

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 764 :
:
:
v. : Case No. PERA-C-07-48-E
:
BERWICK AREA JOINT SEWER AUTHORITY :

PROPOSED DECISION AND ORDER

On January 30, 2007, the Teamsters Local Union Number 764(Union) filed a charge of unfair labor practices (Charge) with the Pennsylvania Labor Relations Board (Board) alleging that the Berwick Area Joint Sewer Authority (Authority) violated Section 1201(a)(1), (3) & (5) of the Public Employee Relations Act (PERA). On March 8, 2007, the Secretary of the Board (Secretary) issued a letter informing the Union that no complaint would be issued on its Charge. On March 26, 2007, the Union timely filed exceptions and a supporting brief contesting the decision of the Secretary.

In its Charge, as amended by exceptions, the Union specifically alleged that the Authority committed bargaining violations by unilaterally changing terms and conditions of employment and by refusing to supply information necessary to grieve those unilateral changes under the parties' collective bargaining agreement. The Union further alleged that the Authority discriminatorily applied these unilateral changes against Samantha Tracy because she prevailed in a grievance arbitration challenging the Authority's unilateral removal of office cleaning work from the bargaining unit. On May 15, 2007, the Board issued an Order Directing Remand to Secretary for Further Proceedings.

On June 6, 2007, the Secretary issued a Complaint and Notice of Hearing directing that a hearing take place on Tuesday, July 24, 2007, at 11:00 A.M. in the Luzerne County Assistance Office in Wilkes-Barre, Pennsylvania. The hearing occurred as scheduled on that date. During the hearing, both parties in interest were afforded a full opportunity to present testimony and documents and cross-examine witnesses. During the hearing, the parties agreed to keep the record open to admit subpoenaed copies of employee timecards. The timecards were received by the Board and admitted into the record, as Union Exhibit 3, on August 22, 2007. On August 31, 2007, the Union timely filed its post-hearing brief. Although the Authority has not filed a post-hearing brief, certain arguments have been obtained from the hearing record.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The Authority is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7).
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7).
3. Article XIX, Section 1 (B), entitled "Work Week", is identical for both the 01/01/03-12/31/05 collective bargaining agreement and the 01/01/06-12/31/08 collective bargaining agreement. That language provides, in relevant part, the following:

First (1st) shift will run from 7:00 A.M. to 3:00 P.M. (must arrive at 6:50 A.M.) with two (2) fifteen (15) minute paid breaks and a twenty (20) minute paid lunch break. . . . Each shift will arrive ten (10) minutes before actual starting time for the express purpose of exchange of plant operational information (will be paid from scheduled starting time).

(Joint Exhibits 1 & 2; Article XIX; § 1(B)).

4. Samantha Tracy had been employed by the Authority for over sixteen years from September 1990 when the Authority terminated her on October 30, 2006. For the last three

years of her employment with the Authority, Ms. Tracy worked in the position of lab technician. The Authority does not employ any second or third shift lab technicians with whom Ms. Tracy is to exchange information at the start of her shift. (N.T. 81-82, 88-89, 127; Joint Exhibit 4-J).

5. Since the beginning of her employment with the Authority, Ms. Tracy regularly reported several minutes late for her shift, but always made up that time at the end of her shift. (N.T. 89-90).

6. Since 1998 through August 2006, the Authority recognized a past practice of permitting employes to arrive within ten minutes late for the start of their shift and make up those minutes after the end of their shift. In October 2001, the parties memorialized that past practice into a written side agreement. The timecards for Ms. Tracy and other Authority employes establish that both the employes and the Authority maintained this practice through multiple collective bargaining agreements up to and including the current 01/01/06-12/31/08 collective bargaining agreement. In August, 2006, the Authority unilaterally changed that past practice without bargaining with the Union by disciplining Ms. Tracy for being less than ten minutes late even though she made up that time at the end of her shift. (N.T. 19, 23-24, 26, 38, 45, 89-90, 93, 127, 134, 150; Joint Exhibit 4-I; Union Exhibit 3).

