

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME, DISTRICT COUNCIL 85 :
LOCAL 3530 :
 :
 v. : Case No. PERA-C-98-460-W
 :
MILLCREEK TOWNSHIP :

FINAL ORDER

On October 18, 1999, Millcreek Township (Township) filed timely exceptions and a brief in support of exceptions to a proposed decision and order (PDO) issued on September 29, 1999. In the PDO, the hearing examiner concluded that the Township violated Section 1201(a)(1) and (5) of the Public Employe Relations Act (PERA) by restricting the local union president's access to Township supervisors and threatening him with discipline for any breach of those restrictions. As a remedy for the violation, the hearing examiner directed the Township to cease and desist from any further violation of PERA. On November 5, 1999, AFSCME, District Council 85, Local 3530 (AFSCME) filed a response to the Township's exceptions along with a brief in opposition.

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

AMENDED FINDING OF FACT

7. On or about August 21, 1998, Mr. Manus contacted Ms. Weber and complained about the Township's recent treatment of an employe, Friday Orr, a black dispatcher. Mr. Manus complained that Ms. Weber mistreated Mr. Orr concerning his employment with the Township. Manus was upset with Weber in part because she and another supervisor had allegedly agreed at a prior meeting with Manus not to discipline Orr. Manus raised his voice at Weber and accused her of having a habit of calling prospective employes at home in an effort to discourage them from taking jobs with the Township. Manus accused her of having done the same thing with respect to Orr before he was hired. Manus conducts himself in this manner only when he and Weber are alone. (N.T. 16-17, 18-23, 40, 42-43).

DISCUSSION

The Township's three elected supervisors divide responsibility for oversight of various Township departments. Suzanne Weber is a member of the board of supervisors and she oversees the public safety department. Weber also serves as director of public services for the Township. When a labor issue arises in a particular department, AFSCME ordinarily communicates with the individual supervisor who has responsibility for oversight of that department. Consequently, Weber is the supervisor with whom AFSCME communicates regarding matters of public safety employes. Public safety employes are included in the bargaining unit represented by

Manus, president of Local 3530 and a mechanic with the Township. On or about August 21, 1998, Manus contacted Weber and complained about the Township's recent treatment of an employe, Friday Orr, a black dispatcher and member of the bargaining unit. Manus was upset with Weber in part because she and another supervisor had allegedly agreed at a prior meeting with Manus not to discipline Orr. Manus complained that Weber mistreated Orr. Manus raised his voice at Weber and accused her of having a habit of calling prospective employes at home in an effort to discourage them from taking jobs with the Township. Manus accused her of having done the same thing with respect to Orr before he was hired. Manus conducts himself in this manner only when he and Weber are alone.

On August 24, 1998, Manus received a memo dated August 21, 1998, from Weber, which provided:

At this point, it has become very clear to me that during your tenure as Union president, any time a black individual is either directly or indirectly involved in an incident which results in discipline by the Board, you are going to turn it into a racial discrimination issue. I am appalled at your insinuations with regard to the recent discipline of Friday Orr, especially because it was I, along with Chief Storten, who recommended to the rest of the Board that he be hired.

Consider this your formal notice that I consider your behavior toward me to be totally out of line, offensive and perhaps subject to Board discipline in and of itself. In the future, you are not to telephone or stop in to see me concerning any employee matters. If you wish me present to discuss anything, you may inform me of this in writing. I will then arrange to have our labor Attorney, Richard Perhacs, present. Again, I will not speak with you other than in the presence of the Attorney. I don't have to use valuable time for which I am being paid, to listen to your accusations or hear you repeat the same questions and comments over and over again just because you don't like the facts or the answers.

If you wish to continually complain about disciplinary actions taken by this Board after they are taken, there is a means to do this. It's called the grievance procedure. As far as I am concerned, our disciplinary decisions are not open to your constant challenges, arguments and offensive accusations. If you don't like a formal disciplinary action we take, file a grievance. Period.

(F.F. 8; Union Exhibit 1). Prior to Weber's memo, Manus routinely called or stopped in without an appointment to raise employe complaints or other issues affecting the bargaining unit. No supervisor had ever previously insisted on the presence of the Township's attorney in a meeting with an AFSCME representative nor is the Township's attorney ordinarily present at such meetings. Since receipt of the letter Manus has refrained from communicating with Weber.

