

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

PENNSYLVANIA SOCIAL SERVICES UNION, :
LOCAL 668, SEIU :
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 V. :
 : Case No. PERA-C-00-168-E
COMMONWEALTH OF PENNSYLVANIA, :
DEPARTMENT OF LABOR AND INDUSTRY, :
OFFICE OF VOCATIONAL REHABILITATION :
 :

FINAL ORDER

On May 31, 2000, the Pennsylvania Social Services Union, Local 668, SEIU (PSSU) timely filed exceptions to the May 12, 2000 letter of the Secretary of the Pennsylvania Labor Relations Board (Board)¹ dismissing PSSU's charges of unfair practices against the Commonwealth of Pennsylvania, Department of Labor and Industry, Office of Vocational Rehabilitation (OVR), and informing PSSU that no complaint would be issued on those charges.² The Board Secretary granted PSSU's request for an extension of time to file its supporting brief, which was timely filed on July 3, 2000.

The OVR purchases and provides training, counseling and rehabilitative services for physically and mentally handicapped persons to prepare them for self-supporting jobs. PSSU is the exclusive bargaining representative for a bargaining unit of employees consisting of various levels of rehabilitative counselors, assistants and interns. In its charge of unfair practices, PSSU asserted that the OVR violated section 1201(a)(1),(3) and (5) of the Public Employee Relations Act (PERA). In support of these charges, PSSU specifically alleged that, on February 1, 2000, representatives of the OVR held a "Statewide Meet and Discuss Meeting" with Union representatives. At this meeting, PSSU allegedly expressed concerns over the OVR's alleged reduction of funding to the OVR district offices for the purchase of client services until the next budget year. PSSU further alleged that, on or about March 16, 2000, the OVR circulated a Memorandum (Memo), via e-mail, to the OVR district office administrators, which encouraged administrators to meet with counselors who had informed OVR customers that they must wait for rehabilitative services because the OVR is "out of money". This Memo, alleged PSSU, instructed district administrators to confront these counselors as if they misrepresented the OVR budget and engaged in "inappropriate and unprofessional activity." Also, the Memo allegedly instructed district administrators to pursue disciplinary action. Accordingly, PSSU alleged that the OVR discriminated and retaliated against

¹ Although the Board received the PSSU's exceptions on June 2, 2000, which was beyond the twenty-day filing period, the United States Postal Service placed a cancellation stamp on the envelope containing the exceptions, which was dated May 31, 2000 and will suffice for determining the timeliness of the filing. Lin v. Unemployment Compensation Board of Review, 558 Pa. 94, 735 A.2d 697 (1999); Fraternal Order of Police Lodge No. 5 v. City of Philadelphia, 31 PPER ¶ 31036 (Final Order, 2000).

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

bargaining unit members for raising "legitimate" concerns relating to the available funding for the purchase of client services in a manner that has interfered with the exercise of the employees' statutorily protected rights. PSSU also alleged that the same conduct constituted a refusal to bargain in good faith. PSSU attached a copy of the minutes of the February 1, 2000 meeting, and a copy of the March 16, 2000 Memo to the charges.

In its exceptions and supporting brief, PSSU alleges that, during the time between the February 1, 2000 meeting and the March 16, 2000 Memo, PSSU "urged employes to educate clients in regards to the funding crisis in OVR." (Brief in Support of Exceptions at 2). PSSU also urged the employes "to share with clients that the funding problems could directly impact the clients['] ability to receive services." (Exceptions at 1). In its supporting brief, PSSU argued that its leadership was very concerned about the impact of funding deficits. Consequently, PSSU encouraged employes to inform clients that they may be unable to receive services and benefits necessary to complete their rehabilitation. PSSU claims that the OVR committed unfair practices when it circulated the March 16, 2000 Memo which allegedly threatened discipline for any employe who acted on the advice of PSSU. According to PSSU, this Memo had a "chilling effect on the Union's ability to organize members and clients around this issue." (Exceptions at 1). By way of the Memo, argues PSSU, the OVR discriminated against counselors for engaging in protected union activity and, by threatening discipline, retaliated against the counselors for engaging in such activity.

Section 702 of PERA provides the following:

Public employers shall not be required to bargain over matters of inherent managerial policy, which shall include but shall not be limited to such areas of discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel. Public employers, however, shall be required to meet and discuss on policy matters affecting wages, hours, and terms and conditions of employment as well as the impact thereon upon request by public employe representatives.

This section, as a matter of law, gives the OVR complete and exclusive control over the manner in which it implements and fulfills its statutory function, i.e. providing vocational rehabilitative services to train physically and mentally challenged individuals for self-supporting jobs. An examination of the minutes of the February 1, 2000 meeting reveals that the OVR fulfilled its statutory obligation, under Section 702, to meet with PSSU members and representatives and discuss the effects of managerial policies such as the budget. At the meeting, the OVR responded to questioning from union representatives regarding the diminution of funding for client services for fiscal year 1999-2000. The OVR informed Union representatives that money from its budget would be allocated to upgrading technology as required by the Commonwealth.

