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	:	

PROPOSED DECISION AND ORDER

On August 22, 2005, the Luzerne County Community College Association of Higher Education (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Luzerne County Community College (College) had violated sections 1201(a)(1), 1201(a)(3), 1201(a)(4), 1201(a)(5) and 1201(a)(8) of the Public Employe Relations Act (Act) by indicating on May 12, 2005, that it was going to eliminate the position of director of student health services and by issuing on July 18, 2005, a directive regarding the reporting of medical emergencies. The Association specifically averred that "all of the duties performed by the Director of Student Health Services will be performed by others outside the bargaining unit" and that "[t]he College's action constitutes union animus and bad-faith bargaining as well as a refusal to implement an arbitration award" directing the College to post and fill the position within the bargaining unit. On September 30, 2005, the Secretary of the Board issued a complaint and notice of hearing assigning the charge to conciliation and directing that a hearing be held on December 6, 2005, if conciliation did not resolve the charge by then. The hearing examiner thereafter continued the hearing upon the request of the College and without objection by the Association. On January 24, 2006, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On March 10, 2006, the Association filed a brief. On March 20, 2006, the College filed a brief.

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

FINDINGS OF FACT

1. On May 28, 1971, the Board certified the Association as the exclusive representative of a bargaining unit that includes professional employes of the College. (Case No. PERA-R-103-C)

2. In 2002, a member of the bargaining unit (Esther Luizzi) retired as the College's director of student health services, and the College began using a non-member of the bargaining unit (Sharon Grzymski) as the director of student health services. (N.T. 17-19, 24-25, 33, 64)

3. On September 1, 2004, an arbitrator issued the following award sustaining a grievance the Association filed alleging that the College violated the parties' collective bargaining agreement by using Ms. Grzymski as the director of student health services:

> "On the basis of all of the above the grievance is sustained on a prospective basis. The College is, accordingly, ordered to post and 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 and pursuant to the relief requested in the grievance. No retroactive relief is deemed appropriate."

(Association Exhibit 1)

4. On November 11, 2004, the Association's then president (Anna Mary McHugh) and then vice president (Christopher Tino) met with the College's vice president of student

development (Thomas Leary) and dean of administration and human resources (Richard Amico) to discuss implementation of the award. Ms. McHugh and Mr. Tino proposed an expansion of the duties of the director of student health services. At the end of the meeting, Mr. Leary and Mr. Amico informed Ms. McHugh and Mr. Tino that the College did not intend to fill the position with a member of the bargaining unit. (N.T. 11-14, 19-21, 26, 29-30, 35, 70, 77-78, 92-94, 97-98)

5. On April 19, 2005, Ms. McHugh and Mr. Tino again met with Mr. Leary and Mr. Amico to discuss implementation of the award. Ms. McHugh and Mr. Tino again proposed an expansion of the duties of the director of student health services. Mr. Leary and Mr. Amico again informed Ms. McHugh and Mr. Tino that the College did not intend to fill the position with a member of the bargaining unit. (N.T. 14, 21, 26, 30-31, 36-37, 78, 92, 98-99)

6. On May 12, 2005, Mr. Amico sent to Mr. Tino as the Association's current president a memorandum providing as follows: "This memorandum is to advise you that the College has determined that it is going to eliminate the Director of Student Health Services position." (Association Exhibit 2).

7. At the end of the day on August 19, 2005, the College eliminated the position of director of student health services. (N.T. 63; Association Exhibit 6)

DISCUSSION

The positions of the parties

The Association has charged that the College committed unfair practices under sections 1201(a)(1), 1201(a)(3), 1201(a)(4), 1201(a)(5) and 1201(a)(8) by indicating on May 12, 2005, that it was going to eliminate the position of director of student health services and by issuing on July 18, 2005, a directive regarding the reporting of medical emergencies. The Association specifically averred that "all of the duties performed by the Director of Student Health Services will be performed by others outside the bargaining unit" and that "[t]he College's action constitutes union animus and bad-faith bargaining as well as a refusal to implement an arbitration award" directing the College to post and fill the position within the bargaining unit.

