COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCIL 88	:	
	:	
v.	:	Case No. PERA-C-02-405-E
	:	
BERKS COUNTY AND THE BERKS	:	
COUNTY CORONER (NICHOLAS BYBEL)[1]	:	

FINAL ORDER

On August 23, 2004, the Berks County Coroner, Dr. Nicholas Bybel, (Coroner) filed exceptions, and a request to reopen the record, with the Pennsylvania Labor Relations Board (Board) challenging the August 2, 2003 Amended Proposed Decision and Order (PDO) in which the hearing examiner concluded that the Coroner had violated Section 1201(a)(1), (3), (5) and (8) of the Public Employe Relations Act (PERA).[2] On September 7, 2004, the American Federation of State, County and Municipal Employees, Council 88 (AFSCME) filed a response to the exceptions. Following the grant of an extension of time, the Coroner filed a brief in support of exceptions on September 21, 2004. Also following an extension of time, AFSCME filed its brief in opposition to the exceptions on October 26, 2004.[3]

While the Coroner challenges several of the hearing examiner's Findings of Fact as unsupported in the record as discussed *infra*, the facts of this case can be summarized as follows. On January 7, 2002, immediately after assuming elected office, the Coroner fired all eight of the bargaining unit Deputy Coroners working in the Berks County Coroner's office. (Finding of Fact 4).[4] Thereafter, he hired three employes, a First Deputy Coroner (Kathleen Rearden), a Second Deputy Coroner (Denise Wesner), and an Acting Chief Deputy Coroner (Ray Bostard), whom the Coroner regarded at the time as managerial or supervisory employes outside the scope of the bargaining unit. (Finding of Fact 5).[5]

On January 9, 2002, AFSCME filed grievances with the County alleging that the eight bargaining unit employes in the coroner's office were terminated without just cause,[6] and that the work of the coroner's office was being performed by non-bargaining unit employes in violation of the collective bargaining agreement.[7] On January 10, 2002, AFSCME filed a charge of unfair practices with the Board, Case No. PERA-C-02-18-E, alleging that the Coroner's termination of the deputy coroners amounted to a unilateral transfer of bargaining unit work in violation of Section 1201(a)(1) and (5) of PERA. AFSCME also filed a civil action in the Court of Common Pleas of Berks County alleging that the

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[1] The caption appears as amended by the Pennsylvania Labor Relations Board.

[2] The hearing examiner also found that the County of Berks (County) violated Section 1201(a)(1), (5) and (8) of PERA, however, no exceptions have been filed by the County.

[3] Review of the exceptions is complicated by the lengthy transcript, consisting of 1054 pages of testimony, and the voluminous documentary evidence introduced as exhibits.

[4] These employes were Joel Bonilla, Christopher B. Chesonis, Kay I. Eisenhower, John M Hollenbach, Richard G. Leisey, Sr., Ronald C. Peters, Terri L. Straka, and Charles E. Sweitzer, Jr. (Exhibit C-1).

[5] All three positions were found to be within the bargaining unit pursuant to a unit clarification petition filed with the Board on August 29, 2002. AFSCME, District Council 88 v. Berks County, 35 PPER 25 (Final Order, 2004), *appeal filed*, No. 04-5128 (Berks County).

[6] The employes' grievances concerning just cause were held in abeyance pursuant to an earlier side agreement between the Court, row officers, and AFSCME, to allow the County and row officials to "relitigate" the issue in Troutman v. Pennsylvania Labor Relations Board, 735 A.2d 192 (Pa. Cmwlth. 1999), *petition for allowance of appeal denied*, 563 Pa. 624, 757 A.2d 937 (2000).

[7] The collective bargaining agreement between AFSCME and the County covering the court-related row office employes was effective January 1, 2000 through December 31, 2003.

deputy coroner terminations were in violation of the employes' First Amendment rights, and sought an injunction pending the unfair practice charge, which was denied.[8] (Finding of Fact 15). The unfair practice charge filed January 10, 2002, alleging an unlawful transfer of bargaining unit work, was held in abeyance pending the outcome of the grievance raising the same or similar issues under the collective bargaining agreement.

The grievance concerning the transfer of bargaining unit work proceeded to arbitration, and on April 30, 2002, an award was issued. The arbitrator found that the County violated the contract by using volunteers and non-bargaining unit employes to perform the work of the deputy coroners. To remedy the contractual violation, the arbitrator directed the County to pay compensation for any work performed by persons other than the coroner or management employes in the coroner's office. Neither the Coroner nor the County appealed the award to the Court of Common Pleas.[9] (Finding of Fact 17).

On May 21, 2002, AFSCME requested employe timesheets to compare to the County's calculation of what was owed under the April 30, 2002 award. AFSCME amended its May 21, 2002 request to include time sheets for all non-management personnel through the current pay period. The Coroner provided some information in response to AFSCME's May 21, 2002 request on August 8, 2002.

In February 2002, the Coroner hired two additional full-time employes. Ellis Edmonds's employment was made retroactive to January 7, 2002 (Finding of Fact 6), and William Hertzog started work in the coroner's office February 12, 2002. (Finding of Fact 7). Both Hertzog and Edmonds were in a probationary period during the first six months of their employment.