In its exceptions, the Township argues that the memo had no effect on Manus' ability to conduct union business and that Manus, contrary to the

examiner's conclusion, continued to discuss employe issues with the other two supervisors. The Township further contends that the examiner failed to consider the totality of the circumstances here and therefore did not properly apply the tendency to coerce test for an independent violation of Section 1201(a)(1) of PERA. AFSCME alleges that Weber threatened to discipline Manus for presenting employe grievances, which AFSCME contends would constitute an independent violation of Section 1201(a)(1) of PERA. AFSCME argues that it matters not whether employes were actually coerced by Weber's alleged threats nor whether Weber's motivation in writing the memorandum was an attempt to counter what she perceived as an attempt by Manus to harass or embarrass her. AFSCME contends that Weber's subjective intent is irrelevant for purposes of determining whether there is an independent (a)(1) violation under PERA.

An independent violation of Section 1201(a)(1) of PERA will be found when the actions of the employer, in view of the circumstances in which they occur, tend to be coercive, whether or not employes were shown in fact to have been coerced. SEPTA, 28 PPER ¶ 28025 (Final Order, 1996); Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985). The "tendency to coerce" test therefore employs an objective, rather than a subjective, analysis. Improper motivation need not be established and even an inadvertent act may constitute an independent violation of Section 1201(a)(1). SEPTA; Woodland Hills School District, 13 PPER ¶ 13298 (Final Order, 1982). Thus, as opposed to a violation of Section 1201(a)(3), where the employer's motive is the offense, Perry County v. PLRB, 364 A.2d 898 (Pa. Cmwlth. 1994), a finding of an independent (a)(1) violation does not require a showing of unlawful motive, though motive is often considered along with all surrounding circumstances. Ringgold School Dist., 26 PPER ¶ 26155 (Final Order, 1995); Springfield Township, 28 PPER ¶ 28072 (Proposed Decision and Order, 1997); Community College of Philadelphia, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989).

The representation of employes within the grievance context is generally considered to be within the realm of concerted activity protected by PERA. SEPTA; Department of Public Welfare, 27 PPER ¶ 27086 (Final Order, 1996). Such activity includes complaints that may lead up to the filing of a grievance. Department of Public Welfare (citing NLRB v. City Disposal Systems, Inc., 465 U.S. 822 (1984), where the Supreme Court held that employe's honest and reasonable assertion of his right under collective bargaining agreement to refuse to drive truck he asserted was unsafe constituted "concerted activity" under the National Labor Relations Act, 29 U.S.C. § 157, regardless of whether the employe was ultimately correct that his right was violated). However, the Board has recognized that union representatives do not have an absolute privilege to behave in a manner that transcends protected activity in the grievance context. SEPTA. As the court recognized in Mobil Exploration and Producing U.S., Inc. v. NLRB, 200 F.3d 230, 243 (5th Cir. 1999), an employe's right to engage in concerted activity permits "some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." Behavior of a union representative, whether that person be a steward or the local president, that is so obnoxious or violent as to render that representative unfit for service is not protected. SEPTA.

As the president of Local 3530, Manus contacted Weber by phone to address his concerns regarding the Township's discipline of Friday Orr, a black dispatcher and member of the bargaining unit. During the course of the conversation, Weber described Manus as "yelling and screaming" at her

and stated that he complained that she mistreated Orr. (N.T. 40, 42). Manus was upset with Weber because she and another supervisor had allegedly agreed at a prior meeting with Manus not to discipline Orr. Manus questioned whether Weber had something against Orr and accused her of having a habit of calling prospective employees at home in an effort to discourage them from taking jobs with the Township. Manus accused her of having done the same thing with respect to Orr before he was hired. Although Manus may have been upset regarding the Township's alleged about-face with respect to the discipline of Orr, Manus' behavior during his conversation with Weber was certainly rude and probably, to say the least, offensive. However, Manus' conduct did not rise to such a level as to lose the protection of the Act.