PSSU argues that the March 16 memo interferes with the exercise of employe rights. The Memo, which was addressed to all district administrators, states the following:

We have been advised that some counselors have told eligible customers that they must wait until 10/1/00 (the beginning of FFY 2000) to receive cost services because "OVR is out of money." As you know, this is not true. OVR has recently distributed third quarter funds, and

fourth quarter dollars will be available as planned for distribution. Our goal for FFY `99 is to have available for case services the same amount of 110 dollars (approximately \$51 million) as distributed in FFY `98.

When customer inquiries regarding funding are received in Central Office, the District Administrator will be contacted and I expect you will meet with the counselor, discuss any misrepresentation of the district budget, and further, resolve with the counselor and customer the funding of the IPE. In this way, you and your supervisory staff have the opportunity to correct customer miscommunications and to assist counselors with methods to better manage their fiscal activities. If a counselor continues this inappropriate and unprofessional activity, I expect you would contact labor relations . . . concerning potential disciplinary action. Additionally, please be certain that accurate information regarding OVR's budget is shared with all staff immediately.

(Unfair Practice Charge, Attachment A). The express and unmistakable import of the Memo is that the OVR received information that its counselors were misrepresenting the condition of its budget to its clients and that the OVR wanted these misrepresentations to cease. Furthermore, the Memo is clear that, as customer complaints flow into the OVR central office, these complaints will be traced to the counselor who provided the misinformation and that the appropriate office administrators should meet with counselors to rectify the misunderstanding. Discipline is a recommended course of action only if properly informed counselors deliberately misrepresent the availability of funding and services to its clientele.

We find that this memo, on its face, constitutes a legitimate exercise of managerial authority. The OVR, as the employer, has the exclusive control over "discretion or policy as the functions and programs of the public employer, standards of services, its overall budget, utilization of technology, the organizational structure and selection and direction of personnel." 43 P.S. § 1101.702. In properly exercising control over the standards and manner of service, the OVR chose to instruct certain counselors not to misrepresent the availability of funds for client services. Counselors who refuse to comply with the OVR's direction may be engaging in insubordinate behavior and the OVR could subject these counselors to disciplinary action without exposing itself to liability under Section 1201 of PERA.

PSSU charged that the OVR violated 1201(a)(3) of PERA by allegedly threatening to discipline the counselors for engaging in protected union activity which consisted of allegedly organizing members and clients around the issue of the alleged funding deficit. In order to establish a prima facie case of discrimination, PSSU must allege sufficient facts that, if true, satisfy the following three elements: (1) the employees were engaged in protected activity; (2) the employer was aware of those activities; and (3) the employer subsequently took adverse action against those employees based on anti-union animus. Teamsters Local 229 v. Susquehanna County, 30 PPER ¶ 30060 (Final Order, 1999). This Board has also held that, absent anti-union motivation, discrimination may be found where the employer conduct is "so inherently destructive of employe interests." Id. at 129 (citing NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1987)).

PSSU failed to set forth any allegations that, if true, could support the necessary findings for a claim of discrimination. The allegations and the attached documentation fail to support a finding that the employees were engaged in protected activity, that the employer action complained of was based on anti-union motivation

or that the OVR's allegedly adverse conduct was so inherently destructive to employe interests. The Memo, which PSSU alleged to constitute unlawful discriminatory behavior, fails to show any unlawful discrimination or retaliation by the OVR. The Memo merely informed the district administrators that counselors were distributing misinformation to the OVR's clientele. The OVR, by and through this Memo, instructed its district administrators to prevent any further misrepresentations that could have interfered with the agency's service and its customers' perception of that service. No discipline was recommended for any behavior that pre-dated budget counseling sessions with the OVR employes. The OVR merely recommended discipline for those counselors whose behavior constituted insubordination, i.e., continuing to represent to clients that their services would be adversely affected by a deficient budget after being instructed that the true state of the OVR budget would not affect client services. The OVR did not commit an unfair practice for recommending discipline for insubordinate activity because insubordination is not protected activity. Pittston Area Fed'n of Teachers Local 1590 v. Pittston Area Sch. Dist., 27 PPER ¶ 27066 (Final Order, 1996) (stating that "no policy of PERA would be served if the acts of insubordination were sheltered under the protection of the right of employes to engage in lawful union activity"). Therefore, the OVR did not "threaten discipline to any employe who engaged in . . . protected, concerted activity," as alleged by PSSU. (Brief in Support of Exceptions at 3). PSSU and its members do not have a protected right to misrepresent the financial resources or the quality of service of the OVR. Absent any showing of possible protected activity, PSSU cannot, as a matter of law, establish a claim for unlawful discrimination or retaliation.

