

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL NO. 764 :  
 :  
 v. : Case No. PERA-C-03-84-E  
 :  
 MONTOUR COUNTY :

**FINAL ORDER**

Montour County (County) filed timely exceptions on November 4, 2003, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued October 23, 2003. The Teamsters Local No. 36 (Union) also filed timely exceptions on November 10, 2003, with the Board from the same order. Upon being granted a fourteen (14) day extension from the Board Secretary to file a supporting brief, the Union filed its Brief in support of its exceptions and in opposition to the County's exceptions on November 24, 2003. In the PDO, the Hearing Examiner found that the County had committed unfair practices within the meaning of Section 1201(a)(1) of the Public Employe Relations Act (PERA), by violating a Union member's Weingarten rights.<sup>1</sup> The Hearing Examiner further found that the County had not disciplined a union member for participating in protected activity; and consequently, had not committed unfair labor practices within the meaning of Section 1201(a)(3) of PERA when it terminated the employe.

In its exceptions, the County asserts that the Hearing Examiner erred by finding that Deputy Warden Gerald Cutchall denied Correctional Officer Joseph Kinn's Weingarten rights on March 4, 2003.

The Union excepts to the Hearing Examiner's rulings that the County did not unlawfully discriminate against Kinn. Particularly, the Union asserts that the disparate treatment afforded Kinn compared to other similarly situated officers, and the proximity in time between Kinn's participation in protected activity and his discipline, are sufficient to prove the County's improper motivation for dismissing Kinn.

The salient facts as found by the Hearing Examiner are as follows. As of June 2001, the County had a policy regarding the procedures for admitting inmates to the county prison, which included the following:

A strip search will be conducted in a respectful and dignified manner by a trained officer. They require

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<sup>1</sup> A public employe has the right to union representation at an investigatory interview with his or her employer, which the employe reasonably believes may result in the imposition of discipline. Commonwealth of Pennsylvania, PEMA v. PLRB, 768 A.2d 1201 (Pa. Cmwlth. 2001); NLRB v. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959 (1975). Further, in PEMA, the Board declared that an employe may be entitled to "make whole" type relief where it is shown that the employer based its decision to discipline on information obtained in the unlawful interview.

offenders to remove their clothing so their entire bodies can be visually inspected as well as the search of their clothing for contraband. Once the officer has conducted his search, all personal property will be removed and documented on the inmates['] property bag...All personal property will be searched with the offender present.

(PDO 2).

By memorandum dated June 7, 2001, Warden Fred Shepperson informed the correctional officers, including Kinn, as follows:

The daily log sheet will be completed for any and all activities that occur during any shift. The daily log sheet will be handle[d] by the duty officer for each shift... Should the duty officer along with the other officers on his shift, discover that they have failed to make an entry on the daily log, for any activity or an event that has occurred on their shift, the duty officer shall make the entry on the log sheet at the end of the report and shall explain the reasons why, [sic] the additional information was added.

(PDO 2-3).

In early 2002, the Union initiated a campaign to organize the correctional officers into a bargaining unit. Kinn assisted another correctional officer, Robert Moser, in relaying communications from the Union to the officers. Kinn informed then Deputy Warden Cutchall of his preference for the Union. Cutchall responded that he "did not know if organizing was a good idea." On October 29, 2002, the Board certified Local 764 as the exclusive representative of the bargaining unit comprised of all full and part-time prison guards employed at the County's prison.

By February 2003, Warden Shepperson transferred responsibility for policy and procedural enforcement at the prison to then Deputy Warden Cutchall. Previously, correctional officers who had improperly corrected inaccurate inmate counts were issued verbal warnings. On February 26, 2003, Kinn admitted to Cutchall that he corrected inmate counts for the second and third shifts on February 22, while working the third shift as the duty officer. In response to this procedural violation, Cutchall suspended Kinn for three days.

On March 2, 2003, Kinn and Corrections Officer Edward Heimbach, while working the third shift, processed inmate Michael Bowman into the prison. Kinn served as the duty officer during this shift. The next day, then Deputy Warden Cutchall received a report from the first shift stating that they found Bowman in possession of contraband, specifically, money and a razor. Subsequently, Bowman informed Cutchall in an interview that he was not strip searched. On March 4, 2003, Cutchall met separately with Heimbach and Kinn. Prior to the commencement of his meeting with Cutchall, Kinn requested Union representation. Cutchall denied this request and conducted the interview. During the interview, Kinn admitted, *inter alia*, that he failed to conduct a proper strip search on Bowman and that he searched the inmate's property outside his presence. By letter dated March 4,

2003, Cutchall informed Kinn that he would receive a three-day suspension for these "serious violations."

On March 5, 2003, Cutchall recommended to the county commissioners that they terminate Kinn for his infractions. The commissioners approved the recommendation, and Cutchall personally notified Kinn of his dismissal. That same day, Cutchall issued a written warning to Correctional Officer Harner for recording an inaccurate inmate count on February 22.