In its brief, the Association contends that the College violated section 1201(a)(1) on an independent or derivative basis by indicating that it was going to eliminate the position and by subsequently transferring the duties of the position to non-members of the bargaining unit and terminating the employe in the position (Ms. Grzymski); that the College violated section 1201(a)(3) by eliminating the position because the Association filed the grievance resulting in the award; that the College violated section 1201(a)(4) by terminating Ms. Grzymski because the Association filed the charge; that the College violated section 1201(a)(5) by refusing to bargain over the transfer of bargaining unit work to non-members of the bargaining unit when it eliminated the position ; and that the College violated section 1201(a)(8) by refusing to comply with the award. The Association also contends that it timely filed the charge within four months of when it had reason to know that the College would not comply with the award.

The College contends that the Association untimely filed the charge under section 1201(a)(8) more than four months after the College indicated that it would not comply with the award. The College also contends that it lawfully eliminated the position without transferring bargaining unit work to non-members of the bargaining unit.

The applicable law

An employer commits an unfair practice under section 1201(a)(1) on an independent basis if it engages in conduct that under the totality of circumstances would have a tendency to coerce employes in the exercise of their rights under the Act. Berks County, 36 PPER 36 (Final Order 2005). An employer commits an unfair practice under section 1201(a)(1) on a derivative basis if it commits any unfair practice under sections 1201(a)(2) through 1201(a)(9). PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d

1073 (1978). An employer commits an unfair practice under section 1201(a)(3) if it discriminates against an employe for engaging in activity protected by the Act. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). An employer commits an unfair practice under section 1201(a)(4) if it discriminates against an employe for filing a charge. Lebanon County, 32 PPER ¶ 32006 (Final Order 2000). An employer commits an unfair practice under section 1201(a)(5) if it unilaterally transfers bargaining unit work to non-members of the bargaining unit. Mars Area School District, supra. An employer commits no unfair practice under section 1201(a)(5) if it transfers to non-members of the bargaining unit work that has not been performed by members of the bargaining unit on an exclusive basis. AFSCME, Council 13 v. PLRB, 616 A.2d 135 (Pa. Cmwlth. 1992). An employer commits an unfair practice under section 1201(a)(8) if it refuses to comply with the provisions of a grievance arbitration award. PLRB v. Commonwealth of Pennsylvania, 478 Pa. 582, 387 A.2d 475 (1978).

In order to be timely, a charge must be filed within four months of when the charging party knew or should have known of the unfair practices charged. Thomas v. Commonwealth of Pennsylvania, PLRB, 483 A.2d 1016 (Pa. Cmwlth. 1994). Negotiations over compliance with a grievance arbitration award will not toll the running of the limitation period for filing a charge where the employer has indicated that it will not comply with the award. Commonwealth of Pennsylvania, 9 PPER ¶ 9003 (Final Order 1977). In order to prove a violation of section 1201(a)(3), the charging party must present during its case-in-chief a prima facie case of discrimination. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993). The respondent is under no obligation to defend the charge unless the charging party has presented during its case-in-chief a prima facie case of discrimination. Id. Standing alone, close timing between an employe's protected activity and the employer's action will not support an inference of union animus, Colonial School District, 36 PPER 88 (Final Order 2005), but close timing between an employe's protected activity and the employer's action coupled with an inadequate reason for the action will. Lehighton Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). Evidence of post-charge conduct may be relied upon to shed light on the true character of the events set forth in a charge, PLRB v. General Braddock Area School District, 380 A.2d 946 (Pa. Cmwlth. 1977), but post-charge conduct may not form the sole basis for the finding of an unfair practice. Commonwealth of Pennsylvania, Pennsylvania State Police, 37 PPER 4 (Final Order 2006)(construing analogous provisions of the Pennsylvania Labor Relations Act). The Board only has jurisdiction to find the unfair practices alleged in a charge. Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974). Any finding of an unfair practice must be supported by substantial evidence. St. Joseph's Hospital, supra.

