

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

STACEY DENINE SANDERS :
 :
 V. :
 : Case No. PERA-C-01-60-E
 PHILADELPHIA HOUSING AUTHORITY :

FINAL ORDER

The Philadelphia Housing Authority (Authority) filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on February 3, 2005, challenging the Proposed Decision and Order of January 14, 2005 (PDO) in which the hearing examiner concluded that the Authority violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA). The Complainant, Stacey Denine Sanders, filed a brief in response to the exceptions on February 25, 2005.

The facts as found by the hearing examiner in the PDO are summarized as follows. Ms. Sanders is a member of the bargaining unit represented by the American Federation of State, County and Municipal Employees (AFSCME) and one of three relocation aides employed by the Authority who used their personal vehicles for work. (Finding of Fact 5). Although the relocation aides were reimbursed for mileage when they used their own vehicles, the Authority provided no training on how to complete mileage reimbursement forms. While the practice was arguably inconsistent with the collective bargaining agreement, relocation aides, including Ms. Sanders, continued to be reimbursed for mileage from the Authority's administrative office to the site location, even though they reported directly to their assigned remote locations, without first stopping at the administrative office. (FF 2). Ms. Sanders' mileage reports, reflecting at least two trips daily between the administrative office and remote site locations from December 1999, to July 2000, were reviewed by her supervisor and an employee of the finance department and paid without question. (FF 2).

In August 2000, based on information from Ms. Sanders and another relocation aide, Lauren Horsey, AFSCME filed a grievance claiming that the Authority was using non-bargaining unit employees to perform the work of relocation aides in violation of the collective bargaining agreement. (FF 3). Mr. Kenneth McIntosh, AFSCME steward, and Ms. Sanders attended the first-step grievance meeting where they were asked by the Authority to provide additional information supporting the claim. (FF 3). Ms. Sanders and Ms. Horsey investigated the grievance and prepared a memo expressing AFSCME's concerns about the Authority's use of non-bargaining unit labor. (FF 3). On September 8, 2000, Ms. Sanders and Ms. Horsey met with Mr. McIntosh at lunch to present their findings and discuss the grievance. (FF 3). Linda Staley, a general manager for conventional site services, scheduled a meeting for all relocation aides on September 11, 2000, when she discovered that relocation aides who attended the lunchtime meeting did not timely report back to work after the meeting. (FF 4).

During the course of the meeting, the Authority expressed its displeasure with the relocation aides meeting with the union as evidenced by Jackie McDowell, another general manager, slamming some quarters on the table and telling the employees to call the union if employees had a problem with the Authority's position. (FF 4). In addition, Ms. Staley announced that all relocation aides' mileage reimbursements would be audited. (FF 5). However, Ms. Staley reviewed only Ms. Sanders' mileage reimbursement forms submitted since December 1999. (FF 5).

Although Ms. Horsey also used her own vehicle for relocation work, she did not have her mileage records audited by Ms. Staley. Even though Ms. Staley was aware that Ms. Horsey also attended the September 8, 2000 AFSCME meeting, she admittedly did not know

that Ms. Horsey assisted in investigating and preparing information for AFSCME in its grievance concerning use of non-bargaining unit employees. (FF 6).

Ms. Staley alleged that Ms. Sanders' mileage reports appeared fraudulent because she claimed the same number of miles throughout the report. (FF 7, N.T. 149). Also, based on a query to MapQuest on the internet, Ms. Staley discerned that Ms. Sanders had been overstating her mileage for each trip. Ms. Staley also claimed that Ms. Sanders sought reimbursement for miles traveled on weekends and for days when Ms. Sanders had been scheduled off. (FF 7, Nt. 150, 155). She therefore concluded that Ms. Sanders made fraudulent claims for mileage reimbursements.

Based on Ms. Staley's investigation, on December 8, 2000, the Authority issued a ten-day suspension notice to Ms. Sanders with the recommendation for her termination from employment, and fired her effective January 26, 2001. (FF 7). Ms. Sanders grieved her dismissal, which was denied by the Authority, and following delays in scheduling arbitration, the grievance was ultimately dismissed by an arbitrator as untimely and not arbitrable under the terms of the collective bargaining agreement. (FF 7).

