COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL NO. 205	:	
	:	
v.	:	Case No. PF-C-04-19-W
	:	
BRENTWOOD BOROUGH	:	

FINAL ORDER

Brentwood Borough (Borough) filed timely exceptions on July 9, 2004, with the Pennsylvania Labor Relations Board (Board) from a Proposed Decision and Order (PDO) issued June 22, 2004. In the PDO, the Hearing Examiner concluded that the Borough had committed unfair labor practices within the meaning of Section 6(1)(a) of the Pennsylvania Labor Relations Act (PLRA) by discriminating against Officer Scott Harding, a member of Teamsters Local No. 205 (Union), for his participation in protected activities.

The Borough has filed twenty-four (24) separately stated exceptions to the PDO, which have been combined for purposes of disposition to the extent that common issues of fact or law are stated. The Borough's exceptions are summarized as follows: 1) The Hearing Examiner erred by finding and concluding that the Borough interfered, coerced or restrained Harding in the exercise of his protected rights by discriminating against him for his participation in PLRA protected activities; 2) The Hearing Examiner's Finding of Fact No. 9 is not supported by substantial evidence because the Borough's witnesses regarding this issue were more credible than the Union's witness; 3) The Hearing Examiner relied upon inadmissible evidence in fashioning Finding of Fact No. 9; 4) The Hearing Examiner failed to reach numerous findings of fact; 5) The Hearing Examiner failed to find that the Borough's actions constituted a proper exercise of managerial prerogative; 6) The Hearing Examiner improperly found that the Union establish a *prima facie* case of unfair practices; 7) The Hearing Examiner failed to find that Borough would have taken the same action even if Harding had not engaged in protected activity; 8) The Hearing Examiner erred in finding that the Borough committed an unfair practice within the meaning of Section 6(1)(a) of the PLRA; 9) The Hearing Examiner's order to the Borough to make Harding whole for any losses in pay and benefits sustained as a result of the unfair practice exceeded the scope of the Union's charge of unfair practices; and 10) The Hearing Examiner's order to the Borough to post a copy of the PDO in a conspicuous place readily accessible to its employes for ten (10) days is punitive in nature.

The Hearing Examiner's salient findings of fact are as follows. In 1994, the Borough hired Harding as a police officer. In 1998, Harding became the steward for the Brentwood Police Association (Association). In 2001, Harding became the steward for the Union, a position he held at the time of the hearing in the present case. As the steward for the Association and the Union, Harding filed grievances against and negotiated collective bargaining agreements with the Borough.

On January 12, 2004, Police Chief Robert Butelli posted the work schedule for February 2004. Apart from one night shift, Harding was scheduled to work a steady daylight shift. He and all other full-time officers, with the exception of an officer assigned administrative duties, had been working rotating shifts. No other officer's schedule was changed from rotating shifts to maintaining steady shifts. After Butelli posted the schedule, he told Borough mayor Ken Lockhart that, "Harding used his power as union steward to undermine the department, he caused officers to use all their sick days and short the shifts, told them to screw with the vacation schedule and then he lied when I confronted him," and that "Harding thinks the union sets the rules, let's see how he and the union likes his new schedule." Officer Harding earns overtime pay for court appearances during the day when he works an afternoon or night shift, but does not earn this overtime pay when he works a daylight shift.

In its initial exceptions, the Borough claims that the Hearing Examiner erred by finding a violation of Section 6(1)(a), because the Union did not show that the Borough "interfered with," "restrained" or "coerced" officer Harding in the exercise of protected activities. The Borough argues that a prerequisite to the finding of a violation of Section 6(1)(a) is a specific, discrete attempt by the employer to interfere, restrain and coerce employes' exercise of protected activity. The Hearing Examiner did find as fact that the Borough discriminated against Harding in retaliation for his activities on behalf of the Union. (The Borough has also excepted to that finding, which is discussed *infra*). The Borough's exceptions are without merit, because our Supreme Court has held that other specifically identified unfair practices are a "species of the generic unfair labor practice" defined as interference, restraint and coercion of employes' basic grant of statutory rights to engage in collective bargaining activities under labor laws. PLRB v. Mars Area School District, 480 Pa. 295, 302, 289 A.2d 1073, 1076 (1978). See also Art Metals Construction Co. v. NLRB, 110 F.2d 148 (2nd Cir., 1940)(same result under the National Labor Relations Act). Therefore, when the Hearing Examiner found that the Borough in fact discriminated against officer Harding in retaliation for his activities on behalf of the Union (PDO at 4), such discrimination *a fortiori* constituted a violation of Section 6(1)(a) of the PLRA.

