of PERA that served as the basis for its charge. The language used for the factual allegations remains identical for all three charge forms.

required the road crew to perform the leaf collection by hand raking. After a thorough review of the entire record and the citations used to support these findings, the Board agrees with the Township and concludes that the record is devoid of legally competent, substantial evidence that support these two findings, without which the charge must be dismissed.

In support of Finding of Fact number 14, the Hearing Examiner cited to pages 32 and 33 of the hearing transcript which contain the testimony of Ms. Szulborski on cross-examination. Ms. Szulborski's testimony, however, begins on page 30 wherein she testifies that, on the morning of November 24, 1999, she hand delivered a document to the crew chiefs stating the work assignments for that day. She testified that she did not say anything to the workers or the crew chiefs. Ms. Szulborski also testified that she did not observe any discussion among the workers and the crew chiefs regarding the use of any power equipment. Neither the Township nor the Union offered Ms. Szulborski's written assignment document into evidence at the hearing. However, on cross-examination, Ms. Szulborski testified to the contents of the document in the following manner:

Q. There was an assignment for hand raking?

A. To the best of my knowledge, it [Ms. Szulborski's work order] said hand raking will be involved was the wording.

(N.T. 32-33). The above-quoted testimony stating that "hand raking would be involved," upon which the Hearing Examiner relied, does not support a finding that Ms. Szulborski's order stated that leaf removal at the site was to be done by hand raking. The exhibits of record indicate that the landscape of the Township Campus is decorated and enhanced by manicured shrubs, bushes and trees. Hand raking would be required to supplement leaf collection in those areas where the power equipment was unable to effectively collect and remove leaves.

In Finding number 15, the Hearing Examiner stated that Mr. Lee "directed [Ms. Szulborski] that the job be done by hand raking." In support of this finding, the Hearing Examiner relies in part on the testimony of Mr. Lee on page 40 of the hearing transcript. However, Mr. Lee's testimony regarding his order and hand raking begins on page 39, and Mr. Lee testified in the following manner:

Q. Did you make the order that they were to be hand raking only?

A. No, I did not. Nor did the crew ask to use any of our equipment other than the rakes.

Q. That you know of?

A. That I know of, Yes.

Q. But you had no direct conversation with the crew with regard to this order?

A. That's correct.

Q. November 24<sup>th</sup>?

A. That's correct. I issued an order that the road crew would do leaf clean up here. That rakes would be required. And I would not have denied that request to use the other equipment.

(N.T. 39-40). Mr. Lee's testimony clearly indicates that he did not order the road crew to use only rakes for the leaf collection project. Mr. Lee's testimony also corroborates the testimony of Ms. Szulborski that the order stated that hand rakes would be required or involved in effectively completing the project, not the sole means for completing the project. Nor does Mr. Lee's prior testimony at N.T. 34-35 support a factual claim that only hand rakes were to be used.

Also, as emphasized by the Township in its exceptions, the only other evidence that the Township allegedly forced the road crew to complete the leaf collection and removal at the Campus on November 24, 1999 with hand rakes only is the testimony of John Trumbauer. Mr. Trumbauer testified that the road crew chief, David A. Terfinko, verbally ordered him and the other workers to use hand rakes only instead of the power equipment. However, with the consent and approval of the Union's attorney, the Hearing Examiner accepted into evidence a post-hearing affidavit from Mr. Terfinko with attached time sheets wherein Mr. Terfinko testified that he was on vacation the entire week and did not have any discussion with any public works employees regarding the Campus leaf collection project on November 24, 1999. Accordingly, Mr. Terfinko's affidavit created a direct conflict in testimony, and the Hearing Examiner expressly resolved that conflict by choosing to disregard Mr. Trumbauer's testimony as not credible. Assuming the support of substantial evidence of record, a hearing examiner has exclusive province over credibility. The Board will not disturb a hearing examiner's credibility determination resolving a conflict in testimony, unless there are compelling circumstances. AFSCME, District Council 84, AFL-CIO v. Commonwealth, Department of Public Welfare, 18 PPER ¶ 18026 (Final Order, 1986). After a thorough review of the record, the Board has not discovered any compelling circumstances to justify overturning the Hearing Examiner's decision to disregard Mr. Trumbauer's testimony.

