

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

COLLIN MERRICK :
 :
 v. : Case No. PERA-C-06-321-E
 :
 LOWER MERION SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) on July 14, 2006, by the Collin Merrick (Merrick), alleging that the Lower Merion School District (District) violated Section 1201(a)(3) and (4) of the Public Employee Relations Act (Act). On August 8, 2006, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on September 22, 2006, in Ardmore, Pennsylvania. A hearing was held on that date during which all parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Neither party filed a post-hearing brief.

The examiner, on the basis of the testimony and exhibits presented at the hearing, and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is an employer within the meaning of Section 301(1) of the Act.
2. Merrick is a public employe within the meaning of Section 301(2) of the Act.

3. When full-time custodial positions are posted interested candidates submit a letter of interest. Typically there are between fifteen and twenty-five candidates. Merrick applied for two full-time custodial positions in 2005, for which there was one set of interviews, and another 2005 position that had its own set of interviews. Candidates participate in an initial interview and the three or four highest-scoring candidates are selected to be interviewed by the principal in the building where the position is located. After that, a mutual decision is made about whom to hire. Merrick applied for the three above-mentioned positions. His rating sheet from the initial interview shows he was not recommended to go to the second-level interview for any of the three. Out of a maximum numerical score of 5.0, Merrick's maximum score was a 2.8. Comments by the interviewer consistently mention that Merrick needs to improve his communication and interpersonal skills. Those selected for the positions had initial interview ratings of 3.6 to 3.9, received only laudatory comments, were consequently interviewed and approved by the respective principals. (N.T. 36, 39, 46, 48; District Exhibit 17, 22, 37, 38, 39).

4. On April 3, 2006 the District posted a vacancy for a full-time night custodian at Penn Valley Elementary School. Merrick made timely application for that position. On August 4, 2006 the District notified Merrick that the position would not be filled. The position was eliminated because the District, upon reflection, concluded it no longer needed that custodial position. The District had negotiated with the Union¹ to eliminate that position in favor of creating an additional sports aide. Sports aides are in the bargaining unit as is Merrick. (N.T. 22, 23, 57-59; District Exhibit 32, 33, 34, 36)

5. The full-time custodial positions for which Merrick applied required more specific custodial skills than did Merrick's then current position. Other successful candidates already possessed those necessary skills. Merrick did not work during the summer in his part-time position and consequently was not paid over the summer. The District offered to pay Merrick over the summer and to train him in just those custodial skills that would make him a more attractive candidate for the kinds of positions he sought. Merrick refused the District's offer because the District's offered hourly pay rate for the training was below what Merrick regularly made in his part-time position. (N.T. 11, 41-48)

¹ The Lower Merion Educational Association, PSEA-NEA. (N.T. 24; District Exhibit 36)

DISCUSSION

Merrick alleges that the District violated Section 1201(a)(3) and (4) of the Act when it denied Merrick permanent, full-time positions and promotions, and other imprecisely described emoluments of employment. The charge recites a gallimaufry of allegations, some of which occurred four years prior to the filing of this charge. Some of the allegations revolve around an arbitration award issued years ago.² Merrick alleges that even though he won the arbitration he "was not given his retroactivity back to October 16, 2000" and that he has unsuccessfully applied for a dozen full-time custodial positions since winning the arbitration award. Merrick then alleges that the District has retaliated against him for filing previous charges with the Board and also alleges that the District has discriminated against him for engaging in protected activities.

In order to prevail with the Section 1201(a)(3) portion of the charge as filed, Merrick must prove that he engaged in protected activity, that the District was aware of that participation, and that the District would not have taken the adverse action it took absent Merrick's participation in the protected activity. Saint Joseph's Hospital, 473 Pa. 101, 373 A.2d 1069 (1977). A violation of Section 1201(a)(4) is proved by the same elements as a Section 1201(a)(3) charge except the motivating factor is the intent to discriminate because the employe has filed charges or given testimony under the Act. Mayview State Hospital, 17 PPER ¶ 17221 (Proposed Decision and Order, 1986), 18 PPER ¶ 18068 (Final Order, 1987).