The charge under section 1201(a)(1)

The Association contends that the College violated section 1201(a)(1) on either an independent or derivative basis by indicating on May 12, 2005, that it was going to eliminate the position of director of student health services and by subsequently transferring the duties of the position to non-members of the bargaining unit and terminating the employe in the position (Ms. Grzymski). The Association submits that the timing of events supports its contention that the College committed an independent violation of section 1201(a)(1). As the Association emphasizes in its brief at 18, "the position of Director of Student Health Services was abolished within six months of an arbitrator's decision that the position should be included in the bargaining unit." The Association posits that the College thereby coerced employes in the exercise of their right to file grievances because employes would be less likely to exercise their right in that regard if by doing so they face the loss of a bargaining unit position. The Association cites Richland School District, 12 PPER ¶ 12154 (Final Order 1981), as controlling authority. In that case, the Board found an independent violation of section 1201(a)(1) where the employer abolished positions after an arbitrator issued an award sustaining a grievance to include them in the bargaining unit.

A close review of the charge reveals, however, that the Association only alleged a derivative violation of section 1201(a)(1). Instead of alleging that the College engaged in conduct that under the totality of circumstances would have a tendency to coerce

employes in the exercise of their rights under the Act, the Association specifically averred that the College engaged in conduct that "constitutes union animus and bad-faith bargaining as well as a refusal to implement an arbitration award." Conduct of that sort constitutes unfair practices under sections 1201(a)(3), 1201(a)(4), 1201(a)(5) or 1201(a)(8), so the charge at best alleges a derivative violation of section 1201(a)(1). See Mars Area School District, supra (a derivative violation of section 1201(a)(1) occurs where the employer commits any unfair practice under sections 1201(a)(2) through 1201(a)(9)); compare Berks County, supra (an independent violation of section 1201(a)(1) occurs where the employer engages in conduct that under the totality of circumstances would have a tendency to coerce employes in the exercise of their rights under the Act). Accordingly, the Board only has jurisdiction to find a derivative violation of section 1201(a)(1). See Commonwealth of Pennsylvania (Liquor Control Board), supra (the Board only has jurisdiction to find the unfair practices alleged in a charge).

The record does not show that the College committed an independent violation of section 1201(a)(1) in any event. Notably, in Richland School District, the Board found an independent violation of section 1201(a)(1) because the employer abolished the positions the very day the arbitrator issued the award sustaining the grievance to include them in the bargaining unit. By contrast, as set forth in finding of fact 3, the record shows that the arbitrator issued the award on September 1, 2004, so more than eight months had passed by the time the College indicated on May 12, 2005, that it was going to eliminate the position. Moreover, as set forth in finding of fact 2, the record shows that the College transferred the duties of the position to Ms. Grzymski well before the award was issued. Furthermore, as set forth in finding of fact 7, the record shows that the College did not eliminate the position and terminate Ms. Grzymski until August 19, 2005. By then, almost one year had elapsed since the award was issued. Thus, unlike in Richland School District, the timing of events provides no basis for finding an independent violation of section 1201(a)(1).

As set forth below, the record does not show that the College violated sections 1201(a)(3), 1201(a)(4), 1201(a)(5) and 1201(a)(8), so there is no basis for finding a derivative violation of section 1201(a)(1) either.

The charge under section 1201(a)(3)

The Association contends that the College violated 1201(a)(3) by eliminating the position of director of student health services because the Association filed the grievance over the College's use of a non-member of the bargaining unit (Ms. Grzymski) as the director of student health services. The Association submits that the timing of events coupled with an inadequate explanation for the College's elimination of the position supports the inference that the College's elimination of the position was motivated by union animus. As set forth in the Association's brief at 11, the Association would have the Board find that "the College eliminated the Director of Student Health Services position just six months after the arbitrator issued his decision [sustaining the grievance]." As set forth in its brief at 12, the Association points out that "the College failed to provide any reason for eliminating the position in question." The Association cites Somerset Area School District, 37 PPER 1 (Final Order 2005), as controlling authority. In that case, the Board found that an employer discriminated against employes by eliminating their positions because they pursued a grievance resulting in an arbitration award including their positions in the bargaining unit. The Board rejected as inadequate the employer's explanation that it was simply complying with a directive from the Department of Education.

