

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AMERICAN FEDERATION OF STATE, :
COUNTY AND MUNICIPAL :
EMPLOYEES, LOCAL NO. 1971 :
 :
v. : Case No. PERA-C-02-484-E
 :
PHILADELPHIA HOUSING DEVELOPMENT CORP. :

FINAL ORDER

On June 26, 2003, the American Federation of State, County & Municipal Employees, Local 1971 (Union) filed timely exceptions to the Proposed Decision and Order (PDO), dated June 6, 2003, with the Pennsylvania Labor Relations Board (Board). On the same date, the Union also requested an extension to file a supporting brief, which the Board Secretary granted on July 3, 2003. On July 28, 2003, the Union timely filed a brief in support of exceptions. In the PDO, the Hearing Examiner concluded that the Philadelphia Housing Development Corporation (PHDC) did not engage in unfair practices in violation of Section 1201(a)(1), (3) or (5) of the Public Employee Relations Act (PERA) when its executive vice-president, Anthony McIntosh, assaulted the Union's president and chief negotiator during a labor-management meeting. On July 31, 2003, the Board Secretary granted the PHDC's request for an extension of time to file its reply. On September 9, 2003, the Board Secretary granted PHDC's second request for an additional extension of time to file a reply to exceptions. On September 9, 2003, the PHDC timely filed a reply to exceptions and a supporting brief. After a thorough review of the Union's exceptions and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

7. Mike Magro, PHDC's Deputy Director of Construction and Development, sat between McIntosh and Brown at the August 26, 2002 labor-management meeting. At some point during the meeting, while McIntosh and Brown were engaged in a heated verbal exchange, McIntosh removed his glasses, stood up, removed his jacket and walked around the table towards Brown. Mike Magro stood up between McIntosh and Brown. An exchange of punches between McIntosh and Brown followed. (N.T. 31-32, 65-66, 82-84, 95, 105-107, 132, 154-156, 168-172, 189).

8. John Ray, Chief Union Steward and Housing Inspector for the PHDC, attended the meeting and tried to remove McIntosh from Brown. In response to the loud noises, bargaining unit employees rushed into the meeting room to quell the violence. (N.T. 34, 108-109).

9. PHDC did not admit wrongdoing or disavow McIntosh's conduct to the employees. The e-mail relating to McIntosh's suspension made no reference to the incident or the reason for the suspension. There is no evidence indicating the number of employees who could have received the e-mail message. The record does not reveal whether PHDC attempted to assess Brown's out-of-pocket expenses as a result of his injuries or

offer to reimburse him for such expenses if they existed. (N.T. 38-39, 85-86, 99, 159).

10. Since the August 26, 2002 incident, McIntosh and Brown have attended step-three grievances together. (N.T. 50, 124, 146).

DISCUSSION

Jeffrey L. Brown is the Union president and its chief negotiator. Anthony McIntosh is PHDC's executive vice president. On August 26, 2002, Brown and McIntosh attended a labor-management meeting along with other PHDC management personnel and Union representatives. At that meeting, discussions between Brown and McIntosh became heated and involved name-calling. Soon thereafter, McIntosh removed his glasses, stood up, removed his jacket and walked toward Brown. Mike Magro is the Deputy Director of Construction and is on the management team. Magro stood up between McIntosh and Brown. An exchange of punches between McIntosh and Brown followed. John Ray, the Chief Union Steward, who also attended the meeting, tried to remove McIntosh from Brown. In response to the commotion, bargaining unit members rushed into the meeting room to quell the violence. Brown suffered a broken thumb and bruises on his body as a result of the incident. Within a few days of August 26, 2002, PHDC conducted an investigation of the incident and suspended McIntosh for twenty days. An e-mail was issued by PHDC informing employees that McIntosh was suspended and that Sandra Barnhill would be in charge of the agency in the interim. The e-mail makes no reference to the incident or the reason for McIntosh's suspension. Mr. McIntosh has resumed his role of meeting with Brown in step-three grievance matters.

Initially, we note that the Union has not excepted to the Examiner's dismissal of the part of its charge alleging violations of Section 1201(a)(3) and (5). Accordingly, the dismissal of those causes of action is conclusive and will not be reviewed. 34 Pa. Code 95.98(a)(3); Fraternal Order of Police, Lodge No. 5 v. PLRB, 727 A.2d 1187 (Pa. Cmwlth. 1999). In its exceptions, the Union challenges several clauses contained within Finding of Fact No. 6. Findings of fact must be supported by substantial, legally competent evidence. PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942); State System of Higher Education v. PLRB, 737 A.2d 313, 315, n.6 (Pa. Cmwlth. 1999); Teamsters Local 429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000); Manuel Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1997). Substantial evidence is "relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Kaufman, supra (quoting Consolidated Edison Co. v. National Labor Relations Board, 305 U.S. 197, 229, 59 S.Ct. 206, 217 (1938)). After a review of the Hearing Examiner's citations to the notes of testimony in support of Finding of Fact No. 6, the Board concludes that the record contains substantial evidence to support Finding of Fact No. 6 and particularly the challenged clauses contained therein.