In March, AFSCME, believing that the scheduling of employes in the coroner's office may be inconsistent with the collective bargaining agreement, filed a grievance with the County. (Finding of Fact 9). During discussions with AFSCME on the grievance, the Coroner became aware that Mr. Edmonds and Mr. Hertzog were, in fact, bargaining unit employes. Thereafter, starting in April, the work shifts for Mr. Edmonds and Mr. Hertzog were changed to four ten-hour days per week pursuant to the collective bargaining agreement.

Beginning in May 2002, the Coroner explained to Mr. Hertzog that he would be structuring the coroner's office exclusively with full-time management employes and part-time non-bargaining unit employes. The Coroner had also been propositioning Mr. Hertzog to accept a supervisory position, stating that the only way Mr. Hertzog could remain employed in the coroner's office was to accept a non-union position. (Finding of Fact 12).

On May 28 and 30, 2002 the Coroner issued several performance evaluations each for Mr. Edmonds and Mr. Hertzog. While the evaluations showed a decline in performance for both Mr. Edmonds and Mr. Hertzog, the Coroner continued their employment. (Finding of Fact 11).

On June 4, 2002, Mr. Edmonds noticed that he had not been paid for three hours overtime incurred to attend a mandatory meeting. When Mr. Edmonds reminded the Coroner that he was a bargaining unit employe entitled to overtime pay, the Coroner responded by asking "Do you want to work in the Coroner's office?" The exchange was repeated, and Mr. Edmonds told the Coroner to fire him if that is what he wanted to do, and the Coroner agreed to terminate Mr. Edmonds's employment at the end of the day. (Finding of Fact 11).

During June and July, 2002, Mr. Hertzog had been anonymously sending his schedules to AFSCME, and on August 7, 2002, met with representatives of AFSCME to discuss working conditions in the coroner's office. (Finding of Fact 12). Mr. Hertzog also told the AFSCME representatives that he had heard the Coroner make several threatening and derogatory statements about the union. (Finding of Fact 12). It was as a result of this information that AFSCME came to believe that the January 7, 2002, terminations of the eight deputy coroners may have been motivated by the Coroner's union animus. (Finding of Fact 13).

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[8] *See* Mazzie v. Commonwealth, 495 Pa. 128, 432 A.2d 985 (1981).

[9] Although the Coroner was aware of the grievance and arbitration, he declined an opportunity to intervene or participate.

Based on what Mr. Hertzog described, AFSCME also believed that the Coroner had been violating the collective bargaining agreement with regard to pay for the bargaining unit employes in the coroner's office. Mr. Hertzog again met with AFSCME representatives on August 15, 2002, who prepared a grievance for Mr. Hertzog concerning his compensation. The AFSCME representative and Mr. Hertzog presented the grievance to the Coroner at 4:00 PM that day. When Mr. Hertzog returned from an investigation that evening, the Coroner asked Mr. Hertzog if he had joined the union. Believing that his affirmative response may result in discipline, Mr. Hertzog requested union representation.[10] In response, the Coroner terminated Mr. Hertzog's employment. The only reason given by the Coroner was Mr. Hertzog's alleged failure to satisfactorily complete his probation. (Finding of Fact 13).

Thereafter, on August 29, 2002, AFSCME filed the present Charge of Unfair Practices with the Board, challenging the January 7, 2002 termination of the deputy coroners and the dismissals of Mr. Edmonds and Mr. Hertzog, and alleging that the Coroner and the County did not fully and truthfully respond to its May 21, 2002 and August 6, 2002 information requests.

The following day, August 30, 2002, the Coroner held a meeting with the remaining full-time employes of the coroner's office, Mr. Bostard, Ms. Rearden and Ms. Wesner. The Coroner's first order of business at the meeting was finding out who spoke to the union, and what about. A week later the Coroner issued a "Deputy Coroner Policy Statement". Ms. Rearden questioned the County whether the policy meant she was precluded from raising any employment concerns with persons outside of the coroner's office. (Finding of Fact 15).

In addition, on October 7, 2002, during a meeting on the Hertzog grievance, AFSCME asked the Coroner and the County for additional scheduling information for the coroner's office, which both agreed to provide. AFSCME followed up on its request by letter dated December 2, 2002. At the first and second days of hearings on this unfair practice charge, January 7 and 9, 2003, the County provided AFSCME with information allegedly responsive to the October 7, 2002 and December 2, 2002 requests.

On January 13, 2003, AFSCME filed an amended charge alleging that the County's belated response to its October 7, 2002 information requests, and the Coroner's failure to respond, violated Section 1201(a)(1) and (5) of PERA.

The Coroner now files exceptions to the hearing examiner's Findings of Fact and determination that he violated Section 1201(a)(1), (3), (5) and (8) of PERA. The Coroner first contends that as for the eight deputy coroners who were fired January 7, 2002, the hearing examiner erred in finding that AFSCME was unaware of its potential claim of discrimination until August 2002, and therefore should not have tolled the statute of limitations.