7. In April, 2005, the Union became aware that the Authority Manager, Gloria Bobersky, was performing office-cleaning work at the Authority office building and initiated a grievance. The Union held a meeting with bargaining unit employees to determine whether any employes wanted the office cleaning work. Ms. Tracy expressed an interest in performing the work. Ms. Tracy testified at the arbitration hearing, which occurred on October 27, 2005. On November 14, 2005, the parties executed the current 1/1/06-12/31/08 collective bargaining agreement. Arbitrator Caldwell issued an award on December 9, 2005 concluding that the office cleaning work in the Authority's offices constituted bargaining unit work and that the Authority violated the parties' collective bargaining agreement by assigning that work to a non-unit employee. Arbitrator Caldwell also ordered that the work be restored to the bargaining unit through the proper contractual procedure and that Ms. Tracy be given backpay for the hours of work the unit missed. The Authority participated in and possessed actual knowledge of the arbitration proceedings and of the award. (N.T. 27-29, 90, 105, 130-131; Joint Exhibit 3).

8. On August 28, 2006, eight months after the arbitration award was issued, the Authority suddenly began to discipline Ms. Tracy for being tardy, a behavior in which she had engaged for sixteen years. The Authority's timecard records establish that Ms. Tracy and her co-workers on the same and other shifts were chronically less than ten minutes late numerous times since 2001 and that Ms. Tracey failed to punch her timecard on numerous occasions without ever having been disciplined. (N.T. 19, 89-90; Joint Exhibit 4-a; Union Exhibits 2 & 3).

9. On August 28, 2006, Assistant Superintendent Richard T. Banks issued a written record of an oral warning to Ms. Tracy for failing to report that she did not have a timecard to punch before 6:50 A.M., on August 21, 2006. On that day, Ms. Tracy arrived at work on time and began working with her "samples" jug and thereafter reported her timecard missing to her supervisor because her supervisor worked in another building. (N.T. 30, 95; Joint Exhibit 4-a; Union Exhibit 3).

10. The very next day, on August 29, 2006, Mr. Banks and Superintendent Allan Fish issued a written warning to Ms. Tracy for reporting late for work on August 23, 2006 and August 25, 2006. The Authority's timecard records establish that Ms. Tracy reported for work on August 23, 2006 at 6:53 A.M., three minutes late, and worked until 3:03 P.M., three minutes later than her normal shift. On August 25, 2006, Ms. Tracy reported for work at 6:51 A.M. and worked until 3:01 P.M., in accordance with past practice on both dates. (N.T. 32, 96; Joint Exhibit 4-b; Union Exhibits 2 & 3).¹

¹ The written warning indicates that Mr. Fish issued prior warnings to Ms. Tracy on 5/17/06 and 7/17/06, however, the nature and extent of those violations were not explained on the record. Even if those violations involve tardiness, there is no evidence establishing whether those tardy arrivals were within the ten-minute rule.

11. Also on August 29, 2006, Mr. Fish and Mr. Banks issued a written warning to Ms. Tracy for allegedly leaving the sewer plant premises without notifying her supervisor on August 25, 2006. In fact, Ms. Tracy did not leave the sewer plant premises that day. Ms. Tracy's friend borrowed her car and drove it off the sewer plant premises. (N.T. 33-34, 97; Joint Exhibit 4-c).

12. Also on the morning of August 29, 2006, effective immediately, the Authority suspended Ms. Tracy without pay for three days, based on the combined discipline issued on the 28th and 29th, i.e., for failure to report a missing timecard before 6:50, reporting several minutes late for work and allegedly leaving the premises. (N.T. 34; Joint Exhibit 4-b).

13. Later on August 29, 2006, Union President, Michael A. Hartman, spoke with Authority Manager Gloria Bobersky and informed her that the factual predicate for the discipline for leaving the premises did not exist and could not serve as a basis for suspension. Ms. Bobersky agreed to reduce the three-day suspension to a one-day suspension already served. (N.T. 33-35; Joint Exhibit 4-d).

14. Two weeks later, on September 15, 2006, Mr. Fish and Mr. Banks issued another written warning to Ms. Tracy for an unexcused absence on September 14, 2006. (N.T. Joint Exhibit 4-e).