As the Board recognized in SEPTA, employees act within their statutory rights even when they assert their rights in a "loud or insistent manner." 28 PPER at 59. Only behavior that is "so obnoxious or violent as to render that employe representative unfit for service is not protected." Id. (citing Washington County, 23 PPER ¶ 23040 (Proposed Decision and Order), 23 PPER ¶ 23073 (Final Order, 1992)). The NLRB has stated that "protected conduct will lose that protection only if it is 'offensive, defamatory, or opprobrious,' and not if it is merely intemperate, inflammatory or insulting." Continental Pet Technologies, 291 NLRB 290 (1988) (quoting Container Corp. of America, 244 NLRB 318, 321-22 (1979)). Behavior on the part of employees that can be considered as offensive or worse than the conduct of Manus here has been held to be protected activity. See e.g., Mobil Exploration, supra (employee's alleged use of intemperate language, not considered insulting, provocative or violent, to small group of co-workers protected concerted activity); American Red Cross Blood Services Division, 316 NLRB 783 (1995) (employee's angry statement that "Someone didn't know what was going on with the situation" when referring to the director's having missed a grievance meeting protected); Harris Corp., 269 NLRB 733 (1984) (employee wrote letter accusing manager of "megalomania" and "purblindness" and of being "tyrannical" and "despotic" protected); Dreis & Krump Manufacturing, Inc., 221 NLRB 309 (1975) (employee's reference to supervisor's "malice, gross negligence, carelessness and dissembling" protected). Compare Paper Board Cores of Alabama, 292 NLRB 995 (1989) (union steward's threat to put a gun to the head of fellow worker in order to resolve grievance not protected); United Parcel Service, 311 NLRB 974 (1993) (employee's own investigation of third party complaint included impersonation of police officer by a union official not protected); Caterpillar Tractor Co., 276 NLRB 1323 (1985) (drawing of obscene cartoon of supervisor not protected).

Heated, emotional and oftentimes loud exchanges can occur between employees and their employer with regard to matters that arise in the workplace. However, such exchanges do not necessarily lose the protection of the Act simply because someone may be offended. Ambridge Area School District, 7 PPER 205 (Nisi Decision and Order, 1976). Weber may have been offended by Manus' treatment of her on the phone but such conduct was not so obnoxious or violent as to lose its protected status. Although Manus' conduct was protected under PERA, the question remains whether Weber's response, in view of the circumstances in which it occurred, would have a tendency to coerce employees in the presentment of their grievances.

In the PDO, the hearing examiner concluded that under the totality of the circumstances Weber's actions and the restrictions placed on Manus were both severe and threatening and created a chilling atmosphere that would

have a tendency to coerce employes in the exercise of their rights. In reaching his conclusion, the examiner stressed that the memo places Manus on formal notice that any similar action will result in discipline and the restrictions set forth therein (namely, written notice and the presence of the Township's labor counsel) effectively prevented Manus from representing the union on day-to-day matters arising in the normal course of events. However, after review of the totality of the circumstances in this case, the Board concludes that Weber's actions would not objectively tend to coerce employes in the exercise of their statutorily protected rights.

Initially, the Board must agree with the Township that the evidence of record did not show that Weber's memo "effectively prevented any further communications" between the Township and AFSCME regarding matters of union business. (PDO at 3-4). Rather, Manus himself admitted at the hearing on the unfair practice charge that he was able to continue conducting union business by communicating with the other Township supervisors after Weber's memo. (N.T. 28, 35). Thus, for the examiner to conclude that Weber's memo effectively prevented Manus from representing the union on a daily basis is simply inaccurate. Moreover, the hearing examiner's conclusion in this regard is contrary to his finding that Manus has only refrained from his communications with Weber, not the entire managerial hierarchy of the Township. (FF 11). Furthermore, the determination of whether an independent (a)(1) violation has occurred is not dependent on whether employes have been actually coerced. As previously mentioned, the test for an independent (a)(1) violation is an objective one that looks at whether an employer's actions "tend to coerce" employes in the exercise of their rights. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985). The Board looks at whether a reasonable person would conclude that the employer's actions would have a tendency to coerce employes. Mifflin County School District, 28 PPER ¶ 28090 (Final Order, 1997), aff'd, 28 PPER ¶ 28186 (Mifflin County Court of Common Pleas, 1997); Northwestern School District, 24 PPER ¶ 24141 (Final Order, 1993).

Next, the examiner's statement that "the memo places Mr. Manus on formal notice that any similar action will result in discipline" (PDO at 3) is overly general, fails to take into account the actual language of the memo and ignores the context of Weber's reference to discipline. In the second paragraph of the memo, Weber stated that "I consider your behavior toward me to be totally out of line, offensive and perhaps subject to Board discipline in and of itself." (FF 8). Review of the memo in its entirety, the circumstances surrounding its issuance and Weber's testimony reveals that she viewed the conduct of Manus toward Weber (making repeated accusations in a loud voice), not the simple presentation of grievances or discussion of employe concerns, as possibly subject to discipline in and of itself. (N.T. 43, 56-57). Indeed, Manus' conduct toward Weber on the phone on August 21, 1998 prompted Weber to issue her memorandum. A fair reading of the memo and the context in which it was issued here does not support the examiner's conclusion that Weber threatened Manus with discipline for presenting grievances.