The Union also excepts to the terminology utilized by the Examiner to describe the events at issue in this case. The terminology at issue is the following: "increasing tension between the two men was

further fueled by the exchange of verbal fusillades, which, in turn, escalated into a pugilistic affray." (PDO at 2). The Union also maintains that the use of the word "donnybrook" on page 2 of the PDO is also inaccurate. The Union contends that this terminology is not supported by the record and does not accurately reflect the events that occurred during the labor-management meeting of August 26, 2002. The Union specifically contends that this terminology inappropriately connotes that the events of August 26, 2002 involved the mutual participation and responsibility of both McIntosh and Brown, but the record demonstrates that McIntosh attacked Brown who was victimized by the assault. However, Finding of Fact No. 6 does indeed support the Examiner's characterizations and, as stated above, Finding of Fact No. 6 is supported by the record.

The Union also contends that the Examiner erred in concluding that the PHDC did not commit unfair practices in violation of Section 1201(a)(1) of PERA. In this regard, the Union argues that the Examiner erred by concluding that the suspension of McIntosh "sent a clear message to the Union that PHDC would punish management employees who engaged in such outlandish behavior" and that "on these facts it is simply inconceivable that employees would tend to be coerced." (Union Exceptions ¶'s 8 & 9 (quoting PDO at 3)).

In Passavant Memorial Area Hosp., 237 N.L.R.B. 138, 98 L.R.R.M. 1492 (1978), the National Labor Relations Board (NLRB) articulated the following standard for determining whether an employer adequately repudiated an unfair labor practice under Section 8(a)(1) of the National Labor Relations Act (NLRA):

It is settled that under certain circumstances an employer may relieve himself of liability for unlawful conduct by repudiating the conduct. To be effective, however, such repudiation must be "timely," "unambiguous," "specific in nature to the coercive conduct," and "free from other proscribed illegal conduct." Furthermore, there must be adequate publication of the repudiation to the employees involved and there must be no proscribed conduct on the employer's part after the publication. And, finally, the Board has pointed out that such repudiation or disavowal of coercive conduct should give assurances to employees that in the future their employer will not interfere with the exercise of their Section 7 rights.

Id. at 138-39 (citations omitted). This standard has also been adopted by and applied in the D.C. and 6th Circuits. Ark Las Vegas Restaurant Corp. v. NLRB, 334 F.3d 99 (D.C. Cir. 2003); Sam's Club v. NLRB, 141 F.3d 653 (6th Cir. 1998); General Indus. Employees Union, Local 42 v. NLRB, 951 F.2d 1308 (D.C. Cir. 1991). Our Supreme Court has opined that the Board properly relies on federal authority from the NLRB where there is no meaningful difference in policy between the NLRA and PERA on the issue. Appeal of Cumberland Valley, 483 Pa. 134, 394 A.2d 946, 950 (Pa. 1978). We find that there is no meaningful difference between the remediation of unfair labor practices under Section 8(a)(1) of the NLRA and Section 1201(a)(1) of PERA regarding an employer's repudiation of its unfair practice against its employees. Accordingly, the Board concludes that the Passavant standard effectively implements the stated policies of PERA "to promote orderly and constructive relationships," and to prevent injury to the public from unresolved disputes. 43 P.S.

§ 1101.101. The elements of the Passavant standard essentially provide for a determination of wrongdoing, make-whole relief and posting requirements that a claimant would obtain by successfully litigating an unfair practice charge. Satisfying this standard, therefore, obviates the need for pursuing litigation while maintaining a constructive cooperative relationship between the employer and the union. Passavant, 237 N.L.R.B. at 139 (stating that an effective disavowal is required to relieve a respondent of liability and the need for further remedial action before the NLRB).

However, a necessary precondition for determining whether an employer avoids liability for the alleged coercive conduct of one of its managers, is a determination that the conduct, standing alone, is indeed coercive and constitutes an unfair practice. Absent such an initial determination, it is unnecessary to evaluate whether an employer adequately repudiated or otherwise remedied the conduct in question. The record establishes that McIntosh's conduct constituted an unfair practice within the meaning of Section 1201(a)(1). Although the findings of fact, as supported by the record in this case, do not indicate who threw the first punch, the uncontradicted testimony clearly establishes that McIntosh was the aggressor by placing Brown in fear of an attack when he removed his glasses, stood up, removed his jacket and walked over to confront Brown, thereby deliberately and foreseeably escalating tensions and precipitating a fist fight. The Board concludes that McIntosh's behavior leading up to and resulting in a fist fight during a labor management meeting is inherently destructive of employe rights and the collective bargaining process under PERA and thereby constitutes a violation of Section 1201(a)(1).¹ Also, for an independent violation of Section 1201(a)(1), it matters not whether employes were in fact shown to be coerced, rather the relevant inquiry is whether the employer's actions tend to be coercive. AFSCME, District Council 85 v. Millcreek Township, 31 PPER ¶ 31056 (Final Order, 2000). The Board, therefore, also concludes that McIntosh's assaultive behavior, which precipitated physical hostilities during a labor-management meeting, has a tendency to be coercive to Brown, as an individual, and to the bargaining unit as a whole. Although rude, offensive or inflammatory speech and elevated voice levels may be expected, and are in fact protected, obnoxious or violent behavior is not, Millcreek, supra, and when perpetrated by management, it constitutes a violation of Section 1201(a)(1).