In addition to filing her grievance, Ms. Sanders also filed the instant Charge of Unfair Practices. Due to the pending grievance at the time, the charge of unfair practices was held in abeyance until the grievance was addressed. Following dismissal of the grievance, the charge was scheduled for hearing and, after a series of unopposed continuances, was heard on March 5, 2004. After hearing and presentation of the evidence, the hearing examiner determined that the Authority discriminated against Ms. Sanders by auditing her mileage records and terminating her employment, because she assisted AFSCME in presenting a grievance.

The Authority excepts to Finding of Fact 3, arguing that it finds that only Ms. Sanders was involved in assisting AFSCME. The Authority is correct that the record shows that Ms. Horsey assisted Ms. Sanders in compiling the information for the grievance regarding the Authority's use of non-bargaining unit employees. However, although not elaborating on the extent of her cooperation, Finding of Fact 3 does acknowledge that Ms. Horsey was involved in the investigation. Finding of Fact No. 6 supports this finding wherein the hearing examiner finds that "Staley was unaware that Horsey was also involved in the report and investigation concerning the Authority's use of non-bargaining unit members to perform bargaining unit work." Accordingly, we find that no addition or correction to the hearing examiner's findings in the PDO is required.

The Authority also claims that the record does not support the hearing examiner's finding of a past practice that allowed employees to be reimbursed for mileage not driven between the administrative office and remote site location. To support its claim the Authority notes that mileage to and from the employee's home and the remote worksite was not reimbursable under the parties' collective bargaining agreement.

Generally, the hearing examiner's findings must be based on substantial evidence in the record. PLRB v. Kaufmann Dept. Stores, Inc., 345 Pa. 398, 400, 29 A.2d 90, 92 (1942). Substantial evidence is such relevant evidence as a reasonable mind would accept as adequate to support the conclusion drawn therefrom. Id. To establish a past practice, there must be substantial evidence that the parties engaged in an accepted conduct that either 1) clarifies ambiguous contract language; 2) establishes a general rule; 3) creates or establishes a separate enforceable condition of employment; or 4) waives a specific contract term. County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977).

Despite the arguably inconsistent contract language, relocation aides continued to submit claims for mileage from the home office to their remote worksites even though they were no longer reporting to the home office before traveling to their site location. Ms. Sanders was not trained by the Authority in the proper completion of mileage reimbursement forms, learned how to complete the forms from coworkers, and completed her mileage reimbursement requests in the same fashion as her coworkers. Ms. Sanders' mileage reports, like all others, went through two levels of review, first by a supervisor and then submitted to the finance department for further review and payment. Without the

Authority ever questioning her claims for mileage between the administrative office and remote worksite, Ms. Sanders received payment for all mileage submitted between December 1999 and July 2000. Likewise, Ms. Horsey's mileage reimbursements through July 2000 also reflect similar trips to and from the administrative office at the start and end of the workday. The evidence of record shows that, despite the contract language, the Authority permitted mileage to be reimbursed from the home office to the worksite even though employees were reporting directly to the site location, supporting the hearing examiner's finding of a past practice inconsistent with the contract terms.

The Authority also challenges Ms. Sanders' claims of discrimination. To establish a violation of Section 1201(a)(3) of PERA, the complainant must show that the employee was engaged in protected activity, that the employer was aware of that activity, and that the employer took action against that employee because of union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). It is the employer's motive which creates the offense under Section 1201(a)(3) of PERA, PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969), and since union animus is rarely overt, an unlawful motive may be inferred from the totality of the circumstances. Dauphin County Peace Officers Association, Local 125 I.U.P.A. v. Dauphin County Court of Common Pleas, 27 PPER ¶27004 (Final Order, 1995). The timing of the employer's adverse employment action, coupled with a display of union animus and the proffer of pretextual reasons for its actions, are sufficient to warrant a finding of a discriminatory motive. Lehigh Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996).