On March 12, 2002, Cutchall issued a written warning to Correctional Officer William James for failing to confiscate contraband, specifically a gold earring, from inmate Robert Reed during his intake on March 8, 2003. Cutchall did not consider James' previous policy violation because of its remoteness in time (1998) with this infraction. On March 13, 2003, Cutchall issued a written warning to Heimbach for inaccurately recording an inmate count on February 22, 2003. On March 19, 2003, Cutchall issued a written warning to James for a similar violation on April 23, 2003. On May 7, 2003, Cutchall suspended Correctional Officer Winger for two days without pay, because inmate counts were inaccurately recorded on April 23, 2003. On May 9, 2003, Cutchall suspended Correctional Officer Harner for one day without pay for altering an inaccurate inmate count by another shift on April 23, 2003.

#### **County's Exceptions**

In its exceptions, the County argues that the Hearing Examiner erred in concluding that the County committed an unfair practice within the meaning of Section 1201(a)(1) of PERA. A violation of Section 1201(a)(1) of PERA occurs when a public employer interferes with, coerces or restrains employes in the exercise of rights guaranteed in Article IV of PERA. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). The law is well established that a public employe has the right to union representation at an investigatory interview with his or her employer, which the employe reasonably believes may result in the imposition of discipline. Commonwealth of Pennsylvania, PEMA v. PLRB, supra, AFSCME, Council 12 by Keller v. PLRB, 514 A.2d 255 (Pa. Cmwlth. 1986); NLRB v. Weingarten, Inc., supra.

The record contains substantial evidence supporting the finding that Cutchall denied Kinn's request for Union representation prior to the March 4, 2003 meeting. (N.T. 73-75, 81). The record further contains substantial evidence to support the Hearing Examiner's finding that Cutchall based his decision to discipline Kinn on information he obtained during that meeting. (N.T. 33-34, 54-55, 73-75, 126-132). Therefore, the County violated Kinn's Weingarten rights by denying his request for Union representation before conducting the investigatory interview.

The County asserts that the Hearing Examiner failed to adequately credit Cutchall's testimony that Kinn never requested Union representation prior to the March 4, 2003 meeting. However, Cutchall did not testify that Kinn failed to request representation; but rather, that he could not remember if Kinn made such a request. (N.T. 34). Therefore, Kinn's testimony that he requested representation is substantially unchallenged.

Assuming, however, the County is correct in its assertion that the Hearing Examiner discredited Cutchall's testimony in favor of testimony from Kinn, this would not warrant a reversal of the PDO. The Board gives deference to the Hearing Examiner's decision to credit all, some or none of the testimony by a particular witness or witnesses, Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1996), because it is the hearing examiner that is able to observe the manner and demeanor of the witnesses at the hearing. York City Employees Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998). The mere fact that the Hearing Examiner chose to credit the Union's witness on this point, rather than the more vague testimony of the County's witness, is not error. See Pennsylvania State Troopers Ass'n. v. Commonwealth of Pennsylvania, Pennsylvania State Police, 27 PPER ¶ 27159 (Final Order, 1996). Therefore, the Board dismisses the County's exceptions.

#### **Union's Exceptions**

In its exceptions, the Union asserts that the Hearing Examiner erred in his determination that the County did not unlawfully discriminate against Kinn for his participation in a PERA protected activity. Specifically, the Union claims that it established union animus as the sole motivation behind Kinn's discipline.

An employer commits an unfair practice within the meaning of Section 1201(a)(1) and (3) of PERA if it discriminates against an employe for having engaged in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The Board and the Court have found improper bias, proving unlawful discrimination under PERA, based solely on disparate treatment. City of Reading v. PLRB, 568 A.2d 715, 719 (Pa. Cmwlth. 1989). In establishing disparate treatment, the charging party must prove that the complainant and the disparately treated employes are similarly situated. Id.

The Union contends that employes who committed the same or similar violations than those committed by Kinn were disciplined in a more moderate fashion. The employes the Union identifies, however, were not similarly situated to Kinn. The Union points to several officers who were issued written warnings for recording or correcting their shift's inaccurate inmate counts. In contrast, Kinn corrected another shift's inaccurate count, a violation Montour County regards as more significant. Additionally, other officers reprimanded less severely than Kinn for conducting improper strip searches lacked Kinn's recent history of procedural violations.

In conjunction with this argument, the Union contends that the Hearing Examiner erred in failing to find that previous officer suspensions for inaccurate counts were later reduced to written warnings, proving that the County disciplined the officers too severely. These reductions, however, occurred pursuant to a settlement over grievance filings. Parties often resolve grievances through settlements for purposes other than recognition or admission of their guilt. See Commonwealth v. Terry, 418 A.2d 673 (Pa. Super. 1980)("[t]here are occasions when it is better to settle a case irrespective of the fact that you are right, rather than to risk the time and expense of a lawsuit"). Consequently, unless a settlement

contains specific admissions of fact, it is insufficient to support factual claims that a party acted improperly. Therefore, the Hearing Examiner was justified in his decision to discredit the inference that the reduction of the disciplinary measures pursuant to a settlement agreement proves that the original disciplinary measures were too severe.