AFSCME contends that the "behavior" Weber sought to proscribe by this statement is set forth in the very next sentence of that paragraph, which provides "[i]n the future, you are not to telephone or stop in to see me concerning any employee matters." Id. Based on this portion of the memo, AFSCME asserts that Weber threatened to discipline Manus for simply presenting employe grievances. However, AFSCME is taking Weber's reference to discipline out of context and is reading it in a vacuum. The reference

to discipline here was clearly not for Manus simply voicing disagreement with Weber's treatment of Friday Orr, but instead was referenced because Weber believed Manus' actions toward her, a Township supervisor, bordered on insubordination. Thus, Weber's reference to discipline would not tend to coerce employes in presenting their grievances to the Township. If anything, the reference to discipline would tend to discourage employes from being insubordinate, which is beyond the realm of protected activity under the Act. Department of Public Welfare, supra.

An objective review of Weber's memo and the totality of the circumstances under which it was issued do not support an independent 1201(a)(1) violation. In the memo, Weber does not state that employes cannot file grievances or that they will be subject to discipline for doing so; rather, Weber in fact directs Manus to file a grievance if the union disagrees with a disciplinary decision of the Township. To conclude that Weber's memo tends to coerce employes in the filing of grievances when the employer is in fact encouraging employes to challenge its actions pursuant to the collectively bargained grievance procedure defies common sense. Although the memo indicates that Weber no longer wishes to deal with Manus one-on-one regarding employe matters, she does not proscribe all communication with Manus. Instead, she directed Manus to notify her in writing of his desire to discuss employe issues and further required the presence of the Township's labor counsel at such meetings.

Nor did Weber say that she refuses to meet with the union's designated representative (Manus) an action that would clearly constitute an unfair practice. City of Pittston, 26 PPER ¶ 26016 (Final Order, 1994) (neither party may refuse to bargain with its counterpart's designated representative). Weber is instead expressing her desire to have the Township's labor counsel present when discussing grievances with a representative of the union who verbally attacks her when they are alone and who allegedly misrepresents their conversations. Such actions would not objectively tend to coerce or interfere with the exercise of the right to pursue grievances. Although a portion of the last paragraph of the memo indicates that the Township's disciplinary decisions are not open to Manus' constant challenges, a statement clearly inconsistent with the nature of the grievance process itself, such a statement cannot be considered in a vacuum but must be considered under the totality of the circumstances in this case. Based on the circumstances in which the memo was issued here, a violation of Section 1201(a)(1) will not be found.

The hearing examiner also concluded that the Township violated Section 1201(a)(5) of PERA. In reaching this conclusion, the examiner determined that Weber placed unreasonable conditions on communications with Manus, which showed a lack of sincere desire on the part of the Township to resolve differences and reach common ground as required by the duty to bargain in good faith. This conclusion is premised on the language of Section 1201(a)(5), which makes it an unfair practice for a public employer to refuse to collectively bargain in good faith with the exclusive representative of its employes, "including but not limited to the discussing of grievances." However, as noted above Weber did not categorically refuse to discuss employe grievances with Manus, the union's representative. Rather, in response to Manus' loud and abusive actions toward her, Weber determined that she no longer wished to discuss employe issues with Manus one-on-one. Based on the circumstances of this case, the obvious intention behind Weber's memo was to ensure that she not be alone

when dealing with Manus, an understandable response to his attitude toward her.

AFSCME asserts that the Board has recognized that an employer's imposition of onerous or unreasonable conditions on communications with the union may constitute a breach of the duty to bargain. Though not directly on point, some of the cases cited by AFSCME in support of this proposition are helpful for purposes of resolving this case. Red Lion School Dist., 10 PPER ¶ 10122 (Final Order), aff'd, 10 PPER ¶ 10288 (York County Court of Common Pleas, 1979) (employer cannot engage in conditional bargaining and refuse to bargain with union unless union withdraws proposals employer regarded as non-mandatory subjects); City of Erie School Dist., 13 PPER ¶ 13270 (Proposed Decision and Order, 1982) (duty to bargain violated where employer refuses to bargain unless union agreed to certain contract language proposed by employer); Northern Cambria School Dist., 3 PPER 318 (Nisi Decision and Order, 1973) (employer committed unfair practice by conditioning further bargaining on the removal of one of union's negotiators from its bargaining team). Compare City of Erie School Dist., 16 PPER ¶ 16116 (Final Order, 1985) (employer's insistence that grievance arbitration hearings be conducted after work hours not unfair practice).

