COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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| TEAMSTERS LOCAL UNION No. 384 | : | |
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| v. | : | Case No. PERA-C-04-143-E |
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| COLONIAL SCHOOL DISTRICT | : | |

**FINAL ORDER**

On January 3, 2005, Teamsters Local Union No. 384 (Union) timely filed exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO), issued December 13, 2004. In the PDO, the Hearing Examiner concluded that the Colonial School District (District) did not engage in unfair practices within the meaning of Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) by dismissing an employe for repeated performance deficiencies after he refused to agree to continued employment with demotion in exchange for waiving his right to contractual and statutory[1] remedies for prospective discipline/dismissal.

Edmond McQuillen was a custodial maintenance employe for the District. On March 11, 2003, the District issued a first-offense, verbal warning to McQuillen for failing to clear snow on February 18, 2003. Also on March 11, 2003, the District issued McQuillen a second-offense written warning for failing to provide custodial coverage for an evening basketball game at the Colonial Elementary School (CES) gymnasium. On June 12, 2003, the District issued McQuillen an evaluation concluding that the quality of his work needed improvement. Additionally, McQuillen committed three separate offenses in early September of 2003. First, McQuillen failed to properly maintain the playground mulch at CES. McQuillen also lost fire extinguishers, which were kept in District vehicles. Third, McQuillen failed to repair a door closer at CES resulting in student injury on September 5, 2003. On September 19, 2003, the District suspended McQuillen pending termination by the school board at its next meeting.

On September 19, 2003, McQuillen and the Union steward met with the District's facilities management coordinator and thereby initiated the parties' grievance procedure. On this same date, a Union business agent sent a letter to the District contesting McQuillen's suspension without pay. On September 29, 2003, the Union filed a written grievance challenging McQuillen's September 19, 2003, suspension without pay with intent to discharge. On October 1, 2003, the District's facilities manager denied the grievance. At a meeting on October 20, 2003, the District proposed an employe demotion/transfer agreement. The agreement offered McQuillen employment in exchange for the following: a demotion to a lesser position, a withdrawal of the present grievance and a waiver of his contractual and statutory rights in the event that he was dismissed for any subsequent violation of the District's rules and regulations. McQuillen and the Union rejected this offer. Consequently, the District denied the grievance at step three of the grievance procedure. On November 20, 2003, the school board unanimously voted to terminate McQuillen. On January 21, 2004, a school board hearing was held constituting a step-four grievance, which was denied on February 12, 2004. The Union filed the charge of unfair practices on March 16, 2004, alleging that the District terminated McQuillen because he refused to waive his right under the collective bargaining agreement to grieve any subsequent decision to terminate his employment.

In its exceptions, the Union contends that the Examiner erred in finding that the charge was untimely and in failing to find that a cause of action did not arise until McQuillen was terminated in February 2004. However, the Examiner did not conclude that the charge was untimely, nor did he dismiss the charge on that basis. Indeed, in

[1] The issues in this case do not require the Board to address whether it would sanction a "last chance" agreement requiring an employe to waive statutory remedies for a future discriminatory discharge in violation of PERA.

footnote one of the PDO, the Examiner expressly states that "[t]he Union's Section 1201 (a)(1) and (3) charge over McQuillen's termination is timely because McQuillen was terminated within four months of the filing of this charge." (PDO at 4). Accordingly, the Union has misunderstood the clear and express language of the PDO.

It was not until its post-hearing brief that the Union argued that the District's mere offer of employment in exchange for a waiver of statutory and contractual rights for future termination constituted a "per se" violation of PERA. However, the Union predicated its charge on McQuillen's termination and alleged that the District's motive for the termination was McQuillen's refusal to waive his contractual rights. Therefore, the Examiner properly concluded that the notice of termination gave rise to the cause of action.

As noted by the Examiner, the Union submitted in its post-hearing argument that the "District's offer of an alleged 'last chance' agreement is a per se violation. The violation of the Act occurred when the 'last chance' offer was also conditioned upon the waiver of McQuillen's contractually and statutorily protected rights." (PDO at 4)(quoting Union Brief at 4). By its own language, the Union is claiming that the offer of the last chance agreement in exchange for a waiver of statutory and contractual rights is an occurrence that gives rise to a separate cause of action in violation of PERA. However, a separate claim of this nature was simply not charged, alleged or preserved. Therefore it was not properly before the Examiner and the District did not have an opportunity to defend this claim at the hearing.

The Board's regulations expressly require that the complainant specify the nature of each particular act or occurrence alleged to constitute the unfair practice charged. 34 Pa. Code § 95.31(b)(3). Although the Board has recognized that strict rules of pleading do not apply in administrative proceedings, the Board has held that fundamental due process requires that an employer be given notice of the factual allegations that support the charge so it has an opportunity to prepare a defense to the testimony and the issues raised at the hearing. Heynoski v. Pleasant Ridge Manor, 32 PPER ¶ 32115 (Final Order, 2001); Independent Refuse, Local 609 v. Teamsters, Local 249, 19 PPER ¶ 19070 (Final Order, 1988). In AFSCME District Council 88 Local No. 790 v. Reading Sch. Dist.,35 PPER 111 (Final Order, 2004), the Board opined that "the purpose of the hearing is to facilitate a full factual inquiry into all factual claims in support of and defense to the charge. Had the [respondent] timely raised this issue before the record was closed, it would have afforded the [complainant] an opportunity to rebut [their position]." Reading Sch. Dist., 35 PPER at 348. Accordingly, the Union's post-hearing claim is waived, and the Board affirms the Examiner's dismissal of this post-hearing claim.

