

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MATTHEW J. WADAS, JR. :
 :
 v. : Case No. PERA-C-04-509-E
 :
 BUCKS COUNTY COMMUNITY :
 COLLEGE :

FINAL ORDER

On April 4, 2005, Matthew J. Wadas, Jr. (Wadas) filed exceptions with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued March 16, 2005, dismissing his Charge of Unfair Practices filed against the Bucks County Community College (College).¹ Wadas challenges the hearing examiner's determination that the College did not discriminate against him for protected union activity in violation of Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA).² The College has not filed a brief in response to the exceptions. After review of the exceptions and all matters of record the Board makes the following:

AMENDED FINDING OF FACT

3. On Memorial Day weekend, May 29 and 30, 2004, Wadas worked 11:00 p.m. to 7:00 a.m. He also worked that shift for the Friday preceding and the Monday following the holiday weekend. While other security guards were on-duty, only Wadas's duty tour included Tyler Hall. On the evening to morning shift of May 29, to May 30, 2004, Wadas toured Tyler twice. The alarm was de-activated each time Wadas entered Tyler on the night in question. Anyone entering the building would set off the alarm unless it was de-activated within 30 seconds. There is no record of when the alarm is disarmed. Wadas had master keys to Tyler Hall. Wadas toured the entire building and saw no other person. (N.T. 31, 37, 95-101).^[3]

DISCUSSION

In a Motion for Summary Judgment and in his exceptions, Wadas asserts that the allegations in the charge were deemed admitted because the College had filed its Answer more than fifteen days after the issuance of the Complaint. Section 95.34 of the Board's Rules and Regulations governing respondent's answers to a complaint, provide in relevant part

(a) The Board recognizes that the primary purpose of pleadings is the formulation of issues. Consequently, rules pertaining to pleadings will be liberally construed to effect that end.

¹On June 2, 2005, Wadas filed a supplement to his exceptions requesting that the Board withhold action pending arbitration. Withholding action on claims of discrimination pending grievance arbitration is not warranted, as the legal issues to be decided are fundamentally different. PLRB v. Pine Grove Area School District, 10 PPER ¶10167 (Order Deferring Unfair Practice Charge Until Further Order of Board, 1979). Accordingly, Wadas's request to defer action on his exceptions is denied.

² Wadas has not challenged the hearing examiner's dismissal of his claims under Section 1201(a)(2) and (4) of PERA in his exceptions.

³ Wadas points out in his exceptions that his work shift over Memorial Day weekend in 2004 was from 11:00 p.m. until 7:00 a.m. (N.T. p. 96). Finding of Fact 3 has been amended accordingly.

* * *

(c) The respondent shall, ... file an answer to the original or amended complaint within 15 days from the service of the complaint... A party who fails to file an answer or to specifically deny allegations in the complaint shall be deemed to admit only those averments relating to the identity of the parties; all other averments shall be deemed to be denied.

34 Pa. Code §95.34. Accordingly, pursuant to Section 95.34 of the Board's Regulations, the only allegations the College was deemed to have admitted by its late filing was that Wadas was the complainant and the College the respondent. Accordingly, Wadas's exceptions to the dismissal of his request for summary relief is denied.⁴

Wadas also challenges the hearing examiner's determination that his charge of unfair practices was untimely. Section 1505 of PERA requires that a charge of unfair practices be filed within four months of the date the complainant knew or should have known of the acts alleged to constitute the unfair practice. Heynoski v. Pleasant Ridge Manor West, 32 PPER ¶32115 (Final Order, 2001). The complainant bears the burden of proving the timeliness of the charge. Northeastern Regional Police Patrolman's Association v. Northeastern Regional Police Board, 21 PPER ¶21041 (Final Order, 1990).

Wadas asserts that attached to the charge of unfair practices is the College's June 21, 2004 memorandum discharging him from employment, which proves that his October 18, 2004 charge was timely filed. However, a finding of timeliness may not be based on a document that has not been made a part of the record evidence. Northeastern Regional Police Board, *supra*. Documents attached to the charge but not offered and admitted at the hearing are not part of the record, and therefore cannot support a finding of timeliness. *Id.* Because evidence of Wadas's dismissal within the limitations period was not introduced at the hearing, and neither Wadas nor the College presented testimony of when Wadas was formally terminated from employment, the record made before the hearing examiner is devoid of any indication that Wadas was fired within four months of the filing of the charge.

