COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

BROOKVILLE AREA EDUCATION ASSOCIATION, PSEA/NEA	:	
v.	:	Case No. PERA-C-06-562-W
BROOKVILLE AREA SCHOOL DISTRICT	:	

FINAL ORDER

The Brookville Area Education Association, PSEA/NEA (Association) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on June 11, 2007, challenging a Proposed Decision and Order (PDO) issued on May 22, 2007. In the PDO, the Hearing Examiner concluded that the Brookville Area School District (District) did not violate Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA). The District filed a brief in opposition to the Association's exceptions on July 2, 2007.

The Hearing Examiner's Findings of Fact (FF) are summarized as follows. Ray Ewing began working for the District as a teacher in 2000. Beginning in 2001, Ewing also held the supplementary position of first assistant girls' basketball coach (FF 2, 3). The District rehired Ewing as first assistant girls' basketball coach on an annual basis through the 2005-2006 school year (FF 3). On June 15, 2006, while Ewing was supervising two students in a scheduled advanced placement biology lab, he sent an e-mail to bargaining unit members urging them to attend the next school board meeting and to speak during the public comment time due to the fact that the bargaining unit had been without a contract for nearly two years (FF 4, 5). Thereafter, on August 21, 2006, the District hired another candidate as first assistant girls' basketball coach for the 2006-2007 school year (FF 6).

The Association's charge alleged that the District violated Section 1201(a)(1) and (3) of PERA by discriminating against Ewing for sending the e-mail. In dismissing the Association's charge in the PDO, the Hearing Examiner found that because Ewing was engaged in union business during work time, his conduct was not activity protected by PERA. Thus, the Hearing Examiner found that the Association failed to prove a prima facie case of discrimination and dismissed the charge without considering the District's explanation for its action.

The Association argues in its exceptions that the Hearing Examiner erred in concluding that Ewing was not engaged in PERA protected activity when he sent the e-mail to bargaining unit members concerning the contract negotiations. The Association also excepts to the Hearing Examiner's conclusion that it failed to present a prima facie case of discrimination.

In order to sustain a charge of discrimination under Section 1201(a)(1) and (3) of PERA, the complainant must prove that the employe engaged in protected activity, that the employer was aware of the employe's protected activity, and that the employer took adverse action against the employe because of a discriminatory motive or anti-union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). "If these three elements are met, then the burden of going forward shifts to the employer to rebut a prima facie case." APSCUF v. Department of Education, Edinboro State College, 14 PPER ¶ 14054 (Final Order, 1983).

After review of the record, we agree with the Hearing Examiner that the Association failed to meet the first element of its burden of proof under St. Joseph's Hospital. The Association claims that the District retaliated against Ewing for sending the e-mail that encouraged bargaining unit members to attend the school board meeting and to speak about the status of contract negotiations. However, it is undisputed that Ewing sent this e-mail during work time. The Board and the Courts have consistently held that employes do not have a protected right to conduct union activity on work time. See, e.g., Ellwood

City Police Wage and Policy Unit v. Ellwood City Borough, 29 PPER ¶ 29213 (Final Order, 1998), affirmed, 736 A.2d 707 (Pa. Cmwlth. 1999); AFSCME v. City of Philadelphia, 32 PPER ¶ 32009 (Final Order, 2000).

In its brief filed with its exceptions, the Association cites National Labor Relations Board (NLRB) decisions in support of its position that sending the e-mail was protected activity. See Richmond Times Dispatch, 346 NLRB No. 11, 179 LRRM 1496 (2005), affirmed, 225 Fed. Appx. 144 (4th Cir. 2007) and Adtranz, ABB Daimler-Benz Transportation, 331 NLRB 291, 167 LRRM 1196 (2000), vacated in part, 253 F.3d 19 (U.S. App. D.C. 2001). The cited decisions indicate that the NLRB's general rule is that employes do not have the right to use the employer's computer or e-mail system to conduct union-related discussions during work time. However, the cited decisions also indicate that the NLRB has created an exception to this general rule where the employer permits use of its computer or e-mail system for non-work related purposes during work time. In such cases, the NLRB has held that the employer may not discriminate against use of such technology for union-related purposes.

We need not decide whether to follow the cited decisions of the NLRB because the Association has failed to prove that the District permitted employes to use its e-mail system for non-work related purposes during work time. There is vague testimony in the record that employes and unidentified "administrators" occasionally used District computers to send personal e-mails, but the record simply fails to support a finding that the District knowingly permitted employes to engage in such conduct during work time. The Association did not introduce any of these alleged personal e-mails during its case in chief at the hearing, nor adduce any testimony to support the notion that these e-mails were sent during work time.[1] Accordingly, the Association failed to prove the factual basis for an exception to the general rule that employes have no protected right to conduct union business on work time. Thus, Ewing's use of the District's e-mail system to send a union-related e-mail during scheduled class time was not protected activity for purposes of PERA, and the Hearing Examiner did not err by concluding that the Association failed to present a prima facie case of discrimination.

After a thorough review of the exceptions, the parties' briefs and all matters of record, the Board shall dismiss the exceptions and affirm the Hearing Examiner's conclusion that the District did not commit unfair practices in violation of Section 1201(a)(1) and (3) 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 May 22, 2007 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, Anne E. Covey, Member, and James M. Darby, Member, this sixteenth day of October, 2007. 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.

[1] For example, Trina Smith, who is a teacher for the District, testified that e-mails were sent during the "day" (N.T. 72-74), but did not testify that this occurred during work time. Indeed, most of the testimony focused on whether the e-mails were personal or work-related, whereas the pertinent issue is whether the District permitted employes to send non-work related e-mails during work time.