Accordingly, the specific issue becomes whether the PHDC's suspension of McIntosh and its e-mail distribution satisfies the repudiation requirements of Passavant. The Passavant Court explained that the employer must broadly disseminate a clear and specific notice that contains the following: (1) an admission of wrongdoing; (2) a reference to the circumstances and persons involved; and (3) assurances to employes that in the future the employer would not interfere with their employe rights. Passavant, 237 N.L.R.B. at 139. The Ark Las Vegas Court followed Passavant and held that, where an employer disseminated a rescission of an unlawful work rule with employes'

¹ For its part, the PHDC acknowledges in its brief in opposition to exceptions that McIntosh was suspended because it deemed his conduct to be unsuitable and inappropriate for the workplace. (PHDC Brief at 15-16).

paychecks, the employer did not effectuate a repudiation of its unlawful work rule because the employer did not admit wrongdoing. Ark Las Vegas, supra. Also, recognizing that a proper repudiation relieves an employer of liability because it effectively supplants a Board remedy, this Board additionally requires that an employer offer appropriate make-whole relief for losses sustained by the affected employe(s), e.g., out-of-pocket medical expenses or co-payments, back pay or lost benefits. Cumberland Valley, supra.

There is no evidence in the record suggesting that PHDC acknowledged or admitted wrongdoing in any way. Although McIntosh was suspended, PHDC failed to publish or express disavowal of McIntosh's conduct. The e-mail lacks a clear expression that McIntosh was suspended for his wrongful conduct towards Brown or that his suspension was without pay. The e-mail not only failed to disavow or retract McIntosh's conduct, but there is no evidence in the record demonstrating that it reached even a majority of the employees in the bargaining unit or that all the employees have access to computers such that they would have received the e-mail. Also, the e-mail does not assure the employees that PHDC and/or its management personnel will no longer interfere with their employe rights. Additionally, there is no evidence on this record that PHDC offered any make-whole relief to Brown for possible out-of-pocket medical expenses or co-payments for the medical treatment he received for his physical injuries.

Moreover, since the incident, McIntosh continues to deal with Union matters and has participated in third-level grievances with Brown. By not disavowing McIntosh's conduct and by involving him again with Union matters, the PHDC has fomented an environment of intimidation. Brown and a reasonable bargaining unit employe would have a tendency to be coerced in future dealings with McIntosh. Brown's and the bargaining unit employees' perception of McIntosh regarding bargaining or Union matters will negatively influence the manner in which and the freedom with which the Union is accustomed to presenting its issues for fear of suffering another explosive response from McIntosh resulting in physical harm. Accordingly, the PHDC failed to adequately repudiate McIntosh's wrongful conduct and, under the circumstances, Brown and PHDC employes would be reasonably intimidated in dealing with McIntosh.

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

CONCLUSIONS

CONCLUSIONS 1 through 3 of the Proposed Decision and Order are affirmed and incorporated herein by reference.

CONCLUSION 4 is vacated and set aside.

5. The PHDC has committed unfair practices in violation of Section 1201(a)(1) of PERA.

6. The PHDC has not committed unfair practices in violation of Section 1201(a)(3) or (5) 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 be and the same are hereby sustained in part; and that the Order on page 3 of the Proposed Decision and Order be, and the same hereby is, vacated and set aside.

IT IS FURTHER ORDERED AND DIRECTED

that the PHDC shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Take the following affirmative action, which the Board finds necessary to effectuate the policies of the PERA:

(a) Reimburse and otherwise make whole Jeffrey L. Brown for any losses including out-of-pocket medical expenses or co-payments for the treatment of the physical injuries he sustained as a result of the fight.

(b) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

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

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Member, and Anne E. Covey, Member, this eighteenth day of November, 2003. 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.

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AFFIDAVIT OF COMPLIANCE

The Philadelphia Housing Development Corporation hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) of PERA; that it has made an offer of make-whole relief to Jeffrey Brown consistent with the Final Order; that it has posted a copy of the Final Order within five (5) days from the effective date of the Final Order in a conspicuous place readily accessible to the employes of the Philadelphia Housing Development Corporation and has had the same remain so posted for a period of ten (10) consecutive days; and that it has served a copy of this affidavit on the Union.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
The day and year aforesaid.

Signature of Notary Public