

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 88 :
 :
 v. : Case No. PERA-C-04-389-E
 :
 LEHIGH COUNTY :

FINAL ORDER

Lehigh County (County) filed exceptions on August 8, 2005, with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued July 19, 2005, wherein the hearing examiner concluded that the County violated Section 1201(a)(1) of the Public Employee Relations Act (PERA) by issuing a counseling memorandum in response to an employee's exercise of protected activity. The American Federation of State, County and Municipal Employees, District Council 88 (AFSCME) filed a response to the exceptions. Following extensions of time the County's brief in support of the exceptions was filed September 7, 2005, and AFSCME's brief in opposition to the exceptions was filed October 18, 2005.

AFSCME filed a Charge of Unfair Practices alleging, *inter alia*, that the County violated Section 1201(a)(1), (3) and (5) of PERA by counseling Corrections Officer Justus James, the local union president, for expressing safety concerns to Sergeant John Donate.¹ The facts giving rise to the charge, as revealed through the testimony of record may be summarized as follows.

During cell inspections on May 28, 2005, Corrections Officer Joseph Makovsky, found that many of the inmates' cells would not meet the standards as explained to him by Sergeant Donate the day before. (Finding of Fact 6). Sergeant Donate directed C.O. Makovsky to go to each cell and instruct the inmate on the proper way to clean a cell, and that inmates were not to be allowed out of their cell until their cells were clean. (Finding of Fact 7). Sergeant Donate permitted C.O. Makovsky to use C.O. James, who was working as a "floor utility",² to cover his station while he inspected each cell individually. (Finding of fact 6). While C.O. Makovsky, was inspecting the cells, Sergeant Donate called the unit to inquire how the inspections were going. C.O. James answered the phone, and told him "[t]his really stinks... You can do this stuff of 1-A or 2-A ... Not on two Charlie. It's a violent unit, I've had officers get hurt here before." Sergeant Donate responded "I'm your boss, I'm your boss," and C.O. James hung up the telephone. Meanwhile, C.O. Makovsky continued with the cell inspections until complete. (Finding of Fact 8).

On June 2, 2004, C.O. James was issued a counseling memorandum arising from his conversation with Sergeant Donate on May 28, 2004. According to the memorandum, Sergeant Donate's factual basis for the counseling was as follows.

Officer Makovsky ask (sic) me to call him on 2C around 1535. Officer Makovsky explained to me that the cells on 2C were a wreck and he tried to fix them yesterday, what did I want him to do? I explained to him to use his base utility and key them out. He said that Justus James was there already.

¹ At the hearing on February 14, 2005, AFSCME withdrew claims of an alleged Weingarten violation, National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251, 95 S. Ct. 959 (1975), and allegations of a refusal to respond to an information request. In addition, AFSCME's claims under Section 1201(a)(5) of PERA, pertaining to an alleged unilateral change to a past practice were deferred to grievance arbitration.

² A "floor utility" is a correctional officer who floats among the units to relieve or assist other correctional officers as needed.

I spoke to James and told him to go around and key them out individually and stay and assist Officer Makovsky. I called him back at around 1635 to follow up with the officers and Justus James answered the phone. I ask (sic) him how did it go and he started argueing (sic) 'it sucked.' I said what do you mean and he went on to shout that he seen Officers get hurt up here and that this policy is bullshit. I said that I was his supervisor and we will reinforce the policy. He continued to argue that just because the policy says something that is not the way it should be done on 2C, there are violent offenders there. I attempted to explain to him that doesn't make a difference; but he hung the phone up on me.

Sergeant Donate explained the reasons for his issuing the memorandum.

The policies are in place to establish consistency and overall effective operation. The policy of cell maintenance are (sic) adequate and effective when applied properly. You need to expect higher standards and not lower ones. I have explained this issue to many officers and have had much success. I would like to expect more from you since you have experience here but I continue to get a low performance on simple issues like these. As the union president you need to set the example and raise the level of your performance expectations and you will see that they can be met. I expect more from you in the future, and be advised that future negative occurrences of this type will result in disciplinary action."

(Finding of Fact 11). Based on the testimony and documentary evidence presented, the hearing examiner found that the counseling memorandum issued by Sergeant Donate to C.O. James would tend to coerce employes in the protected right to express safety concerns, and therefore violated Section 1201(a)(1) of PERA.

In its brief in support of the exceptions the County withdrew its challenges to Findings of Fact 9 and 12 conceding that those findings were not erroneous. In addition, there is no dispute from the County that where one employe complains of a safety matter on behalf of others, that the employe is engaged in concerted activity for mutual aid and protection within the meaning and protections of PERA. Teamsters Local No. 249 v. Millvale Borough, ___ PPER ___, Case No. PF-C-03-109-W (Final Order, April 19, 2005); American Federation of State County and Municipal Employees, Council 13 v. Bensalem Township, 19 PPER ¶19010 (Final Order, 1987); Bonner v. Chester Housing Authority, 18 PPER ¶18035 (Proposed Decision and Order, 1987); Pennsylvania Labor Relations Board v. City of Greensburg, 14 PPER ¶14030 (Proposed Decision and Order, 1983); see also, National Labor Relations Board v. Interboro Contractors, Inc., 388 F.2d 495 (2nd Cir. 1967).

