

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 33, :
LOCAL 1637 :
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 :
 v. : Case No. PERA-C-00-341-E
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 CITY OF PHILADELPHIA :

FINAL ORDER

On October 12, 2000, AFSCME District Council 33, Local 1637 (AFSCME) filed timely exceptions to the letter of the Secretary of the Pennsylvania Labor Relations Board (Board) issued on September 29, 2000, informing AFSCME that no complaint would be issued on AFSCME's unfair practice charge against the City of Philadelphia (City) and therefore AFSCME's charge was dismissed.¹ AFSCME also filed a timely memorandum of law in support of its exceptions.

In its charge, AFSCME alleged that the City violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA) by suspending Michael Bojazi, a union shop steward, in retaliation for conducting union business over the telephone during the work day. AFSCME further alleged that the City's actions are contrary to past practice and contractual rights. The Secretary of the Board dismissed AFSCME's charge because an employee has no statutory right to conduct union business during work hours and any alleged violations of the contract and/or past practice should be addressed through the parties' grievance procedure.

In its exceptions, AFSCME contends that Bojazi was suspended for his actions as a shop steward, which would tend to coerce employees in the exercise of their rights under PERA in violation of Section 1201(a)(1). An independent violation of Section 1201(a)(1) of PERA is established if the employer's actions, in light of the totality of the circumstances, would tend to coerce employees in the exercise of their protected rights. AFSCME, Local 394 v. City of Philadelphia, 24 PPER ¶ 24112 (Final Order, 1993). The threshold question here is whether the allegations in AFSCME's charge establish that Bojazi was in fact engaged in statutorily, not merely contractually, protected activity. The Commonwealth Court, in affirming a Board final order, has concluded that employees do not have the statutory right to conduct union activity on employer time. Ellwood City Police Wage and Policy Unit v. Ellwood City Borough, 29 PPER ¶ 29213 (Final Order, 1998), aff'd sub nom., Ellwood City Police Wage and Policy Unit v. PLRB, 736 A.2d 707 (Pa. Cmwlth. 1999). Thus, as in Ellwood City the employee's actions in this case (conducting union business on the employer's telephone during work hours) cannot be considered protected activity under PERA.

¹For purposes of issuing a complaint, the factual allegations in the charge of unfair practices are accepted as accurate. Pennsylvania Soc. Servs. Union Local 668 v. PLRB, 481 Pa. 81, 392 A.2d 256 (1978).

In Ellwood City, a case decided under Act 111² and the Pennsylvania Labor Relations Act³ (PLRA), Commonwealth Court recognized that Section 5 of the PLRA, 43 P.S. § 211.5, sets forth certain statutorily protected rights, including "the right to self-organization, to form, join or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection." 736 A.2d at 710. The Court went on to conclude that the rights under Section 5 do not include the right to conduct union activity on an employer's time, especially where that activity interferes with the employer's discharge of its duties. Id. Like the PLRA, PERA expressly sets forth statutorily protected employe rights. Section 401 of PERA, which contains language virtually identical to that of Section 5 of the PLRA, provides public employes with the right "to organize, form, join or assist in employe organizations or to engage in lawful concerted activities for the purpose of collective bargaining or other mutual aid and protection or to bargain collectively through representatives of their own free choice." 43 P.S. § 1101.401.⁴ Based on the similarity of language, it is clear that the stated policy objectives of PERA are identical to those of the PLRA, and therefore the same construction of employe rights should apply. AFSCME v. Bensalem Township, 19 PPER ¶ 19010 (Final Order, 1987). It is therefore reasonable to conclude that PERA likewise does not grant employes the right to conduct union business on work time. Ellwood City controls this case and the Board will therefore dismiss AFSCME's exception regarding any alleged violation of Section 1201(a)(1).

AFSCME further contends that its charge sets forth facts sufficient to establish a prima facie case of discrimination under Section 1201(a)(3) of PERA. AFSCME alleges that the three elements needed to prove discrimination as established in St. Joseph's Hosp. v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977), are present in this case. Those elements are as follows: (1) that the employe engaged in protected activity; (2) that the employer knew of the employe's protected activity; and (3) that the employer was motivated by anti-union animus in taking the adverse action. Id. AFSCME claims that Bojazi was engaged in activities in support of, and on behalf of, the union, that Bojazi's supervisors were aware of that activity and that anti-union animus may be inferred from the facts, including the disparate treatment of Bojazi (other shop stewards are allegedly permitted to use the employer's telephone to conduct union business), the timing of the suspension and the lack of adequate explanation.

As stated above, however, Bojazi was not engaged in activity protected by the Act. Ellwood City. Although Bojazi may have been engaged in activity in support of, and on behalf of, the union (union activity), not all union activity is necessarily statutorily protected activity. For instance, in Ellwood City, the employe was certainly engaged in activity in support of, and on behalf of, the union, but that activity, although seemingly authorized by the parties' contract, was

² Act of June 24, 1968, P.L. 237, as amended, 43 P.S. §§ 217.1-217.10.

³ Act of June 1, 1937, P.L. 1168, as amended, 43 P.S. §§ 211.1-211.13.