15. Again, two weeks later, on or about September 28, 2006, the Authority issued a three-day suspension to Ms. Tracy for an unexcused absence the day before on September 27, 2006. On the 27th, Ms. Tracy knew she would be late and feared being fired for lateness, because she had just received a three-day unpaid suspension based, in part, on tardiness. Ms. Tracy called Mr. Fish and Ms. Bobersky to seek their advice on how to proceed. Ms. Bobersky indicated that the only way to avoid progressive discipline for tardiness would be to take an unexcused absence.² These conversations with the Authority Manager and the Authority Superintendent delayed Ms. Tracy and prevented her from calling off by 6:50 A.M. Consequently, Ms. Tracy telephoned her supervisor at 7:02 that she would be off that day. Ms. Tracy was coerced by the Authority's recent fusillade of disciplinary actions against her for tardiness and by an environment of adversity into converting a tardiness into an absence on September 27, 2006. (N.T. 37, 98-99, 151; Joint Exhibit 4-g).

16. On October 3, 2006, Ms. Tracy was again suspended for three days without pay for reporting to work two minutes late, at 6:52 A.M., on September 25, 2006. She clocked out that day at 3:02 P.M. to make up the time consistent with past practice. (N.T. 36; Joint Exhibit 4-e; Union Exhibits 2 & 3).

17. On October 30, 2006, Mr. Fish discharged Ms. Tracy due to an alleged unexcused absence on Sunday, October 29, 2006. The basis for the discharge was that Ms. Tracy was previously warned on September 14, 2006 and September 27, 2006 for unexcused absences and, on September 27, 2006, Ms. Tracy was suspended for three days for being absent and unexcused. (N.T. 38-39, 101; Joint Exhibit 4-j).

18. Ms. Tracy was not absent from work on Sunday, October 29, 2006. She actually worked seven hours that day. Ms. Tracy was late and failed to call in by 6:50 A.M. due to a mistake in setting her clock the night before to Eastern Standard Time. Mr. Fish made a mistake in fact by predicating Ms. Tracy's discharge on an absence rather than the tardy arrival that it was. (N.T. 39, 85, 100-101).

19. Prior to the October, 2005 grievance arbitration, the Authority had not been involved in any grievance arbitrations. Sometime after the award, Mr. Fish told Ms. Tracy that "the Supervisors had it out for her," and Ms. Tracy noticed that Ms. Bobersky's attitude toward her had changed. Ms. Tracy believed that she was being picked on by Ms. Bobersky. (N.T. 79, 113, 124).³

² Ms. Bobersky testified that she may have discussed with Ms. Tracy the option of taking discipline for an unexcused absence instead discipline for a tardy arrival, but she did not specifically remember. The examiner does not credit Ms. Bobersky's testimony on this point of fact.

³ Mr. Fish testified that he did not recall saying this to Ms. Tracy. The examiner does not credit his equivocal testimony.

20. Three other employees were given oral warnings for reporting late during the same period as Ms. Tracy. Their names were Mr. Coolbaugh, Mr. Dent and Mr. Comstock. Only Mr. Coolbaugh asked the Board at a public meeting to expunge his oral discipline for tardiness. Mr. Coolbaugh is a third-shift employee who was late due to the fact that the electric gate to the plant would not open, which delayed his ability to punch his timecard on time. The Authority expunged the records of all three employees, including the discipline received by Mr. Comstock, who is a first shift employee, and Mr. Dent, both of whom were unaffected by the gate malfunction and who did not ask that their records be expunged. No employee other than Ms. Tracy received written warnings or discipline for tardiness even though the timecard records clearly establish that other employees chronically reported late for their shift during the same time periods. After the award, other employees were late for work, but only Ms. Tracy received written discipline, unpaid suspensions and discharge. Ms. Tracy was held to a different standard than her co-workers. In the past eight years no other employees had been fired for lateness or unexcused absence. (N.T. 40-41, 94, 121, 125-126, 135; Union Exhibits 2 & 3).

21. Ms. Tracy forwarded a handwritten letter to the Board members of the Authority requesting that they remove the disciplinary actions against her for tardiness as they had done for her three co-workers, two of whom did not request that their records be cleared. The Authority did not grant her request. (N.T. 94; Joint Exhibit 4-1).

22. On October 30, 2006, Ms. Tracy grieved her discharge seeking reinstatement and backpay. On November 6, 2006, Ms. Bobersky denied the grievance. The grievance was again denied at the second and third steps. At both the third-step grievance meeting on December 22, 2006, and via letter dated January 12, 2007, Union President Michael Hartman requested timecards for all Authority employees from January 1, 2003 through the present to process Ms. Tracy's discharge and suspension grievances. Mr. Hartman also verbally discussed with management the need for the timecard records. (N.T. 43-44; Joint Exhibit 4-m, k, q-u).