Even had Wadas proven that his charge was timely filed, he has failed to sustain his burden of proving discrimination under St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977). To establish discrimination Wadas must show that he engaged in protected activity, that the College knew of that activity and took action against him because of that union activity. St. Joseph Hospital, *supra*. For purposes of discrimination, it is the anti-union motive that creates the unfair practice. Pennsylvania Labor Relations Board v. Ficon, Inc., 434 Pa. 383, 254 A.2d 3 (1969).

Without denying that he engaged in the alleged wrongdoing of copying a supervisor's personnel file, for which he was terminated, Wadas attempts to show a discriminatory motive by attacking the basis for the College's determination that he was the perpetrator. In this regard, Wadas claims that there is no evidence to support when the alarm to the Tyler Building was disarmed (Finding of Fact 3) or that no one else was in the Tyler Building at the time (Finding of Fact 4). He also claims that there is nothing in the record to show that he knew where to find the keys to the filing cabinet where the personnel records were kept (Findings of Fact 5 and 9), or to prove when the alleged copies were made over the Memorial Day weekend. (Finding of Fact 6).

Generally, where the totality of the circumstances warrant, an unlawful motive may be inferred from a showing that the employer's proffered reasons are mere pretext to cover the employer's true anti-union animus. Teamsters Local 312 v. Upland Borough, 25

⁴ Wadas also claims that the hearing examiner misstated the location of the hearing as taking place in Reading, Pennsylvania, not Philadelphia. No correction is needed since the statement is only a reflection of where the hearing was scheduled per the Complaint and Notice of Hearing, and furthermore the location of the hearing is irrelevant for purposes of this review.

PPER ¶ 25,195 (Final Order, 1994). Wadas, however, confuses just cause for his dismissal with the issue of pretext.⁵ Establishing pretext is more than showing a lack of just cause for discipline. Even though the employer's reasons for disciplining an employe may be lacking in just cause, the complainant's burden in an unfair practice proceeding is to show that the employer was consciously intending to retaliate against the employe for engaging in protected activity. An employer's sincerely held, but incorrect (under a "just cause" standard) belief that an employe has committed a dischargeable offense is not an unfair practice.

Here the College engaged in an extensive investigation of who could have made copies of the supervisor's personnel records over the Memorial Day weekend. The College's security records indicated that Wadas was in Tyler Hall at or around the time the copies were made, and its investigation revealed that no other person was in Tyler Hall at those times. (Finding of Fact 5). The College's reason for believing that Wadas may have engaged in wrongdoing by copying a supervisor's personnel file is not so beyond belief as to render it mere pretext.

Wadas claims that his documentary evidence submitted at the hearing establishes the College's anti-union motivation behind his discharge. However, the grievances Wadas filed, his work evaluations, and the College's responses to his requests for parking and vacation time, do not reveal any anti-union sentiment, or unlawful discriminatory motive. Furthermore, the additional documentation, including Wadas's daily activity logs, his prior disciplinary notices, criminal and driving history, *et cetera*, do not support that the College's decision to terminate his employment was motivated by his protected union activities as opposed to its reasonable belief that Wadas engaged in wrongdoing that warranted his dismissal.

After a thorough review of the exceptions and all matters of record, the hearing examiner did not err in concluding that Wadas failed to sustain his burden under St. Joseph's Hospital of proving a discriminatory motive to support his claims under Section 1201(a)(1) and (3) of PERA. Accordingly, Wadas's exceptions to the hearing examiner's conclusions of law are dismissed.

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 Matthew J. Wadas are hereby dismissed, and the March 16, 2005 Proposed Decision and Order, be and hereby is 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

⁵ During closing argument when Wadas began to get into the issue of just cause for his dismissal, the hearing examiner in an effort to assist him as a *pro se* complainant advised Wadas of the St. Joseph's Hospital standard to guide Wadas's arguments toward proving pretext, not "just cause". Wadas proceeded, uninterrupted, to complete his closing arguments. The hearing examiner's unheeded advise was not error.