COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LUZERNE COUNTY COMMUNITY COLLEGE ASSOCIATION OF HIGHER EDUCATION	:	
v.	:	Case No. PERA-C-05-373-E
LUZERNE COUNTY COMMUNITY COLLEGE	:	

FINAL ORDER

The Luzerne County Community College Association of Higher Education (Association) filed exceptions with the Pennsylvania Labor Relations Board (Board) on May 1, 2006, challenging a Proposed Decision and Order (PDO) issued April 11, 2006, wherein the Hearing Examiner concluded that the Luzerne County Community College (College) did not violate Section 1201(a)(1), (3), (4), (5) and (8) of the Public Employe Relations Act (PERA) by eliminating the position of Director of Student Health Services. After requesting and receiving an extension of time to file a brief, the Association filed a brief in support of its exceptions on June 1, 2006. On June 21, 2006, the College filed a brief in opposition to the Association's Exceptions. After review of the exceptions and all matters of record, the Board makes the following:

AMENDED FINDING OF FACT

2. The position of Director of Student Health Services was originally a full-time, 12 month, non-teaching position that was filled by Esther Liuzzi, a member of the bargaining unit. From August of 1999 until March of 2000, Ms. Liuzzi took a sabbatical leave. From March of 2000 until her retirement in July 2002, Ms. Liuzzi was unable to work due to an illness. At the beginning of her absence in August of 1999, Ms. Liuzzi was replaced by Sharon Grzymski. Ms. Grzymski was a part-time nurse who was not a member of the bargaining unit. When Ms. Liuzzi retired in July 2002, Ms. Grzymski continued working in this capacity until the position of Director of Student Health Services was eliminated on August 19, 2005.

DISCUSSION

The factual background is briefly stated as follows: The Association filed a grievance over the College's decision to fill the bargaining unit position of Director of Student Health Services with a non-bargaining unit employe. On September 1, 2004, an Arbitrator sustained the Association's grievance and ordered the College to "fill the position of Director of Student Health Services as a full-time 12-month position within the Bargaining Unit, as soon as practicable in accordance with the collective bargaining agreement ..." (Finding of Fact No. 3; Association Exhibit 1). On November 11, 2004, the Association's President met with a representative of the College, who informed the Association that the College did not intend to fill the position with a member of the bargaining unit. On April 19, 2005, another meeting took place, and the Association was again informed that the College did not intend to fill the position with a member of the bargaining unit. (Finding of Fact No. 5). On May 12, 2005, the College sent the Association a memorandum which stated: "This memorandum is to advise you that the College has determined that it is going to eliminate the Director of Student Health Services position." (Finding of Fact No. 6; Association Exhibit 2). On August 19, 2005, the College eliminated the position of Director of Student Health Services. (Finding of Fact No. 7).

The Association filed a Charge of Unfair Practices on August 22, 2005, alleging that the College eliminated the position of Director of Student Health Services and assigned work to others outside of the bargaining unit, thereby violating Section 1201(a)(1), (3), (4), (5) and (8) of PERA. A complaint was issued and a hearing was held on January 24, 2006. By decision dated April 11, 2006, the Hearing Examiner determined that the College did not commit a violation of Section 1201(a)(1), (3), (4) or (5) and

that the charge under Section 1201(a)(8) was untimely filed. Accordingly, the Hearing Examiner dismissed the Charge of Unfair Practices.

In its exceptions, the Association argues that: 1) the Hearing Examiner erred by considering whether the charge was timely filed because the College did not raise the statute of limitations as an affirmative defense in an Answer to the Complaint, 2) the charge under Section 1201(a)(8) was timely filed because the four-month statute of limitations should begin to run from May 12, 2005 rather than April 19, 2005, and 3) the Hearing Examiner erred by finding that the College's actions in eliminating the position of Director of Student Health Services was not discriminatory.

In support of its argument that the Hearing Examiner erred by considering the affirmative defense of the statute of limitations, the Association cites Section 95.35(a) of the Board's Rules and Regulations, which provides that:

> (a) Affirmative defenses, including but not limited to the jurisdiction of the Board and statute of limitations, shall be pleaded under the heading of new matter in the answer.

34 Pa. Code § 95.35(a). The Association argues that, because the College did not file an Answer to the Complaint raising the defense of the statute of limitations, the College waived this argument. We disagree.

Section 95.34(c) of the Board's Rules and Regulations provides, in relevant part, that:

> (c) ... 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(c). In Warwick v. City of Wilkes-Barre, 25 PPER ¶ 25196 (Final Order, 1994), the Board held that:

> contrary to Complainant's position, the Board has not held that issues are waived if they are not raised in the respondent's answer to the complaint. Indeed, the Board's rules and regulations do not require the respondent to file an answer and only those averments relating to the identities of the parties are deemed admitted if not specifically denied. 34 Pa. Code 95.34. Therefore, an issue need not be raised in an answer to the complaint to be preserved.

Id. at 506-507. See also Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, 27 PPER ¶ 27015 (PDO, 1995) (emphasis added). Accordingly, because the College did not waive any issue by failing to file an Answer, this exception is dismissed.

Next, the Association argues that the Hearing Examiner erred by finding that its charge under Section 1201(a)(8) was not timely filed. Section 1505 of PERA provides, in relevant part, that:

> ... No petition or charge shall be entertained which relates to acts which occurred or statements which were made more than four months prior to the filing of the petition or charge.