Simply put, Merrick has proved nothing. He merely recites his own assertion that he is singularly the best candidate for each of the posted jobs ("And I'm definitely a top candidate." N.T. 18). Merrick's personal opinion that the District is driven by improper motives constitutes the sole basis for this charge. By way of example, when asked if he knew why he was repeatedly turned down for full-time positions, Merrick could only opine, "I do know that it's a personal vendetta against me." (N.T.14). Conspicuously absent from this record is any factual basis for that bald assertion.

The only application for a full-time position Merrick made in the applicable limitations period³ was for a full-time custodial position posted on April 3, 2006. How his not being hired for that position can be evidence of the District's retaliation or discrimination against Merrick remains a mystery since the District simply decided not to fill that position for non-discriminatory reasons. (N.T. 22, 58, 59).

Merrick offered, as evidence of the District's retaliation and discrimination, the fact that he was never told by the District why he was not chosen for any of the applied-for positions. As opposed to showing the District's discriminatory intent, that testimony merely showed Merrick's ignorance of his own collective bargaining agreement, which in Article 52(C) states, "Upon written request, unsuccessful employee candidates shall be given in writing the reason(s) why they were not selected." If the District never told Merrick, it was simply because he never asked. (N.T. 25; District Exhibit 36).

The District, on the other hand, has clearly shown that it consistently used the same objectively measurable criteria to appoint candidates materially more qualified than Merrick to the positions in question. The District used a standard rating sheet for each applicant, covering such general areas as technical skills, ability to work cooperatively, good interpersonal skills, professionalism and growth potential. (N.T.45-47; Union Exhibit 17). In each set of evaluations introduced by the District, Merrick was rated substantially below the selected candidate. In point of fact, Merrick never made it past the initial stage of the District's two-tier selection process. Merrick specifically alleges in his Specification of Charges that, "The grievant [Merrick] was amply qualified for each of the full-time positions. The respondent [District] had rejected each application in favor of others who were less qualified ... than the grievant." That allegation is simply not true on this record. Quite the opposite is true - that the District consistently hired the most qualified candidate for each full-time position it filled.

² The charge states "Grievant [Merrick] won his arbitration against Respondent [District] on June 12, 2002. The turbid wording leaves it unclear whether June 12, 2002, is the date of the arbitration or the date of the award.

³ 43 P.S. § 1101.1505

Essentially, then, Merrick asks me to conclude that the District fabricated the evaluative paperwork and multi-level interview records of all posted custodial positions, in which Merrick was a candidate, simply to retaliate against him. Such a conclusion borders on the fantastic given Merrick's utter lack of proof.

The jobs for which Merrick applied required more specialized skills than did his part-time, general cleaning position. The District offered Merrick additional work over the summer – when he normally did not work – so he could acquire the specific skills needed to make him a more attractive candidate for a full-time position, but Merrick declined the offer. Merrick declined the offer of summer employment because summer work paid less per hour than he made working his part-time position.⁴ In the face of Merrick's refusal to take advantage of paid summer training in the very skills he needed to be a more marketable candidate, Merrick's unsupported assertion that the District's motivation for not hiring him in specialized custodial positions was discriminatory rings particularly hollow.

This charge is dismissed in its entirety because every timely allegation in it is baseless. Merrick gives credence to Daniel Patrick Moynihan's⁵ observation that "[e]veryone is entitled to their own opinion, but not their own facts."

CONCLUSION

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The District is a public employer within the meaning of Section 301(1) of the Act.
2. Merrick is a public employe within the meaning of Section 301(2) of the Act.
3. The Board has jurisdiction over the parties.
4. The District has not committed unfair practices within the meaning of Section 1201(a)(3), and (4) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this sixth day of November, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, HEARING EXAMINER

⁴ Merrick's permanent part-time position did not schedule him for work during the summer and consequently he received no pay during the summer. Nevertheless, Merrick declined the District's offer to pay and to train him in the skills necessary for advancement during the summer. Merrick refused because the District offered him a lower rate for the summer training than his regular hourly rate of pay, even though Merrick's annual wage would be thereby increased. (N.T. 41-44).

⁵ March 16, 1927 to March 26, 2003; academic; U. S. Undersecretary of Labor; U. S. Ambassador to India; U. S. Ambassador to the United Nations; U. S. Senator from New York.