

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LINDA SAYLOR :
 :
 v. : Case No. PERA-C-05-381-E
 :
 YEADON BOROUGH :

LYNETTE DAVID :
 :
 v. : Case No. PERA-C-05-382-E
 :
 YEADON BOROUGH :

AMENDED PROPOSED DECISION AND ORDER

On August 15, 2006, the Pennsylvania Labor Relations Board (Board) issued an Order Directing Remand to the Hearing Examiner for Further Proceedings. That August 15, 2006, order, "remand[ed] this matter to the Hearing Examiner for the purpose of making additional Findings of Fact and Conclusions regarding whether Saylor and David satisfied the second prong of the St. Joseph's¹ test by showing that the Borough had knowledge of their union activity pursuant to the small plant doctrine. The Hearing Examiner shall then proceed with the St. Joseph's analysis and make a determination based on additional findings regarding the second and third prongs of the St. Joseph's analysis as to whether Saylor and David satisfied their burden of proving a violation of Section 1201(a)(3) of PERA."²

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:

ADDITIONAL FINDINGS OF FACT

FINDINGS OF FACT numbers 1 through 6 inclusive, as set forth in the Proposed Decision and Order issued on May 11, 2006, 37 PPER 68 (Proposed Decision and Order, 2006) are incorporated by reference herein and expressly made a part hereof, and the following additional findings are made:

7. There are 10 administrative employees who work for the Borough on the third floor of the Borough building. Across from the elevator sat the receptionist, Sheila Briner. David sat in a cubicle behind, and to the left, of Briner. The zerox machine was in David's cubicle. The code enforcement office was adjacent to David's cubicle. The first desk upon entering that room was occupied by Saylor. Behind her sat Matt Black, the fire marshal. Against an adjacent wall were three desks for the building inspectors, Glen Holt, Rufus Stokes, and Candice Glasshouser.³ At the end of a dead-end hallway that stretched behind Saylor's and the fire marshal's desks was the office shared by Pat Crisswell and Bonenberger. That hall also led to a separate office for the finance officer. (N.T. 12, 13, 39-41, 75).

8. Calvin A. Bonenberger Jr., the interim borough manager and director of code enforcement had his office at the end of a dead-end hallway in the rear of the building. Because of the physical layout of the office, Bonenberger found there to be a "significant disconnect between the manager [himself] and the administrative assistant [David] who sits at the front of the building." (N.T. 75).

¹ St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977)

² Public Employee Relations Act, 43 P.S. §1101.101 to 1101.2301

³ All three of these names are spelled phonetically, as they appear in the transcript. (N.T. 40)

9. When David spoke of the contemplated organizing drive she did so quietly in the lunchroom, in her office and in the hallway. (N.T. 44).

10. David was not comfortable talking about unionizing efforts in front of Matt Black. (N.T. 45).

11. Saylor was aware that Glen Holt and Sheila Briner were not in favor of unionization. Consequently, she excluded them from her discussions. (N.T. 16, 87, 88).

12. Bonenberger had warned employees against "wasted work time" and "water cooler chatter." (N.T. 75).

13. At the relevant times pertaining to this charge, Bonenberger was the director of code enforcement and also became the interim borough manager. Bonenberger was heavily involved in the budget process for the latter part of 2004. In 2005 he was involved with "re-establishing the personnel committee." Bonenberger liked to prepare his own typed materials. Bonenberger was "getting overwhelmed," and "working 60, 70, 80 hours a week." (N.T. 64-66, 71, 72).

DISCUSSION

The entire DISCUSSION section as set forth in 37 PPER 68 is incorporated by reference herein and expressly made a part hereof.

In Temple University, 23 PPER ¶ 23033 at 64 (Final Order, 1992) the Board explained the small plant doctrine as follows:

"The small plant doctrine allows the Board to infer knowledge to a small employer when the facts establish that employees' protected activities were 'carried out in such a manner, or at such times that in the normal course of events, [the employer] must have noticed [the activity].' Friendly Markets, Inc., 224 NLRB 967, 969, (1976). However, the mere fact that an employer's plant is of a small size standing alone is an insufficient basis upon which to apply this small plant doctrine. Hadley Manufacturing Corporation, 108 NLRB 1641, 34 LRRM 1246 (1954)."

Absent close supervision by management, the Board has declined to apply the small plant doctrine. Bensalem Township, 19 PPER 19010 (Final Order, 1987), *aff'd*, 19 PPER 19141 (Court of Common Pleas of Bucks County, 1988). Saylor and David have simply not shown that Bonenberger routinely moved throughout the premises with such regularity that the inference can be made that the Borough "must have noticed" the protected activity. Temple University, 23 PPER at 64. Such detailed evidence is what establishes employer knowledge. "The very foundation of the small plant doctrine is that in a physically limited setting containing few individuals little goes unnoticed." Id.

Saylor and David did not speak openly about the organizing drive. In point of fact, there were other co-workers who they did not want to know about it. David testified she spoke "quietly" about the drive in the lunchroom, the hallway, and in her office. (N.T. 44). Moreover, Bonenberger's office was at the other side of the building, down a "dead-end hallway." (N.T. 75). Bonenberger at the time was working, essentially, two full-time jobs; interim manager and director of code enforcement. There is no evidence that he was closely supervising these employees, or indeed, how often he was even present in the office. Further, it stretches the imagination that employees would have engaged in much talking in Bonenberger's presence after his admonition to employees against "water cooler chatter". (N.T. 75, 76).

Given Saylor's and David's self-imposed restraints, the admonition by Bonenberger against idle chatter, the remove of his office, and no evidence of close supervision, it is too great a leap of logic to find the small plant doctrine applicable. Absent the presumption of knowledge the small plant doctrine provides, there is no evidence that the Borough knew of Saylor's and David's organizational efforts.

Because neither Saylor nor David has proved that the Borough had notice of her protected activity, both charges must fail. Temple University, *supra*. An employer's knowledge of employe-specific protected activity is a necessary principium of a successful discrimination charge under Section 1201(a)(3) of the PERA.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing, the Board's Order Directing Remand to the Hearing Examiner for Further Proceedings, and the record as a whole, concludes and finds that CONCLUSIONS, numbers 1 through 5, inclusive, as set forth in 37 PPER 68 are incorporated by reference and expressly made a part hereof.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the two charges of unfair practices are dismissed and the respective complaints issued thereon are rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall be and become absolute and final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twelfth day of September, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

TIMOTHY TIETZE, Hearing Examiner