PSSU also alleged that the OVR violated Section 1201(a)(5) when it circulated the March 16, 2000 Memo. PSSU, however, failed to explain the nature of the bargaining violation in either its Specification of Charges, its Exceptions or its Brief in Support of Exceptions. The Memo required office administrators to meet with certain misinformed employes and direct them in a manner that directly affects the quality, perception and manner of rehabilitative services provided by the OVR. The Memo, therefore, sought to remedy inappropriate behavior that affected the function and services of the OVR. The subject matter and the manner in which it was addressed are inherently managerial prerogatives under Section 702 of PERA. The OVR did not have any duty to bargain over requiring that its employes cease misrepresenting the budget, which was an activity that negatively impacts the quality of service, or over the recommended discipline for those employes who refused to comply with that directive. An insubordinate employe who deliberately disregards an employer's directive regarding managerial prerogatives such as the manner of service, as in this case, can be recommended for discipline without subjecting the employer to an unfair practice. Pittston, supra.

PSSU also charged that the OVR violated Section 1201(a)(1). There are two types of Section 1201(a)(1) violations: independent and derivative. Athens Area Sch. Dist. v. PLRB, 23 PPER ¶ 23182 (Bradford County Court of Common Pleas, 1992). An independent violation of Section 1201(a)(1) "stands on its own merits while a derivative . . . violation occurs in tandem with a violation of another of the specifically enumerated unfair labor practice provisions." Id. at 463. The Board does not require that complainants specify whether they are charging an independent or derivative violation of Section 1201(a)(1). AFSCME, Council 13, AFL-CIO v. Bensalem Township, 19 PPER ¶ 19010 (Final Order, 1987). In defining the meaning of a derivative violation, our Supreme Court adopted the reasoning that all unfair practices are a species of the generic unfair practice defined in Section 1201(a)(1). PLRB v. Mars Area Sch. Dist., 480 Pa. 295, 389 A.2d 1073, 1076

(1978)(quoting Judge L. Hand in Art Metals Constr. Co. v. NLRB, 110 F.2d 148, 150-51 (2d Cir. 1940)). Because PSSU failed to allege sufficient facts that, if true, would establish prima facie violations of bargaining, discrimination, or retaliation, as claimed, there can be no derivative violation of 1201(a)(1).

Establishing an independent violation of Section 1201(a)(1) requires proof that "the action of the employer, in light of the totality of the circumstances in which the particular act occurred, tends to coerce employes in the exercise of their protected rights, regardless of whether the evidence shows that the individual employe(s) involved in the proceeding have been shown in fact to have been coerced." AFSCME, Local 394, AFL-CIO v. City of Philadelphia, 24 PPER ¶ 24112, 299 (Final Order, 1993). PSSU failed to allege sufficient facts that, if true, would establish a prima facie case for an independent Section 1201(a)(1) violation. As previously discussed herein, the OVR is statutorily obligated and entitled to direct its work force in a manner that ensures quality service, as a matter of law. In this regard, the OVR had a right to prevent its employes from misrepresenting the OVR's budget and from projecting phantom service deficits. Moreover, after these employes were counseled regarding the true nature of the OVR's budget and that client services were not in jeopardy, the OVR was entitled to recommend discipline for insubordinate employes who refused to obey the OVR's directive. The counselors involved in conveying misrepresentations to the OVR's clientele did not have any protected right to do so. This Board has held that disciplinary action, "directly related to acts in defiance of the employer's instruction, does not have a tendency to coerce the exercise of protected employe rights." Pittston, 27 PPER at 145. Therefore, under the totality of the circumstances, the Memo and any other actions complained of by PSSU did not have any tendency to coerce or restrict employes in the exercise of their protected rights because the counselors were not engaged in protected activity or exercising protected rights when directed to cease misrepresenting the ability of the OVR to provide adequate client services.

In PSSU v. PLRB, supra, the Pennsylvania Supreme Court held the following:

The decision of whether or not to issue a complaint does lie within the discretion of the Labor Board. Section 1101.1302 gives the Labor Board 'authority to issue . . . a complaint'; it does not command that it must do so in all cases. Further section 1101.1302 expressly contemplates that, in some cases, complaints will not be issued by the Labor Board.

481 Pa. at 85, 392 A.2d at 258 (quoting 43 P.S. § 1101.1302). Also, the courts will not review or challenge the wisdom of the discretionary acts of the Board absent bad faith, fraud, capricious action or an abuse of power. Id. at 88-89, 392 A.2d at 259-60. Based on the foregoing reasons, the Board concludes that, as a matter of law, PSSU failed to allege sufficient facts that, if true, could establish the necessary elements of any of the unfair practice charges claimed. Therefore, having no legally sufficient foundation for the charges filed, the Board concludes that the Secretary properly declined to issue a complaint.

After a thorough review of the exceptions and supporting brief to the decision of the Secretary declining to issue a complaint, the Board shall dismiss the exceptions and affirm the Secretary's determination.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employee 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 fifteenth day of August, 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.