Section 1505 of PERA provides, in relevant part, that "[n]o petition or charge shall be entertained which relates to acts which occurred or statement which were made more than four months prior to the filing of the petition or charge." An unfair practice charge is time barred if a complainant is aware or should be aware of the existence of the unfair practice and does not file a charge within the limitations period. Fraternal Order of Police Haas Memorial Lodge #7 v. Pennsylvania Labor Relations Board, 696 A.2d 873 (Pa. Cmwlth. 1997); Thomas v. APSCUF, 485 A.2d 903 (Pa. Cmwlth. 1985) (*citing* Nyo v. Pennsylvania Labor Relations Board, 419 A.2d 244 (Pa. Cmwlth. 1980)).

In the case of a charge alleging a discriminatory discharge under Section 1201(a)(3) of PERA, 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).

[10] In Pennsylvania Labor Relations Board v. Conneaut School District, 10 PPER ¶ 10092 (Nisi Decision and Order, 1979), aff'd, 12 PPER ¶ 12155 (Final Order, 1981), the Board adopted the holding in National Labor Relations Board v. J. Weingarten, Inc., 420 U.S. 251, 95 S.Ct. 959 (1975), that an employe has the right to assistance of a union representative at an interview with the employer where the employe has a reasonable fear that discipline may result from the investigation.

Therefore, the four-month statute of limitations would begin to run when the union knew, or should have known, of the employer's alleged unlawful motive for the termination.[11]

The Coroner asserts that AFSCME should have known of its unfair practice claims within the four months following the January 7, 2002 terminations and could have sought to challenge the deputy coroners' dismissals as discriminatory long before August 29, 2002. The Board recognizes that employes are fired for a wide variety of reasons, the vast majority of which are lawful. As pointed out by the hearing examiner, elected officials upon assuming office often times seek to replace existing employes with persons perceived more supportive to a new agenda, and the mere fact that the incumbents are replaced does not convey union animus. Pennsylvania Labor Relations Board v. City of Philadelphia and Register of Wills of Philadelphia County, 10 PPER ¶10053 (Final Order, 1979). Obviously, it would be unwise to fashion a rule regarding PERA's limitations period that encourages employes to file unfair practice charges at the time of their discharge when they may not know, or have reason to know, that they were discriminated against on the chance that the employe may later acquire information regarding an unlawful motive.

Here, the record does not support the Coroner's claim that AFSCME or the affected employes were aware of evidence of unlawful motive more than four months from the filing of the charge. Generally, the facts as found by the hearing examiner will be sustained if the essential findings are supported by substantial evidence in the record. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." Pennsylvania Labor Relations Board v. Kaufmann Department Stores, Inc., 345 Pa. 398, 29 A.2d 90 (1942). In reviewing the testimony for substantial evidence, it is within the purview of the Board to weigh the evidence. St. Joseph Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977).

Lawrence P. Murin, Assistant Council Director for AFSCME, testified that AFSCME was not aware of any union animus in the coroner's office until he met with Mr. Hertzog on August 7, 2002 and August 14, 2002, and was then told of the statements that had been made by the Coroner. This testimony is corroborated by the undisputed fact that after January 7, 2002, the Coroner's first day in office, AFSCME was effectively ousted from the coroner's office, and no longer had representatives employed in that office who could have heard the alleged anti-union statements.

While the Coroner claims that the hearing examiner erred in failing to find that AFSCME's civil complaint did not mention his union animus, that fact would actually support the tolling of the statute of limitations. If anything, the alleged failure of AFSCME to reference union animus in a collateral civil proceeding supports the finding that AFSCME was not aware, at the time, of an anti-union motive in the January 7, 2002 dismissal.

Upon review of the record, the hearing examiner did not err in finding that AFSCME would not have had reason to know of the Coroner's anti-union motivation in terminating the eight Deputy Coroners prior to meeting with Mr. Hertzog, and first became aware of its potential claims of discrimination on August 7, 2002. The hearing examiner's conclusion that AFSCME's charge of unfair practices filed August 29, 2002, was timely filed within four months of when it knew, or should have known, of a potential unfair practice under Section 1201(a)(3) of PERA, was not in error.

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[11] Where the policies of the Pennsylvania and federal labor statutes are similar, federal precedent may guide the analysis under PERA and justify a similar result. *E.g.* Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 527 A.2d 1097 (Pa. Cmwlth. 1987). In this regard, the National Labor Relations Board, which also applies that same principle of tolling, recognized that the statute of limitations for a charge of discrimination would not commence until the union is aware of the employer's alleged unlawful motivation. In John Morrell & Co., 304 NLRB 896 (1991), the company, a multi-facility employer, closed one of its plants, ostensibly for economic reasons, only to reopen as a non-union shop. Given a favorable collective bargaining agreement that allowed it to do so, its conduct was otherwise lawful under the National Labor Relations Act. However, more than two years after closing and reopening of the plant, during discovery in a collateral civil action filed by the discharged employes, the union learned that the employer's motive was to rid itself of the union. The NLRB noted that the six-month statute of limitations for an unfair practice would have commenced no later than the discovery of those documents in April of 1986, and therefore the charge of discrimination filed in 1987 was untimely.

