

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

PENNSYLVANIA STATE CORRECTIONS OFFICERS :  
ASSOCIATION :  
v. : Case No. PERA-C-03-112-E  
COMMONWEALTH OF PENNSYLVANIA :  
DEPARTMENT OF CORRECTIONS :  
PITTSBURGH SCI :

**FINAL ORDER**

On April 7, 2004, the Pennsylvania State Corrections Officers Association (PSCOA) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) to a March 30, 2004 Proposed Decision and Order (PDO) dismissing its Charge of Unfair Practices filed under the Public Employe Relations Act (PERA). The hearing examiner concluded that the Commonwealth of Pennsylvania, Department of Corrections (Commonwealth) did not violate Section 1201(a)(1) or (3) of PERA by arguing for a limitation on its back pay liability during a grievance arbitration. Pursuant to the grant of an extension of time, PSCOA filed its brief in support of the exceptions on May 19, 2004. The Commonwealth's responsive brief was filed on June 15, 2004.

The background circumstances giving rise to PSCOA's charge are essentially the following. Through a Board conducted election, PSCOA replaced AFSCME as the exclusive representative for the correctional officers employed by the Commonwealth. AFSCME, as the prior representative, was in possession of several outstanding and pending grievances. AFSCME claimed that it had exclusive rights to continue processing grievances filed during its term as the employees' representative. Although PSCOA was certified as the exclusive representative on June 21, 2001, AFSCME still claimed a right to process the grievances. The Commonwealth chose to suspend discussing grievances with either union until the question of who had the rights to process those grievances was decided by charges filed with the Board. (Case Nos. PERA-C-01-357-E and PERA-C-01-372-E). In resolving those charges, the hearing examiner issued a November 2, 2001 PDO in which he determined that PSCOA, as the exclusive representative, should process the pending grievances. Thereafter, AFSCME transferred approximately 330 pending grievances to PSCOA in December 2001.

One of those grievances involved the discharge of Corrections Officer Lorne Shields. PSCOA and the Commonwealth proceeded to arbitration on the Shields grievance. During closing arguments at the arbitration, the Commonwealth argued for a limitation on its back pay liability due to scheduling delays occasioned by the change in representation from AFSCME to PSCOA. PSCOA filed a charge with the Board alleging that the Commonwealth violated Section 1201(a)(1) and (3) of PERA by making this argument to the arbitrator, which the hearing examiner dismissed. PSCOA has now filed exceptions to the hearing examiner's dismissal of its charge.

PSCOA first argues, that the hearing examiner erred in finding that the Commonwealth's "advocate noted that there had been a delay in processing of the grievance occasioned by the change in representation from AFSCME to PSCOA," (Finding of Fact 13), and instead should have found that the Commonwealth specifically used the word "decertification" in its argument to limit its back pay liability. PSCOA essentially asserts that use of the word "decertification" in the context of arguing for a limitation of its liability is *per se* an unfair practice. The hearing examiner, however, found that whether or not the Commonwealth used the word "decertification" was not relevant to the charge, as the uncontested facts bore out that the Commonwealth did argue for a limitation of its liability occasioned by a delay caused by the change in representation from AFSCME to PSCOA.

A hearing examiner's findings of fact will be sustained by the Board where there is substantial evidence in the record to support the finding. Substantial evidence is such "relevant evidence as a reasonable mind might accept as adequate to support a conclusion.'" PLRB v. Kaufman Department Stores, 345 Pa. 398, 29 A.2d 90 (1942). In making relevant findings of fact, the hearing examiner may choose to credit or discredit any testimony or evidence, in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth, Department of Corrections Pittsburgh SCI, 34 PPER ¶134 (Final Order, 2003). The hearing examiner's credibility determinations will not be altered absent the most compelling of circumstances. Id.

The hearing examiner's finding that the Commonwealth's request for a limitation of its back pay liability was based on a delay caused by the change in the employees' collective bargaining representative is supported in the record. Dale Wetzel, the Commonwealth's advocate before the arbitrator, referenced the delays in processing grievances caused by the change in bargaining representatives from AFSCME to PSCOA throughout his testimony before the hearing examiner. He specifically noted that his position to the arbitrator was that the Commonwealth "should not be held liable for this chunk of time." (N.T. 32). His testimony constitutes substantial evidence supporting the hearing examiner's finding, that the Commonwealth sought a limitation of liability because of delays affected by the change in representation. Nevertheless, we agree with the hearing examiner that even if the Commonwealth used the word "decertification" to support its argument for a limitation of liability, that fact would not change the result.