On this record it cannot be readily disputed that Ms. Sanders engaged in protected activity, as she raised the issue of non-bargaining unit employees performing the work of relocation aides with AFSCME. Moreover, the Authority was aware of her involvement, as evidenced by her participation in the initial grievance meeting. In addition, there is substantial evidence to support the Authority's display of union animus. Mr. Brad El and Ms. Sanders both credibly testified that the tone of the September 11, 2000 meeting showed the Authority disliked that the employees had met with the union as evidenced by Jackie McDowell, an Authority general manager, throwing quarters on the table and heatedly telling the employees to call the union if they did not like what was being done.

The Authority is correct in its assertion that generally, if there is a credited non-discriminatory legitimate business reason for the employer's action, notwithstanding union animus, no unfair practice will be found. Teamsters Local 776 v. Perry County, 23 PPER ¶23201 (Final Order, 1992), *affirmed*, Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993). To sustain its burden that the employee would have been dismissed in any event, the employer must show that even in the absence of the discriminatory motive it would have taken the same action against the employee based on the non-discriminatory reason. Id. However, the employer's alleged legitimate reasons may be found to be mere pretext for an unlawful motive if the employee's alleged wrongdoing upon which the discipline is based, was only discovered as a result of an investigation which had been motivated by the employer's union animus. See District 1199C, National Union of Hospital and Health Care Employees v. Northeastern Hospital of Philadelphia, 27 PPER ¶27036 (Proposed Decision and Order, 1996); see also, Grant Prideco, L.P. d/b/a Tubular Corporation of America, 337 NLRB No. 13 (2001).

In this regard, the Authority contends that the hearing examiner failed to acknowledge that the only reason Ms. Sanders may have been singled out for a review of her mileage reimbursements was not because of her involvement in the grievance, but because of a statement she made at the September 11, 2000 meeting that she did not transport relocation clients in her personal vehicle. The Authority claims it was that disclosure, not her union involvement, which provided the impetus for the investigation, and therefore it had a legitimate nondiscriminatory reason for investigating Ms. Sanders' mileage records, which in turn, uncovered her alleged fraudulent claim for reimbursement.

The hearing examiner did not make a finding of a legitimate business reason because he had rejected and did not credit the Authority's proffered reason for its investigation of Ms. Sanders. Thus, the disposition of the charge and the exceptions to the PDO turns on the issue of witness credibility. It is the Board's long standing policy not to disturb the hearing examiner's credibility determinations absent the most compelling of

circumstances. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004).

Here, while Ms. Staley testified that she sought to review Ms. Sanders' mileage reports because Sanders acknowledged at the September 11, 2000 meeting that she did not transport relocation clients, Mr. El and Ms. Sanders did not testify that such a statement was made, and in fact, their testimony is consistent with the hearing examiner's findings and discussion that the Authority did not in fact single out Ms. Sanders because Ms. Sanders admitted not transporting relocation clients. Mr. El testified that although clearly intended for Ms. Sanders and Ms. Horsey, Ms. Staley stated to everyone, without provocation, that mileage reimbursements would be reviewed. (FF 5, N.T. 38). This is supported by his testimony that he and another relocation aide, Ms. Jean, questioned why the review was necessary. (N.T. 41). In addition, Ms. Sanders was not cross-examined at the hearing as to her purported admission of wrongdoing, and her testimony on direct leads to the reasonable conclusion that Ms. Staley's statement that mileage reports would be audited was not prompted by an admission from Ms. Sanders at the meeting.

Given the consistent testimony of Mr. El and Ms. Sanders, there is no compelling reason under Board precedent on this record for altering the hearing examiner's credibility determinations and his rejection of Ms. Staley's asserted claim that Ms. Sanders acknowledged that she did not transport relocation clients. Accordingly, there is no reason for the Board to disturb the hearing examiner's determination that the Authority's asserted reason was pretextual.

The Authority argues, on exceptions, that the hearing examiner should have acknowledged "accountability" issues the Authority was having with the relocation aides, and that all employees, regardless of their union activity, were "disciplined" for not reporting to the worksite in a timely fashion following the September 8, 2000 union meeting. The hearing examiner need not make a finding about every fact presented at the hearing where such a finding would be irrelevant to the outcome. Teamsters Local No. 463 v. Penn Delco School District, 29 PPER ¶29062 (Final Order, 1998). Whether or not the Authority was experiencing general "accountability" problems with the relocation aides reporting to work on time, and "disciplined" those employees by making them use accrued leave time,¹ has no bearing on whether the employer separately discriminated against Ms. Sanders by treating her more harshly.