23. By letter dated January 29, 2007, the Authority's attorney denied Mr. Hartman's request for the information. The reason for denying the requested documents was that they are not "subject to Right to Know". (N.T. 46; Joint Exhibit 4-w).

24. Also on January 29, 2007, Union President Hartman responded to the Authority's written denial of requested timecard records of the same date. In his letter, Mr. Hartman informed the Authority that "[i]t is vitally important to the processing of the grievance filed by or on behalf of Samantha Tracy that the Union receive the information requested." (N.T. 46; Joint Exhibit 4-x).

25. The Authority allowed Mr. Hartman to use a room at the Authority to review the timecards for Authority employees. On an unknown date, Mr. Hartman spent six-and-one-half hours reviewing the timecards made available by the Authority. Mr. Hartman wrote detailed notes of the dates and times that various employees reported late for work. (N.T. 49-50, 56-57; Union Exhibit 2).

DISCUSSION

I. Refusal to Provide Requested Information

The Union contends that the Authority engaged in unfair practices by refusing to supply requested timecards necessary to process grievances filed on behalf of Samantha Tracy and to determine whether the Authority was discriminating against her. The Authority's initial position was that the Union is not entitled to the timecards, unless individual employees give their permission, because the collective bargaining agreement, the right to know law and PERA do not expressly require it. However, in its opening, the Authority argued that it did not commit unfair practices because it granted access to the timecards at the Authority facilities.

It is beyond peradventure that a public employer in the Commonwealth of Pennsylvania commits an unfair practice under Section 1201(a)(1) and (5) of PERA when it refuses to provide relevant information to process a grievance. Commonwealth of Pennsylvania v. PLRB, 527 A.2d 1097 (Pa. Cmwlth. 1987). This view is universally held by the Board, the National

Labor Relations Board and both the Federal and Pennsylvania Courts. Id. "Furthermore, the duty to provide information has been said to be a statutory obligation which exists independent of the agreement between the parties." Id. (emphasis added)(citing National Labor Relations Board v. Designcraft Jewel Industries, Inc., 675 F.2d 493 (2d Cir. 1982)). The Board has adopted the liberal standard of relevancy set forth in NLRB v. ACME Industrial Co., 385 U.S. 432 (1967). PSSU Local #668 SEIU AFL-CIO v. Commonwealth of Pennsylvania Department of Public Welfare, 27 PPER ¶ 27205 (Final Order, 1996). Under the ACME standard of liberal relevance, a request for information must be satisfied if the request is supported by a showing of "probable" or "potential" relevance. Commonwealth of Pennsylvania, Department of Corrections, (SCI Muncy) v. PLRB, 541 A.2d 1168 (Pa. Cmwlth. 1988). Indeed, requested information pertaining to employes is presumptively relevant. Commonwealth, 527 A.2d at 1100.

Based on these principles, the Board expressly rejected the Authority's initial position in AFSCME, Council 13 v. Commonwealth of Pennsylvania, Department of Agriculture, 18 PPER ¶ 18003 (Final Order, 1986). In the Department of Agriculture case, the Board recognized that a public employer does not have an obligation to provide a union with confidential employe information. Id. (citing Detroit Edison Co. v. NLRB, 440 U.S. 301 (1979)). Also, a union is not entitled to witness statements obtained by an employer during an investigation of an employe for misconduct. AFSCME, Council 13 v. Pennsylvania Department of Corrections, 17 PPER 17072 (Proposed Decision and Order, 1986), aff'd, 18 PPER 18057 (Final Order, 1987). The Department of Agriculture Board, however, cautioned that the confidentiality exception is a narrow one and held that a public employer is not excused from its obligation to provide employe attendance records, which lack value judgments, opinions and conclusions contained in job performance evaluations and employe discipline. Furthermore, the Board, in Department of Agriculture, expressly rejected the Authority's position regarding the Right to Know Act and employe consent holding that employe attendance records are indeed discoverable under the Right to Know Act and that employe consent to release records to the union is not required under PERA. Therefore, the Authority initially committed an unfair practice under Section 1201(a)(1) and (5) of PERA when it refused to provide the requested timecard information to the Union, under the guise of employe confidentiality. However, the matter became moot when the Authority subsequently presented the requested information to the Union.