With regard to PSCOA's claims of discrimination under Section 1201(a)(3) of PERA, whether or not the Commonwealth used the word "decertification" is immaterial to the outcome. Under Section 1201(a)(3) of PERA "public employers, their agents or representatives are prohibited from ... [d]iscriminating in regard to hire or tenure of employment or any term or condition of employment..." To establish a *prima facie* claim of discrimination the charging party must show 1) protected activity; 2) the employer's knowledge of that activity; and 3) that the employer acted with anti-union motives. St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977).

Mere use of the word "decertification" by an employer is not inherently destructive to employees' rights such that union animus may be implied. See Teamsters Local 229 v. Susquehanna County, 30 PPER ¶30060

(Final Order, 1999). Accordingly, whether or not the Commonwealth exhibited anti-union motives for its conduct, must be inferred from the facts of record. St. Joseph's Hospital, supra. In this regard, PSCOA bore the burden of proof, through direct or circumstantial evidence, that the Commonwealth harbored anti-union animus in making its argument to the arbitrator. Id.

Having heard the testimony of the witnesses, and reviewed the evidence, the hearing examiner determined that the Commonwealth made the challenged argument before the arbitrator with the legitimate intent of limiting its back pay liability because of delays in arbitrating the Shield's grievance. (Finding of Fact 13). The hearing examiner specifically rejected any evidence or testimony to the contrary regarding an unlawful motive, noting that "there is no basis for finding that the Commonwealth made the argument to 'penalize employees for selecting a new bargaining representative, and to chill employees' right to select representatives of their own choosing'.... (PDO at 4). As noted above, the hearing examiner's finding that the Commonwealth sought a limitation of its back pay liability for delays in the arbitration process is supported in the record, and there is no compelling basis to overturn the hearing examiner's acceptance of the employer's stated intent, nor his rejection of any alleged unlawful motive. Based on the hearing examiner's credibility determinations, and the facts as found and supported in the record, PSCOA has failed to sustain its burden in establishing the Commonwealth's anti-union motives necessary to satisfy the third element for a *prima facie* claim of discrimination. Accordingly, the hearing examiner did not err in dismissing PSCOA's charge of discrimination under Section 1201(a)(3) of PERA.

PSCOA argues that the Commonwealth's closing argument to the arbitrator constituted an independent 1201(a)(1) violation as it would tend to chill employees' right to select a representative of their own choosing. PSCOA asserts that the Commonwealth's argument to limit its back pay liability because of the "decertification" would tend to discourage employees from changing their bargaining representative, because, if discharged during the election campaign, their back pay award may be reduced by an arbitrator.

An independent violation of Section 1201(a)(1) occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable employee, regardless of whether anyone was actually coerced. Fink v. Clarion County, 32 PPER ¶132165 (Final Order, 2001). The employer's motive for its actions is irrelevant. Northwestern Education Association v. Northwestern School District, 16 PPER ¶16092 (Final Order, 1985).

As noted above, any suggestion that the mere use of the word "decertification" is inherently damaging to employer rights to constitute a *per se* unfair practice whenever used is rejected. Analysis of an independent 1201(a)(1) violation requires a review of the facts and circumstances surrounding the particular case at hand. As the relevant analysis for a Section 1201(a)(1) violation is case sensitive, Lower Merion School District, 23 PPER ¶123099 (Proposed Decision and Order,