⁴ Unlike the PLRA, PERA provides employes with the additional right to refrain from such activities as well.

not the type of activity protected by the statute. Though the two may overlap, union activity and protected activity are not synonymous. Bensalem Township Police Benevolent Ass'n Inc. v. Bensalem Township, 30 PPER ¶ 30219 (Final Order, 1999). Protected activity, a phrase often used to describe a statutorily defined range of employe rights, may or may not include activity on behalf of a union. Because Bojazi was engaged in union activity on his employer's time, which is not protected by PERA, AFSCME's charge of discrimination must fail.

In a discrimination case, the employer's unlawful "motive creates the offense." PLRB v. Ficon, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). AFSCME's charge fails to set forth any facts that, if accepted as true, establish a prima facie case of anti-union animus. The charge merely alleges that the City suspended Bojazi for conducting union business on work time; an allegation that does not show anti-union animus. Indeed, as already stated an employer has the right to require its employes to work during work hours absent some contractual provision otherwise, which if violated should be resolved through the grievance procedure. Bojazi's status as a shop steward does not somehow change this principle; shop stewards are employes and are not exempt from managerial control because of that status. His status as a steward, though it may certainly be a factor to consider, does not in and of itself create an inference of anti-union animus.

Moreover, the alleged timing of the suspension as stated in the charge does not give rise to an inference of animus here. Under the charge as stated, Bojazi was suspended after his supervisors heard him conducting union business on work time. Such an allegation does not raise suspicions but merely confirms that the City's actions were sequential in ensuring its employes were working. Typically, allegations regarding timing give pause and raise suspicions as to motive, as in Tri-Valley Educ. Ass'n v. Tri-Valley Sch. Dist., 30 PPER ¶ 30048 (Final Order, 1999), a case on which AFSCME relies in support of its exceptions. In that case, the employer reprimanded and transferred a teacher who was a bargaining unit member, president of the union and the union spokesperson at school board meetings. The timing of the adverse actions was suspicious in light of recent protracted negotiations in which the teacher had participated. The union's charges⁵ set forth the above facts and further alleged facts that if proven would show the employer's reasons to be pretextual. Unlike the charges in Tri-Valley, however, AFSCME has alleged nothing to support an inference of animus other than the fact that Bojazi is a steward who was disciplined for engaging in non-protected activity on work time. Thus, the only motive alleged in the charge is the employer's desire to ensure its employes are working, not the type of illegality PERA seeks to rectify. AFSCME's claims of timing, disparate treatment and inadequate employer explanation go to the third element of the St. Joseph's test regarding motive, but as stated above these claims must fail because the charge does not establish that the underlying activity is protected by PERA, the first element necessary to prove discrimination under St. Joseph's. The Secretary of the Board appropriately dismissed the charge of discrimination.

⁵ The union filed two charges in Tri-Valley, which a hearing examiner of the Board addressed in separate, 1998 proposed decisions and orders at 29 PPER ¶ 29200 and 29 PPER ¶ 29202.

AFSCME also alleges that the City's actions here are inconsistent with and contrary to the parties' past practice and their contract in so far as shop stewards are permitted to conduct union business over the telephone during the workday. However, a contract violation is not the same as a statutory unfair labor practice, though the two may at times overlap. For example, where an employer clearly repudiates an explicit provision of the parties' contract, such action may constitute both an unfair practice as well as a grievance. Pennsylvania State Troopers Ass'n (State Troopers) v. PLRB, __ A.2d __ (Pa. Cmwlth. 2931 C.D. 1999, filed November 6, 2000). Although the same action by a public employer may constitute both a contract violation (grievance) and an unfair practice, it does not follow that contract violations are synonymous with statutory unfair practices. Ellwood City. The distinction between the two is often misunderstood. Absent a violation of one of the enumerated unfair labor practices set forth in PERA, the Board is without jurisdiction to address the matter. Millcreek Township School Dist. v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993). Where the applicable statute is not violated, the matter is one typically reserved for an arbitrator. State Troopers. In order for a complaint to be issued on an allegation of repudiation of a contract provision or of a past practice regarding a mandatory subject of bargaining, the charging party must at a minimum allege repudiation of an explicit provision of a collective bargaining agreement and allege a violation of Section 1201(a)(5) of PERA. State Troopers; Ellwood City. AFSCME's charge here alleges only a violation of Section 1201(a)(1) and (3) of PERA, does not set forth any express contractual provision allegedly repudiated and alleges a violation of an alleged "past practice" regarding a matter of managerial prerogative (direction of personnel under Section 702 of PERA). Therefore, the Secretary appropriately refused to issue a complaint.

After a thorough review of AFSCME's unfair practice charge, its exceptions and the memorandum in support of exceptions, the Board shall dismiss the exceptions to the Secretary's decision declining to issue a complaint and affirm that decision.

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 be and the same are dismissed and the Secretary's decision not to issue a complaint be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, pursuant to conference call meeting of the Pennsylvania Labor Relations Board, John Markle Jr., Chairman, and Members L. Dennis Martire and Edward G. Feehan, this twenty-first day of November, 2000. 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.