The Borough next excepts to the Hearing Examiner's Finding of Fact No. 9, asserting that it is not supported by substantial evidence, because the Borough's witnesses regarding this issue were more credible than the Union's witness. Generally, because he is best able to observe the manner and demeanor of the witnesses at the hearing, the Board gives deference to the hearing examiner's decision to credit some, all, or none of a witness's testimony. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER ¶ 33011 (Final Order, 2001); Crestwood School District v. Crestwood Education Association, 32 PPER ¶ 32050 (Final Order, 2001). The Board will not disturb the hearing examiner's credibility determinations absent compelling circumstances. Id.

To show compelling circumstances, the Borough asserts Harding's testimony, that he was in a stall in the men's room at the police station when he heard Butelli's admission to the Borough mayor of

illegal discrimination, is too incredible to be true. According to the Borough, Butelli's and the mayor's denials of the conversation are more credible. The Hearing Examiner, however, adequately addressed these concerns in finding Harding's testimony credible. The Hearing Examiner reasoned:

> The Borough's contention is without merit. Officer Harding's testimony that Chief Butelli admittedly changed his schedule for having engaged in activity protected by the PLRA was plausible. Moreover, Officer John Nort credibly testified that Chief Butelli and Mayor Lockhart exited the men's room a minute or two before Officer Harding did (N.T. 84-85), which lends credence to Officer Harding's testimony about the circumstances under which he heard Chief Butelli's admission. Officer Harding's testimony has been credited accordingly.

(PDO, p.4). Thus, the Hearing Examiner adequately explained the reasons for crediting Harding's testimony, and since those reasons are substantially supported in the record, there is no compelling reason to disturb that credibility determination. Therefore, these exceptions are dismissed.

The Borough also asserts that the Hearing Examiner improperly relied upon inadmissible evidence to support Finding of Fact No. 9. Specifically, the Borough asserts that Union Exhibit 4, the memorandum Harding drafted to memorialize the conversation between Butelli and the mayor he overheard while in the bathroom stall, constitutes inadmissible hearsay. The Borough contends that the Hearing Examiner improperly admitted the evidence under the past recollection recorded exception to the hearsay rule. Our Supreme Court set forth the requisite elements to establish a foundation for the admission of evidence as past recollection recorded in Commonwealth v. Cooley, 484 Pa. 14, 21-22, 398 A.2d 637, 641 (1979):

> Before the content of a writing becomes admissible under that exception, the proponent must lay a foundation to show that four requirements are met: '1) the witness must have had firsthand knowledge of the event; 2) the written statement must be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it; 3) the witness must lack a present recollection of the event, and 4) the witness must vouch for the accuracy of the written memorandum.' McCormick, Evidence § 299 at p. 712 (2d Ed. 1972). *See* Miller v. Exeter Borough, 366 Pa. 336, 342, 77 A.2d 395, 399 (1951); Christian Moerlein Brewing Co. v. Rusch, 272 Pa. 181, 187, 116 A. 145, 147 (1922)."

The Borough asserts that the Union failed to establish the second and third elements necessary to lay a proper foundation.

The second element requires that the written statement be an original memorandum made at or near the time of the event and while the witness had a clear and accurate memory of it. Id. The Borough contends that Union Exhibit 4 was not the "original" memorandum made at or near the time of the event. The Borough further alleges that Harding failed

to testify with any specificity as to when the document was prepared. While Harding did prepare contemporaneous notes while listening to the conversation, these notes are irrelevant to the analysis. No testimony or other evidence presented indicates that Harding based the memorandum on his contemporaneous notes rather than his memory of the conversation. Therefore, the memorandum is an original document. Harding typed the memorandum five and a half (5½) hours after the conversation took place.[1] Our Supreme Court has ruled that a memorandum typed within twenty-four (24) hours of the event qualifies as "near the time of the event." See Commonwealth v. Shaw, 494 Pa. 364, 431 A.2d 897 (1981). Accordingly, the document satisfies the second requisite element.