Although this case involves the discussion of grievances and not at-the-table negotiations or bargaining, the Board recognized in City of Erie School Dist., 16 PPER ¶ 16116 (Final Order, 1985), that such a distinction is irrelevant. The discussion of grievances is part and parcel of the collective bargaining process, is required by Section 1201(a)(5) of PERA and furthers the general policy of the Act. See Dunmore Police Assoc. v. Borough of Dunmore, 528 A.2d 299 (Pa. Cmwlth. 1987). The key is whether the restrictions set forth by Weber, an agent of the Township, on Manus, a representative of the union, were onerous and unreasonable. There is absolutely no question here that Weber had the right to reasonably react to Manus' rude and abusive behavior. However, the restrictions on communications regarding employe matters that Weber imposed on Manus, the local president, went beyond what was necessary to alleviate the problem. Weber testified that in order to prevent Manus from yelling at her and misrepresenting what occurred during their meetings she decided to require the presence of the Township's labor counsel. (N.T. 44). Thus, at a minimum she wanted to avoid a situation where she would be alone with Manus, who could not only raise his voice at her again and make accusations but also misrepresent their conversations as she alleged he had done on prior occasions. Weber's conduct in this regard does not violate PERA.

However, the requirement of prior written notification and the presence of an attorney went beyond what was necessary to meet that goal. The requirement of prior written notice and the presence of labor counsel each and every time Manus wishes to discuss employe matters with her ignores the reality of the workplace and sets up unnecessary barriers to communication between representatives of employers and unions, who often have to act promptly to informally address situations that arise. Moreover, Weber forbade Manus from phoning her or from stopping by at her office to see her. This restriction also goes beyond what is necessary to address her concerns. The least restrictive way for Weber to attain her goal here was to require the presence of some other person during her conversations, whether on the phone or in person, with Manus. Under the circumstances of this case, the Township's actions must be considered unreasonable. Accordingly, the Township will be directed to rescind the memo. It must be stressed that an employer need not tolerate abusive

conduct and, like Weber, can act to address such conduct but cannot do more than is necessary to do so and cut off effective communication with the representative of its employees.

After a thorough review of the exceptions and all matters of record, the Board shall sustain the Township's exceptions in part and vacate the hearing examiner's finding of an independent violation of Section 1201(a)(1) of PERA and dismiss the remainder of the Township's exceptions, thus leaving intact the finding of a violation of Section 1201(a)(5) of PERA.

CONCLUSIONS

Conclusion numbers 1 through 4¹ as set forth in the Proposed Decision and Order are hereby affirmed and incorporated herein by reference and made a part hereof.

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 filed to the above case number are hereby sustained in part and denied in part and the Order on page 4 of the Proposed Decision and Order is hereby vacated and set aside, and

IT IS HEREBY FURTHER ORDER AND DIRECTED

that Millcreek Township shall:

1. Cease and desist from interfering with, restraining or coercing employees in the exercise of their rights in Article IV of PERA.

2. Cease and desist from refusing to bargain collectively in good faith with the employee organization that is the exclusive representative of employees in an appropriate unit, including but not limited to discussing of grievances with the exclusive representative.

3. Take the following affirmative action, which the Board finds necessary to effectuate the policies of the Public Employee Relations Act:

(a) Rescind the August 21, 1998 memo issued by Suzanne Weber to Larry Manus.

(b) Post a copy of this Final Order and the Proposed Decision and Order within five (5) days of the date hereof in a conspicuous place readily accessible to the employees of Millcreek Township and have the same remain so posted for a period of ten (10) consecutive days; and

¹ Although the Board vacated the finding of an independent 1201(a)(1) violation, the Board sustains the finding of a 1201(a)(5) violation, which also constitutes a derivative violation of (a)(1). PLRB v. Mars Area School Dist., 480 Pa. 295, 389 A.2d 1073 (1978). Thus, CONCLUSION number 4 is left intact.

(c) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Order by completion and filing of the attached Affidavit of Compliance.

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-eighth day of March, 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.

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

Millcreek Township hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (5) of the Public Employee Relations Act; that it has rescinded the August 21, 1998 memo issued by Suzanne Weber to Larry Manus; that it has posted the proposed decision and order and final order as directed and that it has served a copy of this affidavit on AFSCME at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public