A finding of discrimination is often based on reasonable inferences drawn from the totality of the circumstances. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981); PLRB v. Child Development Council of Centre County, 9 PPER 9188 (Nisi Decision and Order, 1978).

[C]ourts and other triers of facts, in a multitude of cases, must rely upon such evidence, i.e., inferences from testimony as to attitudes, acts and deeds; where such matters as purpose, plans, designs, motives, intent, or similar matters, are involved, the use of such inferences is often indispensable. Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, "Use me", like the cake, bearing the words "Eat me", which Alice found helpful in Wonderland.

F.W. Woolworth Co. v. National Labor Relations Board, 121 F.2d 658, 660 (2nd Cir. 1941).

In this regard, the Authority's responses to the "red flags" allegedly evident in Ms. Sanders' mileage reimbursement requests lends support for an inference that unlawful anti-union reasons were the true motives for its decision to investigate and discharge Ms. Sanders. For instance, if there were general accountability issues with all the

¹ The Authority's request that employees returning late for work after lunch account for that time can hardly be described as discipline under the parties' collective bargaining agreement.

relocation aides, why was Ms. Sanders the only one audited, especially after she advised the Authority during the third-step grievance that she was only following the direction of her co-workers. (Exhibit A-3). A cursory review of mileage reimbursements reveals that for some time Ms. Sanders and others were claiming mileage between the administrative office to the worksite twice daily and routinely approved by management. Although Ms. Sanders was discharged for claiming this mileage, Ms. Horsey's approved mileage records, which also reflect trips to and from the administrative office at the start and finish of the workday, did not raise any concern for the Authority. Given the Authority's pervasive past acceptance of mileage reimbursement claims to and from the administrative office, admittedly contrary to the terms of the collective bargaining agreement, its dismissal of Ms. Sanders as a means of reversing its policy and now enforcing those contract terms is a disproportionate measure and tends to support the lack of a legitimate non-discriminatory reason for its decision to terminate her employment.

Moreover, if, as claimed by the Authority, mileage could not be claimed for these trips when reporting directly from home to the worksite, why would the Authority, without questioning Ms. Sanders, merely reduce her mileage as opposed to not allowing any mileage for a trip that was allegedly not reimbursable? Similarly, as pointed out by the hearing examiner, even for days that the Authority claimed Ms. Sanders did not work at all, the Authority only reduced her mileage. Finally, if it was simply that Ms. Sanders overstated her mileage from the administrative office to the worksite, why did Ms. Horsey's records, which claim a similar distance, not raise the same concern? The disparity between the treatment of Ms. Sanders (dismissal) and Ms. Horsey (no investigation and no discipline), whose mileage reimbursement claims were similar, supports the hearing examiner's conclusion.

The timing of the investigation of Ms. Sanders' mileage reimbursement requests, occurring shortly after a meeting with Ms. Sanders and AFSCME representatives concerning a pending grievance, coupled with the Authority's display of union animus at the September 11, 2000 meeting, singling Ms. Sanders out for an audit when another employee claimed the same expenses, and the pretext of the Authority's alleged reason for investigating only Ms. Sanders' mileage records, support a reasonable inference of an anti-union basis for Ms. Sanders' discharge. After a thorough review of the exceptions and all matters of record, under the circumstances of this case, the hearing examiner did not err in finding an unlawful discriminatory motive for the Authority's investigation and termination of Ms. Sanders' employment, and concluding that the Authority violated Section 1201(a)(1) and (3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order of January 14, 2005, are dismissed, and the PDO is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this seventeenth day of May, 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.

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Pennsylvania Labor Relations Board

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 PHILADELPHIA HOUSING AUTHORITY :

AFFIDAVIT OF COMPLIANCE

The Philadelphia Housing Authority hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) and (3) of PERA; that it has offered the affected employe unconditional reinstatement to her former position without prejudice to any rights or privileges enjoyed by her; that it has made the affected employe whole for all wages and benefits that she would have earned from the date of discharge to the date of unconditional offer of reinstatement and that it has posted a copy of the Final Order and Proposed Decision and 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