In the alternative, the Coroner requests that the Board reopen the record to allow him to introduce the transcript of the preliminary injunction hearing before the Court of Common Pleas in January 2002, which he alleges contains statements showing that AFSCME was aware of the Coroner's union animus more than four-month before filing its charge of discrimination. Unless the proffered evidence sought to be introduced is 1) new; 2) could not have been obtained at the time of the hearing; 3) relevant and non-cumulative; 4) not offered solely for purposes of impeachment; and 5) likely to compel a different result, the Board will not exercise its discretion to reopen the record. Pennsylvania State Troopers Association v. Pennsylvania State Police, 33 PPER ¶ 33,011 (Final Order, 2001). The Board does not reopen the record on exceptions merely to allow a party to introduce evidence it had in its possession and could have presented to the hearing examiner. Slavanish v. Service Employees International Union, AFL-CIO, Local 585, 18 PPER ¶18,056 (Final Order, 1987).

The transcript of the preliminary injunction hearing sought to be introduced is not new and could have been introduced during the unfair practice proceeding. The Coroner acknowledges that the injunction hearing occurred in January 2002, eight months before the charge, and a year before the first day of hearings on the charge.[12] Moreover, even without the transcript, the Coroner could have called witnesses who were present at the preliminary injunction proceedings to testify about the hearing for purposes of establishing that AFSCME must have had notice of the Coroner's union animus. The Coroner's oversight, or reluctance, to present this available evidence at the unfair practice hearing does not justify the reopening of the record for a second opportunity to do so.[13] Accordingly, the Coroner's request to reopen the record is denied.

The Coroner argues that even if the charge of unfair practices over the discharge of the eight deputy coroners is timely, AFSCME failed to sustain its burden of establishing a claim of discrimination under Section 1201(a)(3). To prove a case of discrimination under Section 1201(a)(3), the charging party must establish that employes were engaged in a protected activity, that the employer knew of that activity, and that the employer's action(s) were motivated by union animus. St. Joseph Hospital, supra. The St. Joseph Hospital elements are satisfied where, because of anti-union reasons, an employer replaces its workforce in an attempt to avoid its collective bargaining obligations. County of Bucks v. Pennsylvania Labor Relations Board, 465 A.2d 731 (Pa. Cmwlth. 1983); Fraternal Order of Police, Lodge No. 85 v. Commonwealth of Pennsylvania, 18 PPER ¶ 18,093 (Final Order, 1987). Even without overt hostile acts by the employer, union animus, as the true reason for the employer's action, may be inferred from the surrounding circumstances. Pennsylvania Labor Relations Board v. Sand's Restaurant Corporation, 429 Pa. 479, 240 A.2d 801 (1968); York City Employes Union v. City of York, 29 PPER ¶ 29, 235 (Final Order, 1998). The crux of the Coroner's exceptions challenges the hearing examiner's inference that the termination of the eight deputy coroners on January 7, 2002, was motivated by union animus.

The Coroner argues that because neither Mr. Edmonds nor Ms. Reardon could state with certainty that he expressed union animus within the coroner's office, the hearing examiner's inference of an anti-union motive in discharging the eight deputy coroners, is not supported by substantial evidence. The oft cited reasoning of Second Circuit Court of Appeals in F.W. Woolworth Co. v. National Labor Relations Board, 121 F.2d 658 (2nd Cir. 1941) is equally applicable here to the hearing examiner's analysis of the testimonial evidence regarding the Coroner's union animus and unlawful motive behind the discharges.

> Implicit in petitioner's argument is a basic objection to reliance upon so-called "circumstantial evidence". But courts and other triers of facts, in a multitude of cases, must rely upon such evidence, i.e., inferences from

[12] Subsequent hearings were conducted January 9, March 11, and March 14, 2003, and at none of these hearings did the Coroner seek to introduce the transcript.

[13] In addition, we note that the proffered transcript of the civil proceeding would be irrelevant, cumulative, and not alter the result, since the Coroner concedes in his brief in support of the exceptions that "none of the original witnesses in the hearing on the complaint filed in January 2002, docketed at No. 02-324 provided testimony that there was anti-union animus." (Brief in Support of Exceptions at 6).

> 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., 121 F.2d at 660.

In this regard, Mr. Hertzog credibly testified, without reference to his notes,[14]

Q. What kind of threats were made?

A. Specifically to me, again, unionism comments and if I were to ever join the union, my future might be done at the Coroner's Office.

Q. Who made those comments?

A. Nicholas Bybel did.

Q. To you?

A. To me directly, yes.

* * *

Q. What other anti-union comments --- were there other kinds of anti-union comments besides the threats that you would lose your job?

A. Oh, in general, that union members, the past deputies, were thieves, that they all made $50,000 and mostly in overtime and that was one of the reasons he fired him (sic), because they were thieves. You can't trust union people, the mentality of the union people. They're not trustworthy.

Q. Do you recall anything else that he said about unions or union people?

A. They're bringing the nation down, they had no place in the County government, no place in the Coroner's Office. We had to get rid of them in general.