Alternatively, the Board agrees with the Examiner that, had the Union's "per se" violation been properly charged, it would be untimely. The Examiner concluded that "[s]ince the last chance agreement was tendered on October 20, 2003, and the Union asserts that the tendering of that last chance agreement was a per se violation of the Act in its March 16, 2004, charge, this portion of the charge is grossly outside the applicable statute of limitations." (PDO at 4). The Union attempted to amend its charge with an untimely cause of action in its post-hearing brief, which the Examiner properly dismissed. The Board and its examiners lack jurisdiction over untimely claims. Thomas v. PLRB., 483 A.2d 1016 (Pa. Cmwlth. 1984). The time for filing, and therefore jurisdiction, "cannot be extended as a matter of grace or mere indulgence." Bass v. Commonwealth, 485 Pa. 256, 401 A.2d 1133, 1135 (1979).

The Union also contends that the Examiner erred in failing to find that the District's reasons for terminating McQuillen were pretextual because, notwithstanding his prior performance deficiencies, the District would have retained McQuillen but for his refusal to agree to the waiver. The Union's argument, however, mischaracterizes the record and the unchallenged findings of fact and, consequently, the relevance of pretext in this case.

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 engaged in conduct that was motivated by the employe's involvement in protected activity, i.e., union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977); 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. Teamsters Local No. 764 v. Montour County, 35 PPER 147 (Final Order, 2004). The employer's unlawful motivation creates the offense in a discrimination claim. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981).

In dismissing the Union's claim of pretext and unlawful motive in this case, the Examiner concluded as follows:

> [T]he District wanted to terminate McQuillen before he was offered a last chance agreement. The District suspended McQuillen without pay pending termination on September 19, 2003, because of five prior incidences. That suspension, with notice to terminate, occurred more than a month before the District offered McQuillen the last chance agreement. McQuillen was not terminated because he refused the last chance agreement, rather he was terminated for five prior incidences set forth in the subsequent board hearing.

(PDO at 4)(emphasis added). As the Examiner concluded, the Union's argument that the District's reasons were pretextual is not supported by the record. In Montour County, supra, the Board held that "protected activity is not a motivating factor when the record fails to demonstrate by substantial evidence that the employer knew of the activities before the discharge. Therefore, the employe's activities cannot, by operation of law, be a motivating factor in the employer's decision to act against the employe." Montour County, 35 PPER at 452. The Montour County Board further stated that "without establishing the [employer's] knowledge before [the employe's] termination, either by stipulation or other substantial evidence, the Union cannot, as a matter of law, establish that [the employe's activities] were in any way related to the [employer's] motivation for [the] dismissal." Montour County, 35 PPER at 453.

The District decided to terminate McQuillen for multiple performance deficiencies, which resulted in student injury, one month before the offer of a last chance agreement, and the alleged protected activity. When an employer's decision to act has its "genesis" before the employe engages in activity protected by the collective bargaining statutes, "the timing of events does not support an inference of [unlawful] motive." Delaware County Prison Employees Independent Union v. Delaware County, 28 PPER ¶ 28005, p.21 (Final Order, 1996). See also, Giovinazzo v. PLRB, 415 A.2d 1267 (Pa. Cmwlth. 1980)(affirming the Board's conclusion that an employer does not commit an unfair practice in deciding to terminate an employe before that employe engages in protected activity). At the time the District decided to discharge McQuillen, he had not engaged in protected activity, the District could not have known of any alleged protected activity and, under Montour, supra, and Delaware County, supra, could not therefore have been unlawfully motivated by the alleged protected activity as a matter of law. Accordingly, the Union failed to meet its burden of proving the three necessary elements required by our Supreme Court in St. Joseph's Hospital, supra. The Union's claim that McQuillen would not have been terminated but for his refusal to accept the District's offer is factually inaccurate since the decision to terminate was already made at the time of his refusal.[2]

The Union's inability to establish motive, by operation of law under Montour, precludes a finding that the reasons offered by the District were pretextual. Pretext is a misleading reason or excuse proffered to conceal a true purpose. Webster's Encyclopedic Unabridged Dictionary, 1534 (Gramercy, New Deluxe Ed., 1996). Where an unlawful motive is nonexistent by operation of law, the reasons for discharge are not pretextual because there is no unlawful motive to mask or conceal. The District

[2] The Union has not specifically alleged or established that the school board's subsequent decision to terminate McQuillen was in any way tainted by the exercise of Article IV rights.

terminated McQuillen for multiple performance deficiencies, at least one of which led to student injury. These reasons were lawful and not pretextual.