However, the Hearing Examiner also stated the following:

[B]oth Ms. Szulborski and Mr. Lee admitted that the leaf raking order was given by Ms. Szulborski on [November 24, 1999]. Given these witnesses' admissions, it can be found as a fact that [T]ownship officials in charge of the department issued a leaf raking order, notwithstanding the unreliability of Mr. Trumbauer's testimony on that point.

(PDO at 6). The Board's examination of the record reveals that Ms. Szulborski and Mr. Lee admitted that the leaf collection order stated that hand rakes would be involved or required in the leaf collection project. Neither person "admitted" that the order required the road crew to use hand rakes only or otherwise forbade the use of the Township's power equipment. Contrary to the above-quoted statement, it cannot be found as fact on this record that the Township officials in charge of the public works department issued a leaf raking

order for the entire leaf collection project at the Campus on November 24, 1999.

The record, therefore, lacks any evidence that a reasonable mind might accept to support a finding that the Township or any of its officers or agents ordered the road crew to perform leaf collection at the Township Campus on November 24, 1999 with hand rakes only. Accordingly, we are left with the suspicions created by the allegations in the charge which have not been proved. Absent substantial evidence and support in the record, Finding of Facts numbers 14 and 15 are in error and a finding that the Township ordered the leaves to be collected by hand raking only cannot be made. Also, absent such a finding, the Hearing Examiner's analysis and conclusions, which relied upon that finding, are in error.

In support of his conclusion that the Township violated Section 1201(a)(1) of PERA, the Hearing Examiner stated that "the [Township] offered no justification why it required the leaf cleaning job to be done with hand rakes, when it was normally done with power equipment." (PDO at 3). As previously determined, however, there is no evidence, and hence no finding upon which to base such a conclusion. Accordingly, the Township did not have the burden of offering any justification for an action not shown to have been taken. Therefore, the Hearing Examiner erred by concluding that the Township engaged in conduct that constituted a violation of Section 1201(a)(1) of PERA because the record contains no support for such a conclusion.

The Hearing Examiner concluded that the Township violated Section 1201(a)(3) of PERA in retaliation for employees' engaging in protected activity, i.e., filing three grievances throughout the month of November 1999 for using seasonal temporary employees to perform bargaining unit work. In analyzing the Union's 1201(a)(3) claim, the Hearing Examiner relied upon Saint Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977), and correctly noted that the Union had the burden of proving three elements. The third element requires "that the employer was motivated by anti-union animus in taking the adverse action." (PDO at 4 (citing Saint Joseph's, supra)). Again, the record is devoid of substantial, legally competent evidence to support a finding that the Township engaged in any adverse action. Fundamentally, without such a showing, the Union cannot, as a matter of law, satisfy the necessary elements of Saint Joseph's Hospital and meet its burden of proving its discrimination claim under Section 1201(a)(3) of PERA.

In its exceptions, the Township also asserts that the Hearing Examiner erred by concluding that the timing of the work assignment is suggestive of unlawful motivation. The Hearing Examiner's conclusion that union animus existed in this case is in error because it is based on adverse action that was not established in the record. In the PDO, the Hearing Examiner stated that "[t]he first factor from which to infer animus is the close timing of the adverse action to the filing of grievances by the workers affected by the order to rake the leaves." (PDO at 5). The Hearing Examiner also stated that "[t]he next factor which the Union urges should be recognized as a factor to infer animus is that the order to use rakes was not adequately explained to the employees or to this hearing examiner." Id. As previously determined, the Township did not order the road crew to collect all the leaves

solely with hand rakes and therefore, no adverse action was taken. Absent that factual predicate, any inquiry into unlawful motivation is moot.

After a thorough review of the exceptions, the Proposed Decision and Order and all matters of record, the Board shall sustain the exceptions.

#### **CONCLUSIONS**

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

1. Lower Macungie Township is a public employer within the meaning of Section 301(1) of PERA.
2. Teamsters Local No. 773 is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. Lower Macungie Township has not committed unfair practices in violation of Section 1201(a)(1) and (3) of PERA.

#### **ORDER**

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

#### **HEREBY ORDERS AND DIRECTS**

that the exceptions filed to the Proposed Decision and Order in the above-captioned matter be and the same are hereby sustained; and that the Order on pages 6 and 7 of the Proposed Decision and Order be, and the same hereby is, vacated and set aside. The Board further orders and directs that the charge of unfair practice is dismissed and the complaint issued thereon is rescinded.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, John Markle, Jr., Chairman, L. Dennis Martire, Member, and Edward G. Feehan, Member, this twenty-seventh day of March, 2001. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.