Q. Did he ever say anything to you, or in your presence, about the union's presence in the Coroner's Office in particular as opposed to County Offices in general?

A. Yeah, there were two theories. Specifically, he didn't want the union presence in the Coroner's Office nor did he really want union presence at all in the County structure.

Q. Did he ever tell you anything about whether the had any plans to bring that about? As to how he'd bring that about?

A. He mentioned to me that he was working with other County row officers to bring this about. He was working with the Pennsylvania Coroner's Association to help bring this about, but the unions would be a thing

[14] The Coroner challenges the weight of Mr. Hertzog's testimony because he had used notes to refresh his recollection during his testimony. The hearing examiner correctly noted that a witness may use anything to refresh recollection, and further determined that the notes made by Mr. Hertzog were written contemporaneous with the alleged statement referred to therein. *See* 1 P.L.E. WITNESSES § 122. Nevertheless, the necessary substantial evidence to support the hearing examiner's finding of union animus is Mr. Hertzog's testimony, independent of his notes.

> of the past. They would not be helpful or utilized in the Coroner's Office and hopefully in County government.

(N.T. 179-181).

The Coroner asserts that he had not made any of the alleged anti-union statements and the hearing examiner erred in discrediting his testimony to that effect. Under the separate heading of the Discussion, entitled "Credibility", in the PDO, the hearing examiner expressly noted the disparity in the testimony of the Coroner. Having observed the witnesses, the hearing examiner found that "[t]he demeanor of the Coroner on the stand raises significant doubts as to the honesty and forthrightness of his responses." (PDO at 9). The hearing examiner additionally explains this credibility assessment by describing several instances where he found the Coroner's testimony internally inconsistent.

In rendering his findings, the hearing examiner chose to discredit the Coroner's denial, and accept Mr. Hertzog's account of the anti-union sentiments being expressed by the Coroner. The hearing examiner fulfilled his obligation to address and resolve contested points of fact and applied the lawful standard in deciding credibility of witnesses. Thus, even if the Coroner's statements are not considered as overt acts of discriminatory motive, Mr. Hertzog's credible testimony is substantial evidence supporting the inference of union animus, and an anti-union motive in connection with the discharge of the eight deputy coroner's on January 7, 2002.

Incredulously, the Coroner claims that even if he did make the statements alleged by Mr. Hertzog, because he has a First Amendment right to express his views about unions and unionization, those statements cannot be used to support a finding of an anti-union motive in discharging the deputy coroners. An employer does have the right generally to express its views of unions and unionization absent threats of reprisal or promises of benefits. In Pennsylvania Labor Relations Board v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981), the Commonwealth Court noted that "an employer's rights cannot outweigh the equal rights of the employees to associate freely, as those rights are embodied in [the National Labor Relations Act]…." Id., at 1175 (*quoting* National Labor Relations Board v. Gessel Packing Co., 395 U.S. 575, 617 (1969)) and found that the employer's statements of union animus supplied the factual basis for the inference of anti-union motivation.[15] It has since been well recognized in this Commonwealth "that anti-union statements made … by individuals who are ultimately responsible for terminating … [an] employee can demonstrate unlawful motive." City of Reading v. Pennsylvania Labor Relations Board, 568 A.2d 715, 719 (Pa. Cmwlth. 1989). Thus, while an employer may express its views about unions and unionization, in doing so it cannot act on those beliefs by threatening, coercing or discriminating against an employe for exercise of rights under PERA. The Coroner overlooks the fact that the issue presented here is that he went beyond mere expression of opinion and acted on his union animus in discharging the bargaining unit employes.

The Coroner contends that since he hired people to fill bargaining unit position in the coroner's office, no union animus can be inferred for the discharge of the deputy coroners. However, the fact is that all the replacement employes the Coroner hired he regarded to be managerial employes and did not recognize AFSCME as their representative. The First Deputy Coroner, Second Deputy Coroner, and Acting Chief Deputy Coroner positions, filled by Ms. Rearden, Ms. Wesner, and Mr. Bostard, respectively, were considered by the Coroner to be managerial until a contested unit clarification proceeding found that these positions were within the bargaining unit. AFSCME, District Council 88 v. Berks County, supra. With regard to Mr. Edmonds and Mr. Hertzog, the Coroner himself testified, unequivocally that, "I considered them not to be working as bargaining unit employees, actually prior to the end of March." (N.T. 971).[16] Coupled with his display of union animus, the fact that the Coroner replaced the deputy coroners with

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[15] *See* Footnote 11 and Commonwealth of Pennsylvania, supra.

[16] Moreover, the Coroner also utilized volunteers and part-time employes, not covered by the collective bargaining contract, to work in the coroner's office.

persons he construed to be working outside the bargaining unit supports the finding of an unlawful discriminatory motive.

The record contains more than ample evidence supporting the inference that the termination of the eight deputy coroners was premised on the Coroner's union animus and his unlawful desire not to be burdened by collective bargaining obligations. Accordingly, the hearing examiner did not err in finding that AFSCME sustained its burden of establishing the Coroner's violation of Section 1201(a)(3) of PERA.