Assuming, arguendo, that the settlements substantially support the Union's assertion, the Hearing Examiner may still properly reject the evidence. The Hearing Examiner is obligated only to set forth those findings necessary to support his conclusion. He is not required to summarize the evidence, make unnecessary findings of fact or make findings that would support another conclusion, regardless of the existence of substantial evidence to support such findings. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975); Ford City Borough, 19 PPER ¶ 19117 (Final Order, 1988); AFSCME v. Dep't Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986).<sup>2</sup>

Next, the Union contends that the County's anti-union animus is established through the close proximity in time between Kinn's participation in protected activity and his termination. The Union asserts that the County disciplined the correctional officers more harshly following the successful organizing campaign and a grievance filed by the Union on behalf of its members.

Close timing alone is insufficient to support a basis for discrimination. Teamsters Local No. 429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000), citing Shive v. Bellefonte Area Bd. Of Sch. Dir., 317 A.2d 311 (Pa. Cmwlth. 1974)("[t]he Board will not substitute mere conjecture or surmise for sound evidence of a discriminatory motive or intent."); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Dep't of Labor and Indus., Office of Vocational Rehabilitation, 16 PPER ¶ 16020 (Final Order, 1984)("[a]lthough there are cases wherein the Board will infer a violation based on the timing of a display of anti-union activity where there is a proper evidentiary foundation, the timing of such activity standing alone is not controlling.").

Furthermore, the appointment of a new administrator charged with enforcing policy militates against a finding of anti-union bias. Previous cases have established that new administrators may employ different styles of management, including the meting out of discipline. This is particularly true when the new administrator is instructed to improve the effectiveness and efficiency of the workplace. Sto-Rox Educational Support Personnel Assoc., ESPA/PSEA/NEA v. Sto-Rox School Dist., 26 PPER ¶ 26038 (Proposed Decision and Order, 1995)(dismissing a charge where the District's decision not to fill a position came soon after a new administration assumed control of the day to day operations of the District and reassessed the District's needs); Temple University

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<sup>2</sup> Additionally, the alleged disparate treatment was contemporaneous with Kinn's activity and discipline, all of which was coincident with the protected activity. Therefore, to establish discrimination based on disparate treatment, the Union bore the burden of proving that the disparately treated employes failed to participate in protected activity. The Union failed to meet this burden, and consequently, the Hearing Examiner properly rejected this syllogism.

Chapter, American Assoc. of University Professors v. Temple University, 18 PPER ¶ 18179 (Proposed Decision and Order, 1987)(no anti-union animus found where new administrator credibly testified that her discharge of employes was motivated by her desire to improve the efficiency of her department).

By February 2003, Warden Shepperson had transferred responsibility for imposing discipline at the prison to then Deputy Warden Cutchall. (Finding of Fact 8). As is common with new administrators, his management style differed from that of his predecessor, choosing to reprimand policy or procedural violators with harsher penalties. Coincidentally, this shift in management corresponded to the formation of the bargaining unit. This mitigates the persuasiveness of the Union's argument that the closeness in time between the protected activity and Kinn's discipline proves anti-union animus. The Board, therefore, dismisses these exceptions.

Finally, the Union excepts to the Hearing Examiner's finding that the County had an adequate explanation for Kinn's dismissal. An inadequate explanation for an employer's termination of an employe may provide a sufficient basis for finding anti-union animus. See e.g. Lehigh Area School Dist. V. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). Here, the record contains substantial evidence that the County had an adequate explanation for terminating Kinn.

Kinn admitted that he violated procedures regarding Bowman and the inmate count. Kinn failed to document his physical inspection of Bowman's body for lacerations or bruises. During Bowman's strip search, Kinn failed to detect contraband on the prisoner. Kinn admits to searching Bowman's personal effects outside his presence. While Kinn was the duty officer in charge, Bowman was improperly issued a razor. Finally, on February 22, Kinn adjusted the inmate count in the daily log, correcting his and another shift's mistakes. Clearly, these procedural violations are adequate grounds for termination. Additionally, the violations establish that the County would have disciplined Kinn for cause, even if he had not engaged in a protected activity. See Sugarloaf Township Police Department v. Sugarloaf Township, 33 PPER ¶ 33023 (Final Order, 2001). Therefore, this exception is dismissed.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions filed by the County and the Union and make the Proposed Decision and Order final.

#### **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 above case number be and the same, are hereby dismissed, and the Proposed Decision and Order 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, L.

Dennis Martire, Member, and Anne E. Covey, Member, this seventeenth day of February, 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.

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**AFFIDAVIT OF COMPLIANCE**

The County hereby certifies that it has ceased and desisted from its violation of section 1201(a)(1) of the Act, that it has submitted to Mr. Kinn in writing an unconditional offer of reinstatement to his former position without prejudice to any rights and privileges enjoyed by him, that it has made Mr. Kinn whole for any losses in pay and benefits that he may have suffered as the result of his termination, that it has calculated any backpay due as directed, that it has paid interest at the simple rate of 6% per annum on any backpay due, that it has posted a copy of the proposed decision and order as directed and that it has served a copy of this affidavit on Local 764.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title

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

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Signature of Notary Public