43 P.S. § 1101.1505.

The Hearing Examiner found that, on April 19, 2005, the College informed the Association that it did not intend to fill the position of Director of Student Health Services as a full-time bargaining unit position. This finding is supported by the evidence, as Anna Mary McHugh, the vice president of the Association, testified as follows:

> Association's attorney: When did it become apparent to the Association that the College would, under no circumstance, post the position?

> Ms. McHugh: In April of 2005 ... it was at that time that they said they did not intend to fill it as a full-time position, we asked for that statement in writing. And then Mr. Amico sent the memo to Chris, as president of the Association, stating that they were not going to fill it.

(N.T. 1/24/2006, pp. 30-31; emphasis added). The Hearing Examiner cited Pennsylvania Labor Relations Board v. Commonwealth of Pennsylvania, 9 PPER ¶ 9003 (Final Order, 1977), which stands for the proposition that, when the charge of unfair practices relates to the failure to comply with an arbitration award, the four month statute of limitations begins to run when a party takes a "firm and unyielding stance" that it will not comply with the award. Applying this proposition to the testimony of Ms. McHugh, it is evident that the College took a firm and unyielding stance that they would not comply with the arbitrator's award on April 19, 2005. Thus, the charge alleging a violation of Section 1201(a)(8) is untimely because it was filed on August 22, 2005, which is more than four months after April 19, 2005. Accordingly, this exception is dismissed.

The Association also argues that the College violated Section 1201(a)(4) of PERA, which provides that public employers are prohibited from "[d]ischarging or otherwise discriminating against an employe because he has signed an affidavit, petition or complaint or given any information or testimony under this Act." The Board has held that Section 1201(a)(4) is violated where an employe is discriminated against for filing petitions or charges or providing information or testimony in a Board proceeding. See PLRB v. Beaver County, 7 PPER ¶ 307 (Nisi Order, 1976). However, the College eliminated the position of Director of Student Health Services and terminated Ms. Grzymski before the Association filed its charge on August 22, 2005. Thus, it cannot be said that the College retaliated against the Association for filing the charge that is the subject of this case. Further, the Association argues that the College violated Section 1201(a)(5) by transferring bargaining unit work. However, the Association's allegation that the College eliminated the position of Director of Student Health Services is more properly regarded as prohibited retaliation against the Association for engaging in protected activity rather than a bargaining violation. Further, it is undisputed that Ms. Grzymski began performing the work of the Director of Student Health Services in August of 1999. Therefore, any transfer that occurred happened then and would not properly be the subject of a charge of unfair practices filed in August of 2005.

The Association next argues that it proved that the College was motivated by anti-union animus when it eliminated the position of Director of Student Health Services and that, therefore, the Hearing Examiner should have found a violation of Section 1201(a) (3).

In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must prove 1) that the employes engaged in protected activity; 2) the employer was aware of that protected activity; and 3) but for the protected activity, the adverse action would not have been taken against the employes. St Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). It is well-settled that the timing of an employer's action is a key factor in making a determination as to motivation behind that action. St. Joseph's.

The Hearing Examiner reasoned that the timing of the events provided an insubstantial basis for inferring union animus on the part of the College. Specifically, the Hearing Examiner noted that the College did not eliminate the position until almost a year had elapsed since the arbitration award was issued, as the arbitration award was issued in September 2004 and the position was not eliminated until August of 2005. The facts of record show that, in August of 1999, the College made the decision that the position of Director of Student Health Services should not be a bargaining unit position. The College's position in this regard has remained constant, which is evidenced by its decision not to fill the position with a bargaining unit employe after the arbitrator's award and its elimination of the position in August of 2005.[1] In order for the Association to succeed in its claim of discrimination, it must show that the College took adverse action against the Association for engaging in protected activity. However, the adverse

[1] While it is the Board's consistent policy that an employer's unilateral removal of a position from a bargaining unit violates Section 1201(a)(1), no such claim is presented on this record.

action that the College took, which was filling the position with a non-member of the bargaining unit, started in August of 1999, and the Association did not engage in the protected activity of trying to get the position filled by a bargaining unit employe until well after that, when it filed the grievance and attempted to obtain the College's compliance with the arbitrator's award. Thus, the Hearing Examiner appropriately found no nexus between the College's adverse action and the Association's protected activity because the College's adverse action preceded the Association's protected activity. Because the College's actions preceded the Association's protected activity, it cannot be said that, but for the Association's protected activity, the College would not have taken adverse action against the Association. Therefore, the Hearing Examiner did not err by failing to find a violation of Section 1201(a)(3). Accordingly, this exception is dismissed.

After a thorough review of the exceptions, the briefs in support and opposition and all matters of record, the Board shall dismiss the Association's exceptions and affirm the Hearing Examiner's conclusion that the College did not engage in unfair practices in violation of Section 1201(a)(1), (3), (4), (5) and (8) of PERA.

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 by the Association are hereby dismissed, and the April 11, 2006 Proposed Decision and Order as amended herein as set forth herein, be and hereby is made absolute and final.

SIGNED, SEALED, DATED and MAILED this nineteenth of September, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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L. DENNIS MARTIRE, CHAIRMAN

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ANNE E. COVEY, MEMBER

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JAMES M. DARBY, MEMBER