The Coroner argues that even if AFSCME established a *prima facia* case of discrimination with regard to the termination of the eight deputy coroners, the hearing examiner erred in rejecting his alleged legitimate business reasons for doing so. An employer may defend a Section 1201(a)(3) claim by establishing, by a preponderance of the evidence, that even in the absence of protected activity, the employer would have taken the same action. Teamsters Local 776 v. Perry County, 23 PPER ¶ 23,201 (Final Order, 1992), *affirmed*, 634 A.2d 808 (Pa. Cmwlth. 1993). However, this defense may be a "double edged sword" where a finding that the proffered reasons are mere pretext can actually support the inference of union animus. Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25,195 (Final Order, 1994); Pennsylvania Labor Relations Board v. Berks County, 13 PPER ¶ 13, 277 (Final Order, 1982). Such as in County of Bucks, supra, where the Commonwealth Court upheld the Board's finding that the employer's proffered reason for discharging its bargaining unit employes, to avoid potentially costly interest arbitration awards, was in actuality a pretext and an unlawful motivation. See also, Borough of Geistown v. Pennsylvania Labor Relations Board, 679 A.2d 1330 (Pa. Cmwlth. 1996) *petition for allowance of appeal denied,* 547 Pa. 759, 692 A.2d 568 (1997).

The Coroner asserts that his alleged belief that the discharged deputy coroners abused overtime to the point of theft constitutes a legitimate non-discriminatory reason for their discharge. However, his proffered reason for discharging the bargaining unit employes in an effort to avoid potentially ongoing and costly contractual overtime pay is merely a pretext to mask union animus. *See* County of Bucks, supra. The fallaciousness of the Coroner's alleged reason is even more clearly evident in that he alone had authority over scheduling employes and could have drafted work schedules to avoid or limit overtime (as he had done in April 2002 when he discovered that Mr. Hertzog and Mr. Edmonds were in fact bargaining unit employes).

Moreover, although not challenged in the exceptions, the hearing examiner's other reasons for rejecting the Coroner's proffered reasons for terminating the deputy coroners as pretext, were not in error. As noted by the hearing examiner, the Coroner's assertion that the eight discharged deputy coroner's engaged in theft of overtime pay was unsubstantiated by any investigation whatsoever. In addition, the Coroner claims that the employes in the coroner's office needed a certain educational background, but yet he did not know the qualification for some of those employes he discharged on January 7, 2002.

In all, the hearing examiner did not err in finding that the Coroner's proffered reasons for firing the eight deputy coroners were mere pretext for a discriminatory anti-union motive and an unlawful desire to rid the coroner's office of the obligation to bargain with AFSCME under the law. Therefore, the hearing examiner did not err in concluding that the Coroner violated Section 1201(a)(1)[17] and (3) of PERA in discharging the eight deputy coroners on January 7, 2002. *See* Lehighton Area School District v. Pennsylvania Labor Relations Board, 682 A.2d 439 (Pa. Cmwlth. 1996); Upland Borough, supra.

The Coroner also takes issue with the hearing examiner's determination that he violated Section 1201(a)(1) and (3) in terminating Mr. Hertzog and Mr. Edmonds because of their protected activity under PERA. The Coroner asserts that there is no evidence that Mr. Edmonds engaged in protected activity, because he was not a union member and did not speak to AFSCME prior to his termination from employment. However, on June 4, 2002, the

[17] A derivative violation of Section 1201(a)(1) is found whenever there has been a violation of any other of the enumerated clauses in Section 1201(a). Pennsylvania Labor Relations Board v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978).

day he was fired, Mr. Edmonds approached the Coroner to question him about overtime compensation he was owed pursuant to the contract. As recognized in PSSU, Local 668 v. Department of Public Welfare, 27 PPER ¶27,086 (Final Order, 1996), even in the absence of a grievance, an individual employe asserting a right or benefit under a collective bargaining agreement is engaged in concerted activity protected under PERA. (*Citing* National Labor Relations Board v. City Disposal Systems, Inc., 465 U.S. 822 (1984)). Thus, Mr. Edmonds's questioning the Coroner about unpaid overtime compensation was protected activity of which the Coroner was aware.

The Coroner asserts, however, that the hearing examiner erred in finding an anti-union motive for Mr. Edmonds's discharge, because he, in fact, paid Mr. Edmonds the overtime compensation due, and had fired Mr. Edmonds because of unsatisfactory performance, not his request for overtime pay. The timing of Mr. Edmonds's discharge, occurring during his discussion with the Coroner about unpaid overtime, coupled with the Coroner's established union animus, supplies the necessary basis to support the inference, and the hearing examiner's finding, of an unlawful motive for the Coroner's decision to terminate Mr. Edmonds's employment. *See* Perry County, supra.; Berks County, supra.