The timing of events, however, provides an insubstantial basis for inferring union animus on the part of the College. Again, as set forth in findings of fact 3 and 7, the record shows that the College did not eliminate the position until almost one year had elapsed since the award was issued. By contrast, in Somerset Area School District, the employer eliminated the positions a little over one month after issuance of the award including them in the bargaining unit. Thus, Somerset Area School District is distinguishable on the facts.

Moreover, the fact that the College did not provide a reason for eliminating the position provides no better basis for inferring union animus on its part. As the charging party, the Association had the burden of proving by substantial evidence that union animus motivated the College. St. Joseph's Hospital, supra. In order to carry that burden, the Association had to present during its case-in-chief a prima facie case of discrimination. Perry County, supra. The College was under no obligation to present a defense until the Association met its burden in that regard. Id. During its case-in-chief, the Association presented no evidence that the College had an inadequate reason for eliminating the position, so whether or not the College provided a reason for eliminating the position is immaterial.

Nothing in Somerset Area School District provides otherwise. Indeed, in that case, the Board only addressed the adequacy of the employer's explanation for eliminating the positions after first finding that the charging party presented during its case-in-chief a prima facie case of discrimination by showing that the employer eliminated the positions a little over one month after issuance of the award and that the employer previously threatened to retaliate if the employes filed their grievance.

The charge under section 1201(a)(4)

The Association contends that the College violated section 1201(a)(4) by terminating Ms. Grzymski because the Association filed the charge. A close review of the charge, however, reveals that the Association did not allege that the College committed unfair practices by terminating her. Accordingly, the Board may not find the College in violation of section 1201(a)(4) for terminating her. See Commonwealth of Pennsylvania (Liquor Control Board), supra (the Board only has jurisdiction to find the unfair practices alleged in a charge).

Moreover, as the Association frames the issue, the Board has no jurisdiction to find the College in violation of section 1201(a)(4) for terminating Ms. Grzymski in any event. If, in fact, the College terminated her because the Association filed the charge, it follows that the College terminated her after the Association filed the charge. Thus, her termination could not be before the Board in this charge. See Commonwealth of Pennsylvania, Pennsylvania State Police, supra (post-charge conduct may not form the sole basis for the finding of an unfair practice).

The charge under section 1201(a)(5)

The Association contends that the College violated section 1201(a)(5) by refusing to bargain over the transfer of bargaining unit work to non-members of the bargaining unit when it eliminated the position of director of student health services. In support of its contention, the Association presented evidence that on July 15, 2002, the College assigned to campus security the responsibility for issuing handicapped parking permits (Association Exhibit 5), that on July 18, 2005, the College's director of safety and security (Bill Barrett) directed that medical emergencies be reported first to campus security (Association Exhibit 3), that on August 22, 2005, the College issued a reminder that medical emergencies are be reported first to campus security (Association Exhibit 6), that on October 18, 2005, a non-member of the bargaining unit (Mary Jo Griffith) issued an update regarding student health forms (N.T. 56; Association Exhibit 9), that a December 15, 2005, job description for Ms. Griffith includes among her duties assisting with the notification of the status of student health forms and assisting with the coordination of health activities (Association Exhibit 8), that Ms. Griffith sent to Mr. Tino a status report regarding student health forms (N.T. 17-19, 56; Association Exhibit 4) and that Ms. Griffith is responsible for completing insurance forms (N.T. 58-59). The Association also presented evidence that the director of student health services previously performed all of that work (N.T. 17-18, 39-40, 57).

