

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

COLONIAL FOOD SERVICE EDUCATIONAL :
PERSONNEL ASSOCIATION :
v. : Case No. PERA-C-03-431-E
COLONIAL SCHOOL DISTRICT :

FINAL ORDER

On December 3, 2004, the Colonial Food Service Personnel Association (Union or Association) timely filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board), to a Proposed Decision and Order (PDO) issued November 19, 2004.¹ In the PDO, the Hearing Examiner concluded that the Colonial School District (District or Employer) did not engage in unfair practices within the meaning of Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) by refusing to interview the Union president for or promote her to the position of head cook at the Colonial Middle School (CMS). On December 21, 2004, the District filed a response to the Union's exceptions. On March 15, 2005, the Board issued an Order Directing Remand (ODR) to the Hearing Examiner with direction to make additional findings and issue a prospective proposed decision and order. On April 8, 2005, the Examiner issued an Amended Proposed Decision and Order (APDO). On April 25, 2005, the Union timely filed exceptions, with a supporting brief, to the APDO. On May 3, 2005, the District timely filed a response.

Diane Crocco has worked in the District's food services department since 1993. She has been the Union president for four years, and she is currently the assistant cook at CMS. As Union president, Ms. Crocco filed approximately seventeen grievances, which were all resolved, except for one. Evan Haines has been the director of food services for the District for twenty-six years, and he decides which employes receive promotions within the department.

In 2002, the District filed a unit clarification petition² with the Board seeking to remove head cooks from the bargaining unit. Crocco testified in those proceedings. On July 29, 2003, an examiner issued a proposed order of dismissal (POD) concluding that the head cooks were to remain in the unit.³ Crocco was also the serve safe manager at CMS. The serve safe manager is certified by the Board of Health (BOH) to ensure compliance with BOH regulations regarding kitchen safety and cleanliness and proper food handling. On June 4, 2003, Crocco notified Haines that she was interested in obtaining the vacant head cook position at CMS. Crocco applied for the CMS head cook position in August of 2003, when it was posted. However, Haines contacted Terry Marchozzi and encouraged her to apply for the position. Marchozzi subsequently applied for the CMS head cook position and Haines hired her. Marchozzi previously served as head cook for eighteen months at Whitmarsh Elementary School. Haines' performance evaluations of Marchozzi refer to her as having "excellent management potential" and state that she is a good "candidate for a larger operation in the future." Contrary to Marchozzi's performance record, Crocco received a written warning from Haines for her failure to keep the CMS kitchen in conformity with serve safe standards in her capacity as safety manager. Crocco has also had negative interactions with co-workers. Crocco also inadequately completed her performance evaluations of employes while she was the acting head cook at CMS, which was a specific job function of the head cook.

¹ On November 19, 2004, the Hearing Examiner issued a Corrected Proposed Decision and Order providing the originally omitted issuance date. Both orders will simply be referred to as the PDO.

² Docketed at Case No. PERA-U-02-155-E.

³ In the Matter of the Employes of Colonial School District, 34 PPER 93 (Proposed Order of Dismissal, 2003).

In its exceptions, the Union contends that the Examiner erred in failing to properly apply St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977) and find that the District committed an unfair practice in failing to promote Ms. Crocco into the CMS head cook position. In its brief, the Union specifically argues that the District failed to adequately explain its reasons for seeking and hiring Marchozzi, when she did not apply for or express any interest in the CMS head cook position, or its failure to interview Crocco after she expressed interest in the position in June 2003 and formally applied for it after the position was posted in August 2003. The Union claims that the close timing between receiving the order dismissing the District's unit clarification petition, for which the District allegedly blames Crocco, and the denial of Crocco's promotion coupled with the District's inadequate, pretextual explanations yields an inference of animus.

In a discrimination claim under Section 1201(a)(3) of PERA, the complainant possesses the burden of proving that the employe engaged in activity protected by PERA, the employer knew that the employe engaged in protected activity and the employer's complained of conduct was motivated by union animus. St. Joseph's Hosp., supra; Delaware County Lodge 27, FOP v. PLRB, 694 A.2d 1142 (Pa. Cmwlth. 1997). The complainant must establish all three elements of the three-part conjunctive standard by substantial, legally competent evidence to establish a prima facie case. Teamsters Local No. 764 v. Montour County, 35 PPER 147 (Final Order, 2004). As part of its prima facie case, the complainant may discredit the employer's reasons for the adverse action taken and expose them as pretextual or inadequate. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994).

On this record, the Union's claims are unsubstantiated and fail to satisfy the elements of St. Joseph's Hosp., supra. As recognized by the Examiner, there is no dispute that Ms. Crocco engaged in protected activity and that the District knew of that activity. However, the Examiner concluded that "[w]hat the Association has not shown is that the District refused to promote Crocco because of her protected activity," (PDO at 3). In a charge of discrimination, the employer's motivation is the sine qua non that creates the offense. PLRB v. Ficon, 434 Pa. 383; 254 A.2d 3 (1969); Perry County v. PLRB, 364 A.2d 898 (Pa. Cmwlth. 1994); Indiana Area Educ. Ass'n v. Indiana Area School Dist., 34 PPER 133 (Final Order, 2003). Having reviewed the record as a whole, the Board finds that the Examiner properly concluded that the Union failed to meet its burden of proving that the District promoted Marchozzi to the position of head cook at CMS instead of Crocco as a result of Crocco's Union activity.