1992), is neither controlling nor persuasive.<sup>1</sup>

It cannot be said on this record that the arguments of the Commonwealth's advocate in the Shields' grievance would have a tendency to coerce employes from engaging in protected activity. It is common knowledge of labor relations, that arbitration proceedings are adversarial -- each party, the employer and the union, vying for the best possible outcome. There are no guarantees as to the results of arbitration as the ultimate decision is in the hands of a neutral arbitrator, thus, leading the Pennsylvania Supreme Court to recognize that an "arbitrator might fashion an invalid award." Commonwealth, Office of Administration v. PLRB, 528 Pa. 472, 479, 598 A.2d 1274, 1277 (1991). Merely because an arbitrator may accept an argument of one party and reach an adverse result for the employe, does not mean that employes should or would expect the same result from the same, or a different arbitrator, in a subsequent matter. What should be obvious to the employes, and to the union, is that just because the employer may attempt to assert the same position in a subsequent arbitration, is not a foregone conclusion that that argument will be accepted by another arbitrator, or that it would not be overturned on appeal. Accordingly, the potential for the Commonwealth to argue for a limitation of its back pay liability resulting from a "decertification" and/or delays there from, would not have a tendency to coerce or interfere with the employes' right to designate their collective bargaining representative. As such, the hearing examiner did not err in dismissing PSCOA's independent Section 1201(a)(1) claims.

PSCOA also argues that the hearing examiner erred by asserting that the PSCOA charge was nothing more than an impermissible collateral attack on the award, and determining that the "repugnancy standard" for reviewing grievance arbitration awards did not apply. PSCOA asserts that its charge alleged that the Commonwealth's conduct during the arbitration hearing was the unfair practice, and argues that the result of that unfair practice was an award which is repugnant to PERA.

The Board has long recognized a repugnancy standard for reviewing whether it should defer to an arbitrator's award which, in effect, resolved potential unfair practices. In PLRB v. Pine Grove Area School District, 10 PPER ¶10167 (Order Deferring Unfair Practice Charge Until Further Order of Board, 1979), the Board held that where a grievance under the collective bargaining agreement and a charge of unfair practices are simultaneously filed based on the same employer action (excluding claims of discrimination) the Board will defer the unfair practice charge pending a grievance settlement or an arbitrator's award. Once an arbitrator's award is issued, the Board will dismiss the unfair practice, as having

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<sup>1</sup> The Board is not bound by a hearing examiner's decision. Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 29 PPER ¶29240 (Final Order, 1998). Nonetheless, there is at least one dispositive material fact distinguishing Lower Marion School District from the facts of this case. In Lower Marion School District, the employer, referencing a teacher's union status, unilaterally denied him an assistant student teacher for his class. Here, however, a neutral arbitrator limited Shields' back pay award, not the employer. Given this distinction on the facts, the hearing examiner did not err in distinguishing this case from Lower Marion School District, and rejecting any reliance thereon.

been resolved through arbitration, where "(a) the grievance arbitration proceedings were fair and regular; (b) the dispute was amicably settled or submitted promptly to arbitration; and (c) the result reached was not repugnant to the Act." Pine Grove Area School District, 10 PPER at 271. The Board has not applied this "repugnancy standard" outside the scope of its deferral policies, and, in light of the favored policy of having the parties' disputes resolved through the contractual grievance and arbitration mechanism, State System of Higher Education (Cheyney University) v. State College and University Professional Association (PSEA-NEA), 560 Pa. 135, 743 A.2d 405 (1999), declines to do so here as well. Accordingly, since this case does not involve a question of deferral, the hearing examiner did not err in refusing to review the award as to whether it was repugnant to PERA.

Moreover, what is obvious from the charge is that PSCOA is dissatisfied with the award, and is now attempting to assert an alleged unfair labor practice occurring during the course of the arbitration hearing as a means of overturning the award. Dissatisfied with the result of arbitration, PSCOA in its charge of unfair practices claims that the Commonwealth discriminated against and interfered with employees' rights through its advocacy before the arbitrator, as opposed to challenging the result through the underlying facts related to Shields' discipline. The Board and the courts have long recognized that unfair practice proceedings before the Board are not a permissible forum for reviewing the merits of an arbitration award. PSCOA's remedy to challenge the merits of the award is by direct appeal of the award, and not through a collateral attack on the award in an unfair practice proceeding before the Board. Pennsylvania Labor Relations Board v. Commonwealth, 478 Pa. 582, 387 A.2d 475 (1978); Derry Township v. Pennsylvania Labor Relations Board, 571 A.2d 513 (Pa. Cmwlth. 1989).

After a thorough review of the exceptions and all matters of record, the hearing examiner did not err in dismissing PSCOA's claims under Section 1201(a)(1) and (3) of PERA, and its exceptions thereto are therefore dismissed.

#### ORDER

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

#### HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order of March 30, 2004, are dismissed, and the PDO is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this seventeenth day of August, 2004. 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.