The Association's contention finds no support in the record as a whole, however. By the Association's own evidence, campus security has been issuing handicapped parking permits since 2002 (Association Exhibit 5). It is apparent, then, that no member of the bargaining unit was performing that work after 2002. Moreover, as set forth in finding of fact 2, the record shows that the College began using a non-member of the bargaining unit

(Ms. Grzymski) as the director of student health services in 2002. Thus, no member of the bargaining unit was performing the work of the director of student health services after 2002; rather, non-members of the bargaining unit were. Accordingly, no transfer of bargaining unit work to non-members of the bargaining unit could have occurred after 2002. See AFSCME, Council 13, supra (no transfer of bargaining unit work occurred where members of the bargaining unit had not been performing the work on an exclusive basis).

Furthermore, a close review of the charge reveals that the Association only alleged that the College transferred bargaining unit work when it issued the May 18, 2005, directive to report medical emergencies to campus security. The charge may be searched in vain for any allegation that the College transferred that work or any other work to Ms. Griffith. Thus, the Board may not find the College in violation of section 1201(a)(5) for transferring bargaining unit work to her in any event. See Commonwealth of Pennsylvania (Liquor Control Board), supra (the Board only has jurisdiction to find the unfair practices alleged in a charge).

Beyond that, the record shows that Ms. Griffith did not begin to perform any duties of the director of student health services until September 1, 2005 (N.T. 63). The charge, of course, was filed on August 22, 2005, so even if the College transferred bargaining unit work to her on September 1, 2005, the Board has no jurisdiction to find that the College thereby committed an unfair practice. See Commonwealth of Pennsylvania, Pennsylvania State Police, supra (post-charge conduct may not form the sole basis for the finding of an unfair practice).

The charge under section 1201(a)(8)

The Association contends that the College violated section 1201(a)(8) because it did not post and fill the position of director of student health services within the bargaining unit as directed in the award. The Association submits that it timely filed the charge under section 1201(a)(8) within four months of when it had reason to know that the College would not comply with the award. In support of its contention, the Association points out that the College's dean of administration and human resources (Mr. Amico) testified that he sent to the Association's current president (Mr.Tino) the May 12, 2005, memorandum indicating that the College was going to be eliminating the position "[b]ecause at the time, there was some discussion regarding filling the position on a part-time basis. The College confirmed that we were not interested in it on a full-time basis" (N.T. 100). As set forth in its brief at 8, the Association posits that "as evidenced by Mr. Amico's testimony, the parties were still negotiating over the implementation of the award as of May 12, 2005." May 12, 2005, is, of course, within four months of when the charge was filed on August 22, 2005.

The record shows, however, that before Mr. Amico sent the May 12, 2005, memorandum he and the College's vice president of student development (Mr. Leary) informed Mr. Tino and the then president of the Association (Ms. McHugh) first on November 11, 2004, and then on April 19, 2005, that the College had no intention of posting and filling the position with a member of the bargaining unit (findings of fact 4-6). Thus, whether or not the parties were negotiating as late as May 12, 2005, is immaterial. See Commonwealth of Pennsylvania, 9 PPER ¶ 9003, supra (negotiations over compliance with an award will not toll the running of the limitation period for filing a charge where the employer has indicated that it will not comply with the award). Inasmuch as November 11, 2004, and April 19, 2005, are both more than four months before the filing of the charge, the charge under section 1201(a)(8) is, therefore, untimely.

CONCLUSIONS

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

1. The College is a public employer under section 301(1) of the Act.

2. The Association is an employe organization under section 301(3) of the Act.

3. The Board has jurisdiction over the parties.

4. The College has not committed unfair practices under sections 1201(a)(1), 1201(a)(3), 1201(a)(4) and 1201(a)(5) of the Act.

5. The charge under section 1201(a)(8) of the Act is untimely filed.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eleventh day of April 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

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April 11, 2006

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LUZERNE COUNTY COMMUNITY COLLEGE
Case No. PERA-C-05-373-E

Enclosed is a copy of the proposed decision and order that I have issued this date.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Luzerne County Community College