Although close timing between the employe's protected activity and the employer's action alone is insufficient to establish unlawful motive, AFSCME, Council 13 v. Commonwealth, Department of Labor and Indus., Office of Vocational Rehabilitation (OVR), 16 PPER ¶ 16020 (Final Order, 1984), and a pretextual reason, standing alone, is also insufficient to establish unlawful motive, Clarion-Limestone Area School District, 25 PPER ¶ 25033 (Final Order, 1994), when timing is coupled with an insubstantial or pretextual reason for the action, the Board may infer union animus. Lehigh Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996); Teamsters Local #429 v. Lebanon County and Lebanon County Sheriff, 32 PPER P. 32006 (Final Order, 2000).

In the APDO, the Examiner expressly concluded that the District promoted Marchozzi because she was the better candidate and Crocco's performance paled in comparison to Marchozzi's. (APDO at 2). The Examiner also expressly stated that he "credited the testimony of Haines as to his reasons for choosing Marchozzi over Crocco. To the extent other testimony contradicts the reasons Haines gave for promoting Marchozzi over Crocco, I have not credited that testimony." (APDO at 2). The Examiner, therefore, concluded that the District's reasons were both credible and legitimate. Moreover, because the Board's hearing examiners are present to observe the demeanor of the witnesses, the Board adheres to its long-standing policy that it will not disturb the credibility determinations of its hearing examiners absent the "most compelling of circumstances." AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986); accord Clarion-Limestone Area Educ. Ass'n v. Clarion-Limestone Area Sch. Dist., 25 PPER ¶ 25033 (Final Order, 1994). The Union has not presented any reason to question the Examiner's credibility determinations in this case, which will therefore remain undisturbed. Consequently, the record not only supports the Examiner's conclusion that

the District's promotion decision was legitimate, but also, based on the credibility determinations, there is insubstantial support for the Union's case in chief. Therefore, the District's credible reasons were not pretextual, as argued by the Union. Accordingly, all that remains is the alleged timing between the issuance of the POD and Crocco's protected activity, which is alone insufficient to establish unlawful motive absent some other indicia of discrimination. Commonwealth (OVR), supra; Shive v. Bellefonte Area Bd. of Sch. Dir., 317 A.2d 311 (Pa. Cmwlth. 1974).

The Union also claims that the District's failure to promote Crocco, the Union president and only applicant, and promote Marchozzi who did not initially apply, one month after the POD and given the numerous grievances that Crocco had filed, is inherently destructive of employe rights. The Board has adopted the test set forth in NLRB v. Great Dane Trailers, Inc., 388 U.S. 26 (1967). AFSCME, Council 13 v. Bensalem Township, 19 PPER 19034 (Order Denying Application for Stay, 1988; Chester County Deputy Sheriffs Ass'n v. Chester County, 28 PPER ¶ 28045 (Final order, 1997). Under that analysis, "proof of an unlawful motive is not necessary to establish a violation of Section 1201(a)(3) of PERA if the employer's actions are inherently destructive of important employe rights." Chester County Deputy Sheriffs Ass'n v. Chester County, 28 PPER ¶ 28045 (Final Order, 1977) (citing Great Dane, supra; Center County, supra. "[W]here inherently destructive conduct is demonstrated, the employer may defend its action by producing evidence of legitimate business justification." Oxford Area Educational Support Personnel Ass'n v. Oxford Area Sch. Dist., 32 PPER ¶ 32168 (Proposed Decision and Order, 2001)(citing Great Dane, supra.) "Inherently destructive conduct by employers is conduct that creates 'visible and continuing obstacles to the future exercise of employe rights.'" Oxford, 32 PPER at 414 (quoting Portland Willamette Co. v. NLRB, 534 F.2d 1331, 1334 (9th Cir. 1976). The Board will determine whether conduct is inherently destructive by weighing the facts on a case-by-case basis. Id.

A review of the case authority reveals that a legitimate exercise of managerial prerogative is not "inherently destructive" of employe rights and does not constitute a "visible and continuing obstacle" to the union-employer relationship, the continued viability of the union, or its leadership's ability to fulfill bargaining obligations on behalf of employes. See, e.g., Oxford, supra; PSSU v. Pennsylvania Department of Labor and Indus., Office of Vocational Rehabilitation (OVR), 31 PPER ¶ 31127 (Final Order, 2000); Pennsylvania State Troopers Ass'n v. Commonwealth of Pennsylvania, Pennsylvania State Police, 30 PPER ¶ 30125 (Proposed Decision and Order, 1999). The District exercised its managerial prerogative to promote the more qualified person as part of its duty to ensure the requisite quality of service, and there is no indicia of unlawful motive. As the Examiner aptly stated, union leadership and seniority alone are not guarantees for promotion absent the requisite abilities for the position in question. (PDO at 4). In this case, denying Crocco the promotion was not unlawful because her work history and experience did not satisfy the substantive qualifications established by the District consistent with the credibility determinations made by the Hearing Examiner.

The Union further argues that the Examiner failed to follow the directive of the Board's ODR by failing to hold another hearing for additional evidence and that the APDO is inconsistent with the Board's ODR. In the ODR, the Board expressly required the Examiner to make additional findings of fact in support of his decision "on the existing record without further hearing." (ODR at 2). The APDO contains the requisite additional findings of fact in support of the Examiner's conclusions. In his decision, the Examiner expressly notes that he credited the testimony of Haines as to his reasons for choosing Marchozzi over Crocco. Therefore, the APDO is consistent with the Board's ODR.

After a thorough review of the exceptions, response thereto and all matters of record, the Board dismisses the exceptions and sustains the Amended Proposed Decision and Order of the Examiner.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Amended Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the Amended Proposed Decision and Order is hereby made absolute and final.

SIGNED, SEALED, DATED and MAILED this twenty-first day of June, 2005.

PENNSYLVANIA LABOR RELATIONS BOARD

L. DENNIS MARTIRE, CHAIRMAN

ANNE E. COVEY, MEMBER