The third element requires that the witness lack a present recollection of the event. The Hearing Examiner relied on Harding's testimony that he could not remember the exact language used in the conversation to satisfy this element. (PDO, p.4 n.2). Since the relevant event is Butelli's admission, failure to remember the exact language constitutes failure to specifically remember the event. Therefore, this requisite element is met, and these exceptions are dismissed.

Assuming, *arguendo*, that the document is inadmissible hearsay, the Hearing Examiner's finding that Butelli changed Harding's schedule because of a discriminatory motive would still prevail. There is substantial evidence in the record supporting the finding that Butelli's motivation for changing Harding's schedule was discriminatory. In deciding whether or not the charging party has presented a *prima facie* case of employer discrimination, the Board looks at a variety of factors, including whether or not the alleged discriminatee is a leading union advocate and whether or not the employer has presented an adequate explanation for its actions. AFSCME, Council 13, AFL-CIO v. Bensalem Township, 19 PPER ¶ 19010 (Final Order, 1987), citing PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1977). The Borough does not contest that Harding was a leading Union advocate. Furthermore, the Hearing Examiner established that the Borough never presented an adequate explanation for its actions. The Hearing Examiner provides a detailed analysis of the Borough's two purported reasons for changing Harding's schedule and why he discredited each respectively. (PDO, p.5). Absent a showing that the employer was motivated by a legitimate business purpose, the Board may impute a discriminatory motive where the employer's alleged legitimate business reason has been discredited. See Westmont-Hilltop Education Association v. Westmont-Hilltop School District, 23 PPER ¶ 23191 (Final Order, 1992); Jenkins and Yarnall v. Commonwealth of Pennsylvania, Department of Labor and Industry, OVR, 18 PPER ¶ 18141 (Final Order, 1987); Sto-Rox Educational Support Personnel Association, ESPA/PSEA/NEA v. Sto-Rox School District, 26 PPER ¶ 26038 (Proposed Decision and Order, 1995). Therefore, the Union established a *prima facie* case of unfair practices without Butelli's admission.

[1] While the Borough contends that Harding failed to recall or testify to the exact time that the memorandum was typed, this contention is unsupported by the record. In providing support for his finding of fact, the Hearing Examiner cited portions of the record where Harding testified to the exact date and time (1/12/04 at 1400 hours) he prepared the memorandum. (PDO, Finding of Fact 9; N.T. 74).

The Borough's next exception asserts that the Hearing Examiner failed to make numerous findings of facts that support another conclusion of law from that reached in the PDO. 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). As stated previously, the Hearing Examiner's findings substantially support his conclusions of law. Since the Hearing Examiner is not required to make additional findings, even if they support a different conclusion, these exceptions are dismissed.

In its exceptions, the Borough asserts that the change in Harding's schedule constituted a proper exercise of managerial prerogative. Where a change in schedule affects only a part of the bargaining unit and where the employer puts forth managerial concern for the change, the employer has a managerial prerogative to make a unilateral schedule change. Reading Fraternal Order of Police Lodge No. 9 v. City of Reading, 30 PPER ¶ 30121 (Final Order, 1999). However, a public employer's managerial prerogative does not insulate it from the statutory obligation to exercise that authority without anti-union discrimination. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994). Consequently, while Butelli's actions may have constituted an allowable exercise of managerial prerogative absent an improper purpose, his discriminatory motive behind the schedule change transforms the permissible action into an unfair practice. Therefore, this exception is dismissed.

The Borough next asserts that the Hearing Examiner erred in finding that the Union established a *prima facie* case of unfair practices. To establish a *prima facie* case that an employer discriminated against an employe for engaging in activity protected by the PLRA, the charging party must prove that the employe engaged in a protected activity, that the employer knew that the employe engaged in the activity and that the employer took action against the employe for having engaged in the activity. Commonwealth of Pennsylvania, Pennsylvania State Police, 33 PPER ¶ 33011 (Final Order, 2001), citing PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). The Borough does not contest that Harding engaged in protected activities, and that the Borough was aware of his participation. The Borough challenges the finding that Butelli's motives behind the schedule change were discriminatory. As previously stated, the Hearing Examiner's finding of a discriminatory motive is supported by substantial evidence and satisfies the third element necessary to establish a *prima facie* case. Consequently, this exception is dismissed.