The Coroner's unlawful motive for firing Mr. Edmonds is evident from his response to Mr. Edmonds's demand for contractual overtime compensation, by questioning Mr. Edmonds whether he wished to work in the coroner's office. Notably, even though the Coroner knew since April 2002 that Mr. Edmonds was in the bargaining unit and entitled to overtime, he only gave the direction to make payment for unpaid overtime on Mr. Edmonds' termination paperwork, after he had already been fired. Moreover, in each of the allegedly poor performance reviews, presented to Mr. Edmonds earlier that week, the Coroner continued Mr. Edmonds's employment. Accordingly, the hearing examiner did not err in rejecting the Coroner's proffered reasons, and finding that the Coroner terminated Mr. Edmonds's employment out of an unlawful anti-union motive for Mr. Edmonds having engaged in protected concerted activity. *See* Stairways, supra.

Likewise, the Coroner claims that the hearing examiner's finding that the Coroner fired Mr. Hertzog for his seeking the assistance of AFSCME is based on pure speculation, and is in error. However, again, the timing of the Coroner's firing of Mr. Hertzog, together with his prior display of union animus, supplies the necessary foundation for an inference of anti-union motivation. Mr. Hertzog presented the Coroner with a grievance on August 15, 2002, which is clearly a protected activity under PERA. Lehighton, supra. In addition, when Mr. Hertzog feared that discipline may be the ultimate outcome of the Coroner's questioning about the grievance, he sought union representation, which was also his protected right.[18] In response to Mr. Hertzog's request for union representation, and during the questioning about his grievance, the Coroner terminated Mr. Hertzog's employment. The timing of Mr. Hertzog's dismissal, together with the Coroner's previous display of union animus, is abundant support for the finding that the Coroner was motivated by union animus in terminating Mr. Hertzog.[19]

The hearing examiner properly rejected the Coroner's contention that he terminated Mr. Hertzog's probation for poor performance, noting that not only did Mr. Hertzog's performance reviews result in retention, but the Coroner had repeatedly requested Mr. Hertzog accept a supervisory position in the coroner's office, a prospect inconsistent with a performance worthy of a discharge. Moreover, despite the Coroner's assertion that Mr. Hertzog had not satisfactorily completed probation, Mr. Hertzog's six-month probation period would have ended August 12, 2002, days before his dismissal. Accordingly, there is no basis on the record to challenge the hearing examiner's rejection of the Coroner's proffered reason for terminating Mr. Hertzog from employment. Thus, the hearing examiner did not err in finding that Mr. Hertzog was unlawfully discharged for his union activities.

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[18] *See* Footnote 10, and Weingarten, supra.

[19] Having already established the Coroner's discriminatory motive from his timing and union animus, the fact that the Coroner may have "grinned" in response to Mr. Hertzog's inquiry whether he was being fired for his involvement with AFSCME, is nothing more than the proverbial "icing on the cake" to support an inference of unlawful motivation.

The Coroner argues that since he had responded to AFSCME's May 21, 2002, request for information following the grievance arbitration award, he should not have been found to have failed to comply with AFSCME's subsequent request for additional information regarding the hours worked by non-bargaining unit personnel and volunteers. The Coroner claims there was no obligation to supplement his response because AFSCME's August 6, 2002 request for additional information was inappropriately premised on Mr. Hertzog's unsupported personal records that he anonymously provided to the union.

Generally, a union is entitled to any information reasonably necessary for it to carry out its collective bargaining duty, or to police the contract. Commonwealth of Pennsylvania v. Pennsylvania Labor Relations Board, 527 A.2d 1097 (Pa. Cmwlth. 1987). It is beyond dispute that the information sought by AFSCME concerning the County and the Coroner's compliance with the grievance award, is in furtherance of its policing of the collective bargaining agreement. An unreasonably delayed response to a request for information, even if complete, is nevertheless an unfair practice under Section 1201(a)(1) and (5) of PERA. North Hills Education Association v. North Hills School District, 29 PPER ¶ 29,063 (Final Order, 1998).

The mere fact that it may have been Mr. Hertzog's allegedly speculative records which raised AFSCME's suspicion that the Coroner had not fully and truthfully provided the information initially requested, is no basis for overturning the hearing examiner's finding that the Coroner failed to timely respond to AFSCME's subsequent written requests for updated information. Here, although Frederick R. Mogel, Esquire, solicitor for the Coroner, testified that he thought the August 6, 2002 letter was merely a follow up to AFSCME's earlier request seeking time sheets through May 2002, when asked why the Coroner did not provide the updated information through August as requested, he testified that "as soon as I complied with any further requests, there'll be another request for additional pay period, and on and on it will go." (N.T. 769). Mr. Mogel acknowledged that the information requested in AFSCME's August 6, 2002 letter, was finally provided at the first day of hearing, on January 7, 2003. A five month delay in providing updated information to the union, simply to avoid speculated additional requests for further updates, is unreasonable and constitutes an unfair practice under Section 1201(a)(1) and (5) of PERA.