However, relying on Pyro Mining Company, 230 NLRB 782 (1977), the County argues that C.O. James's complaint about the cell inspection policy was nothing more than a continued protest about a safety hazard that had already been eliminated, and therefore was no longer statutorily protected under PERA. In this regard, the County asserts that C.O. James's concerns for the safety of C.O. Makovsky were corrected by allowing C.O. James to assist C.O. Makovsky with the inspections.

The facts of this case are unlike those in Pyro Mining. In Pyro Mining, after complaining about a broken drill, an employe was directed to wait while the drill was being repaired. Once the drill was fixed the employe continued in his refusal to work, not because he believed the drill was still a safety hazard, but because of his supervisor's conduct over the complaint. Here however, C.O. James believed the safety hazards to C.O. Makovsky persisted even after the accommodations made by Sergeant Donate. Even with C.O. James there to assist, C.O. James still believed that C.O. Makovsky was in an unsafe predicament. As the record reflects, C.O. James believed that the cell inspections, even with him there to assist, were not safe and still posed a hazard for employes. As noted in Pyro Mining, the assertion that others may believe there is no danger to employes, standing alone, does not diminish the employe's statutory protections for raising his or her reasonable belief that there is a legitimate safety concern needed to be addressed. See Pennsylvania State Corrections Officers Association v. Commonwealth

of Pennsylvania, Department of Corrections, Rockview SCI, 36 PPER 13 (Proposed Decision and Order, 2005); Roadway Express, Inc., 217 NLRB 278 (1975).

In addition, the controlling factor in Pyro Mining, the employes refusal to work, is missing here. Despite their concerns about safety, neither C.O. James nor C.O. Makovsky refused to perform the cell inspections for any reason. Accordingly, C.O. James's concerns about the safety of C.O. Makovsky in performing the cell inspections were protected under PERA.

The County also makes the curious argument that somehow C.O. James's complaints about employe safety were unprotected because he made them to Sergeant Donate who lacked any authority to modify the County's cell inspection policy. We reject any suggestion that an employe must violate employer rules regarding the chain of command, subjecting the employe to potential discipline, in order for his safety concerns to be protected by PERA. Millvale Borough, supra. The statutory protection to engage in concerted activity for mutual aid and protection by expressing safety concerns in the workplace is not eviscerated simply because the supervisor or co-worker to whom the complaints are made lacks the authority to remedy the matter.

In addition, the County contends that the hearing examiner erred in finding that the counseling memorandum issued by Sergeant Donate to C.O. James would tend to coerce employes from raising safety concerns in the workplace. Section 1201(a)(1) of PERA provides that it is unlawful for a public employer to interfere, restrain or coerce employes in the exercise of protected rights. In determining whether an employer's actions are coercive of bargaining unit employes, a violation of Section 1201(a)(1) will be found if the actions of the employer, in light of the totality of the circumstances, would tend to be coercive, regardless of whether employes have, in fact, been coerced. Northwest Education Association v. Northwest School District, 24 PPER ¶24141 (Final Order, 1993).

Based on the wording of the counseling memo issued by Sergeant Donate's to C.O. James, it is reasonable for any employe, especially C.O. James, as union president, to believe that future complaints about the safety of cell inspections would subject them to discipline. C.O. James was counseled because he raised a safety issue about the cell inspections and the counseling memo unequivocally threatens, "that future negative occurrences of this type will result in disciplinary action".

The County asserts that the future actions for which C.O. James could be disciplined is his refusal to accept that the cell inspection policy must be followed by both corrections officers and sergeants. The fallacy of this argument is that C.O. James never indicated that he would not follow the policy, and in fact both he and C.O. Makovsky performed the cell inspections as directed. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004) (finding that employer's assertion that employe refused to use new computer system, was pretext where employe did not refuse to use the system if it was made mandatory). The only reasonably conceivable "future negative occurrences of this type" discernable from the counseling memo is C.O. James's protected complaints about the safety of the cell inspections. Sergeant Donate's direct threat of discipline for engaging in the protected activity of raising safety concerns in the future, would unquestionably tend to interfere, restrain, and coerce not only C.O. James, but other correctional officers as well, and therefore violates Section 1201(a)(1) of PERA.

The County further relies on American Federation of State County and Municipal Employes, District Council 85 Local 3530 v. Millcreek Township, 31 PPER ¶ 31056 (Final Order, 2000), which is wholly distinguishable on its facts. In Millcreek Township, there was no threat, veiled or otherwise, which would have tended to interfere, retrain or coerce the union representatives from raising grievances with the employer. In fact, the letter issued to the union representative, which was alleged to be coercive, noted that the union representative was acting inappropriately and offensively toward a manager, and further encouraged grievances to be raised and presented pursuant to the contract. Sergeant Donate's counseling memorandum, on the other hand, expressly states, without

qualification as in Millcreek Township, that discipline may be imposed for raising safety concerns about cell inspections in the future.

The counseling memorandum issued by Sergeant Donate to C.O. James, threatening discipline for raising concerns about the safety of fellow corrections officers who perform cell inspections, would clearly tend to coerce employes from raising those safety issues in the future. Accordingly, after a thorough review of the exceptions and all matters of record, the hearing examiner did not err in concluding that the County violated Section 1201(a)(1) 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 exceptions filed by Lehigh County are hereby dismissed, and the July 19, 2005 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this fifteenth day of November, 2005. 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
Pennsylvania Labor Relations Board

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LEHIGH COUNTY :

AFFIDAVIT OF COMPLIANCE

Lehigh County hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of PERA; that it has rescinded the counseling memo issued to Officer James; 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 the Union 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