The Borough further argues that even if the Union established a *prima facie* case, the Hearing Examiner should have found that the Borough would have taken the same action absent Harding's participation in protected activity. If the charging party presents a *prima facie* case, then the charge must be sustained unless the employer shows that it would have taken the same action even if the employe had not engaged in activity protected by the PLRA. Sugarloaf Township Police Department

v. Sugarloaf Township, 33 PPER ¶ 33023 (Final Order, 2001), citing Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1992). The Hearing Examiner discusses at length the Borough's contention that it would have acted in the same manner absent Harding's participation on behalf of the Union, and ultimately dismisses these assertions as lacking credibility. (PDO, pp. 5-6). The Hearing Examiner's credibility determination is both logical and substantially supported by the factual record. Therefore, the Board will not disturb this finding, and this exception is dismissed.

The Borough's final two exceptions concern the relief directed by the Hearing Examiner. The Borough first contends that the Hearing Examiner's order to the Borough to make Harding whole for any losses in pay and benefits sustained as a result of the unfair practice exceeded the scope of the Union's complaint. Section 8(a) of the PLRA empowers the Board to "order any person engaging in any unfair labor practice to cease and desist from such unfair labor practice, and to take such reasonable affirmative action . . .as will effectuate the policies of this act." 43 P.S. § 211.8(c). This power to remedy unfair practices is remedial in nature and not punitive, Plumstead Township v. PLRB, 713 A.2d 730 (Pa. Cmwlth. 1998), and is designed to protect the rights discriminantees and of the bargaining unit members to engage in protected activity without fear of reprisal. David Braymer, Mary Jane Braymer v. Beaver Valley Intermediate Unit, 21 PPER ¶ 21006 (Final Order, 1989). It is well within the discretion of the Hearing Examiner to direct "make whole" type relief where the employer's unfair practice results in demonstrable lost wages, including lost overtime, so long as alleged lost wages are not speculative. The Hearing Examiner fashioned an award that provides a formula to specifically identify the amount of income the Borough must pay Harding to remedy the unfair practice. (PDO, p.7). Additionally, the award remedies the unfair practice specifically alleged by the Union, and therefore, does not exceed the scope of the Union's charge or the unfair practice found by the Hearing Examiner. Accordingly, this exception is dismissed.

The Borough next asserts that the Hearing Examiner's order to the Borough to post a copy of the PDO in a conspicuous place readily accessible to its employes for ten (10) days is punitive in nature. The order directing the Borough to post a copy of the PDO in a conspicuous place is the usual and customary remedy imposed by the Board under Section 8(c) of the PLRA See Plumstead Township v. PLRB, *supra*; Local 3536, International Association of Fire Fighters v. Pottstown Borough and Philadelphia Steam Fire Engine Company No. 1, 28 PPER ¶ 28162 (Final Order, 1997); Jessup Borough Police Department Employees v. Jessup Borough, 33 PPER ¶ 33145 (Proposed Decision and Order, 2002). Posting of the Board's order on bulletin boards readily accessible to employes in not punitive, but effectuates the salutary purpose of apprising affected employe(s) of the outcome of the dispute. Enforcing virtually identical language under Section 10(c) of the National Labor Relations Act, the United States Supreme Court stated:

> We have often held that the posting of notices advising the employees of the Board's order and announcing the readiness of the employer to obey it is within the authority conferred on the Board by § 10(c) of the Act "to take such affirmative action...as will effectuate the policies" of the Act.

NLRB v. Express Publishing Co., 312 US 426, 438, 61 S.Ct. 693, 701 (1941). 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 Borough and make the Proposed Decision and Order final.

ORDER

In view of the foregoing, and in order to effectuate the policies of Act 111 of 1968 and the Pennsylvania Labor 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 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, Chairman, and Anne E. Covey, Member, this twenty-first day of September, 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.