In addition, on October 7, 2002, AFSCME requested time records and information from the Coroner and the County with regard to the use of non-bargaining unit personnel and volunteers in the coroner's office, as needed for its continued policing of the April 30, 2002, grievance arbitration award. AFSCME followed up on that request December 2, 2002. Mr. Murin testified at the hearing on January 7, 2003, that the County had provided the requested payroll records that morning, but that the work schedules and the documentation on transports, within the control of the Coroner, had not yet been provided. At the next day of hearing, January 9, 2003, the County provided AFSCME with attendance records for Melissa Brown, a non-bargaining unit intern working in the coroner's office from April to July 2002. However, no documentation was received from the Coroner regarding the work schedules for part-time non-bargaining unit employes William Clark, Brent Leiby, or William LeVan. Accordingly, because as there is a request still pending for information that is relevant to AFSCME's policing of the grievance award that has gone unanswered by the Coroner, the hearing examiner did not err in concluding that the Coroner violated Section 1201(a)(1) and (5) by failing to respond to AFSMCE's October 16, 2002 request for information.[20]

The Coroner further contends that the hearing examiner erred in concluding that he violated Section 1201(a)(8) of PERA by not complying with the April 30, 2002 grievance arbitration award. There is no dispute here that an unappealed grievance arbitration award exists that and is binding on the parties and has not been complied with. Fraternal Order of Police Lodge #5 v. City of Philadelphia, 29 PPER ¶29042 (Final Order, 1998).

[20] The affirmative relief directed in the PDO is to comply with AFSCME's request "to the extent not already done." Even if the Coroner may be attempting to claim that there is no further documentation in his possession to produce, we note that there is nothing in the record to suggest that he advised AFSCME that this is his reason for not supplying the additional information, which is nevertheless a failure to respond.

Notably, the Coroner's assertion that AFSCME failed to sustain its burden of showing noncompliance with the award because it could not establish the hours worked by part-time employes and volunteers is, in part, attributable to his refusal to respond to AFSCME's request for that information. Nevertheless, some time records, specifically those dealing with Ms. Brown, were turned over to AFSCME on January 9, 2002. The Coroner does not assert, nor is there any basis in the record for finding, that with regard to even Ms. Brown's hours, the Coroner has effectuated the compensation directed by the April 20, 2002 grievance award. Accordingly, the hearing examiner did not err in finding that the Coroner failed to comply with a grievance award directing compensation for use of non-bargaining unit labor in the coroner's office, and thus violated Section 1201(a)(8) of PERA.

Finally, the Coroner takes issue with the hearing examiner's finding of an independent violation of Section 1201(a)(1) for issuing an overly broad "no communication" rule. The no communication rule issued by the Coroner states that an employe "shall not be permitted to discuss with any third party any of the internal workings of the [employer], nor anything that they have learned, or have come to know, by and through the course of their conduct of their duties…, unless such discussion and subsequent dissemination of information is expressly approved by the [employer], in writing and in advance of such discussion or dissemination."

An independent Section 1201(a)(1) violation occurs where the totality of circumstances of the employer's actions would have a tendency to coerce employes in the exercise of protected rights. Northwestern Education Association v. Northwestern School District, 24 PPER ¶ 24,141 (Final Order, 1993); Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transportation Authority, 17 PPER ¶17,038 (Final Order, 1986). However, nowhere in the amended charge of unfair practices filed January 13, 2003, does AFSCME allege that the Coroner's issuance of the September 6, 2002 policy statement violates PERA, *see* Independent State Store Union v. Liquor Control Board, 22 PPER ¶ 22,009 (Final Order, 1990) (holding that the Board is powerless to find an unfair practice where none is alleged), and moreover its attempt to do so would have been untimely. Section 1505 of PERA; International Association of Firefighters, Local 2227 v. Lehigh Valley International Airport, 26 PPER ¶ 26,140 (Final Order, 1995) (an amendment raising a new cause of action must be filed within the four-month statute of limitations). Accordingly, therefore, we must vacate the hearing examiner's directive to rescind the Deputy Coroner Policy Statement.

After a thorough review of the exceptions and all matters of record, the hearing examiner did not err in concluding that the Coroner violated Section 1201(a)(1), (3), (5) and (8) of PERA, and the Coroner's exceptions thereto are dismissed. However, because the Deputy Coroner Policy Statement was not a part of the charge of unfair practices, the Coroner's exception to the finding of an independent Section 1201(a)(1) violation must be sustained, and the remedy directing him to rescind the Deputy Coroner Policy Statement issued September 6, 2002, vacated.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Amended Proposed Decision and Order of August 2, 2004 are dismissed in part and sustained in part, and clause 5(e) of the affirmative relief on page 20 of the PDO is vacated. In all other respects the PDO, as amended herein, 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 fifteenth day of March, 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

AFSCME DISTRICT COUNCIL 88 :
:
v. : Case No. PERA-C-02-405-E
:
BERKS COUNTY AND NICHOLAS BYBEL :

AFFIDAVIT OF COMPLIANCE

The Coroner certifies that he has ceased and desisted from his violation of Section 1201(a)(1), (3), (5) and (8) of the Act; that he has offered Hertzog, Edmonds and the eight employes terminated on January 7, 2002 unconditional reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them; that he has made those affected employes whole for all wages and benefits that they would have earned from the date of discharge to the date of unconditional offer of reinstatement; that he has paid the Union an amount equal to the hours worked by the volunteer intern Brown; to the extent not already done, that he has fully complied with the Union's information requests; that he has posted the final order and amended proposed decision and order as directed; and that he has served a copy of this affidavit on AFSCME District Council 88 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