In this regard, the Hearing Examiner was required to set forth only those facts that were necessary to support his decision. He was not required to summarize all the evidence presented, make findings that are unnecessary or make findings that would support another decision. 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). After reviewing the record and the PDO, the Board concludes that the Examiner indeed made those findings that were necessary to support his conclusions and that he did not omit any necessary findings. The Union's proposed finding, that the District's reasons were allegedly pretextual, is not necessary (or relevant) to the Examiner's conclusion that the Union failed to meet its burden of establishing a prima facie case of discrimination. Indeed, pretext is simply not a factor in this discrimination claim.

The Union also argues that the Examiner erred in relying on Penn Hills Municipal Employes Organization v. Penn Hills Municipality, 34 PPER 135 (Final Order, 2003), aff'd, sub nom., 1219 C.D. 2004 (Pa. Cmwlth. June 9, 2005)(enforcement of last chance agreement by Board); McCall v. U.S. Postal Service, 839 F.2d 664 (Fed. Cir. 1988) (employe and union may waive employe's statutory rights in last chance agreement); Bethenergy Mines v. Mark Segidi, 308 NLRB 1242, 141 LRRM 1145 (1992). The Union contends that these three cases are inapposite because, in those cases, "the affected employee filed charges after the employee had already agreed to waive his contractual or statutory rights," and the employes in those cases were attempting to overturn a valid waiver. (Union's Exceptions at 2, ¶ 5). The Examiner cited these cases to support his statement that "both this board and the National Labor Relations Board have found last chance agreements to be acceptable vehicles for parties wishing to resolve their grievances short of the formal process. This is true even when contractual and statutory rights are waived." (PDO at 4).

The Union's attempt to distinguish the cited cases from this case on the grounds that, unlike here, a valid waiver already existed in those cases is unpersuasive. In Penn Hills, the Board held that obtaining a valid last chance agreement, which contains an intentional, clear, express and unequivocal waiver of contractual grievance arbitration rights, satisfies an employer's collective bargaining obligation to resolve future disciplinary grievances regarding the same employe. The Union is now asking the Board to conclude that, although last chance agreements are lawful, an employer's efforts to obtain one, for the mutual benefit of the employer and the employe, is unlawful.

Last-chance agreements promote mutually agreeable and voluntary solutions to collective bargaining disputes. They also give an employe another opportunity to retain employment and improve job performance where, as here, the employer has a legitimate basis for discharging the employe and a strong case for arbitration. The Union's position here would negatively affect employes' ability to retain their positions, where, in the absence of a last chance agreement, the employe would be discharged. It would also prevent employers from seeking mutually agreeable settlements acceptable to both parties in contrast to the process which takes decision making out of the hands of the parties. As a policy matter, the Union's position negatively impacts bargaining relationships at the expense of employes. Adopting the Union's position would effectively discourage last chance agreements by causing employers to fear exposure to unfair practice litigation by proposing last chance agreements.

The Union further challenges the Examiner's seemingly negative inference from the Union's decision to stipulate to the record from the grievance proceeding.[3] In its post-hearing brief and exceptions, the Union argued that, "assuming arguendo that McQuillen's

[3] The Union did not stipulate to the record from the grievance proceedings. The Union stipulated to District Exhibits 1-25 at the unfair practice hearing in this case. Any possible relationship between these documents and the grievance proceeding is not a matter of record here and is not known to the Board.

alleged performance deficiencies were true, the District nonetheless would have forgiven those failings if McQuillen ha[d] agreed to waive his contractual and statutory rights." (Union's exceptions at 2, ¶ 4). In addressing this argument, the Examiner correctly noted that "[t]his argument is surprising since at the hearing the Union presented no witnesses or documentary evidence, but merely agreed to factual stipulations and agreed to the admission of twenty-five District exhibits. There is not one whit of evidence to support the Union's bald assertion that the incidences upon which the District based McQuillen's dismissal are other than *bona fide*." (PDO at 4). The Union failed to produce any documentation or witness testimony challenging or contradicting the District's twenty-five exhibits to which the Union stipulated. Exhibits three through ten inclusively contain employe incident reports, student injury reports, a photograph and a performance evaluation memorializing McQuillen's repeated performance failures, one of which resulted in student injury. Therefore, notwithstanding whether the Examiner's statement constitutes a "negative inference", the Examiner properly rejected that part of the Union's argument that questioned the existence of McQuillen's performance deficiencies as the basis for dismissal, given the great weight of uncontradicted record evidence to which the Union stipulated.

After a thorough review of the exceptions, responses thereto and all matters of record, the Board shall dismiss the exceptions and sustain the Proposed Decision and Order of the Hearing Examiner consistent with this Order.

**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 Proposed Decision and Order in the above-captioned matter be and the same are hereby dismissed; and that the 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

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L. DENNIS MARTIRE, CHAIRMAN

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ANNE E. COVEY, MEMBER