The Authority made the timecards and a conference room available. Indeed, Mr. Hartman spent six and one-half hours inspecting those documents and compiling the employe timecard data contained in Union Exhibit 2. Although a union is entitled to information relevant to the processing of a grievance, a union is not necessarily entitled to the information in the specific form requested for union convenience. Pennsylvania Department of Corrections, 18 PPER 18057. The Union here may have wanted the Authority to make copies of the timecards or permit the Union to make copies, but such action was not required by law. If the Union needed original timecards or copies thereof to present at the arbitration hearing, the avenue of pursuing the records in that form is the arbitration subpoena, which indeed the Union caused to be issued on June 5, 2007. (Union Exhibit 1). Also, there is no evidence indicating that the timecards made available were not in compliance with the Union's request for information. For example, the Union did not assert that the timecards provided did not date back far enough in time or that the Authority did not provide timecards for some employes. There is no evidence that Mr. Hartman was limited in time or that he would not have been permitted to continue his inspection of the timecards on a different day, if he so desired. Therefore, the portion of the Charge alleging violations of Section 1201(a)(1) and (5) for failing to provide requested timecards for Authority employes is hereby dismissed as moot. Cf., AFSCME Local 1971 v. Philadelphia Housing Development Corp., 34 PPER 145 (Final Order, 2003) (holding that a charge will be dismissed where an employer repudiates its unlawful conduct and posts its repudiation for the employes).

II. Unilateral Change in Past Practice

The Union also claims that the Authority violated Section 1201 (a)(1) and (5) by unilaterally changing the terms and conditions of employe discipline when it suddenly changed the past practice of permitting employes a discipline-free, ten-minute grace period for tardiness, provided they make up that time after their shift. The Authority argues that such a

policy is not a current term and condition of employment because it was not incorporated into the current collective bargaining agreement, which contains a waiver clause excluding any matters from the employment relationship that are not expressly included in that agreement.⁴

The Board and the Commonwealth Court expressly rejected the Authority's position in Commonwealth of Pennsylvania v. PLRB, 459 A.2d 452 (Pa. Cmwlth. 1983). In that case, the employer relied on a waiver provision in the collective bargaining agreement, with similar language to the waiver provision in Article XXXII in this case, to justify its unilateral change regarding an unwritten smoking policy. The employer in Commonwealth, argued that matters otherwise negotiable, but not expressly agreed to in the collective bargaining agreement, were non-negotiable terms and conditions of employment subject to employer change during the life of the agreement, as directed by the waiver clause. The Commonwealth Court adopted the position of the Board and other state jurisdictions in opining as follows:

[A] union's waiver of the right to bargain on mandatory subjects during the term of an agreement will not be found in a boiler plate waiver clause alone. Instead, the prevailing view, in the PLRB's analysis is that such clauses may only be employed as a shield by either party to prevent incessant demands during the contract terms made by the other party seeking to alter the status quo. Use of the clause as a sword by one seeking to impose unilateral changes without first bargaining is not favored. . . .

. . . [W]e believe it is entirely reasonable for the PLRB to determine that the parties never intended by this provision to permit unilateral mid-term alterations in working conditions.

Commonwealth, 459 A.2d at 457 (emphasis added). Accordingly, absent evidence that the union bargained away the particular matter in question, past practices recognized by the employer during subsequent collective bargaining agreements containing waiver clauses survive those agreements. The Authority may not use the Article XXXII waiver clause as a sword to unilaterally change the ten-minute grace period for tardiness, which is a past practice that has become an expected condition of employment for the past 16 years bridging several collective bargaining agreements.

The record establishes that the Authority allowed employees to report late for their shift and make up that time if they were less than ten minutes without fear of discipline. This practice continued uninterrupted from 1990 through August 2006 into the current collective bargaining agreement when it was unilaterally changed. Therefore, the practice constitutes an understanding by and between the parties that created "a separate enforceable condition of employment which cannot be derived from the express language of the agreement," County of Allegheny v. Allegheny county Prison Employees Independent Union, 476 Pa. 27, 34, 381 A.2d 849, 852 (1977).⁵

The unwarranted tardiness violations imposed on Ms. Tracy as a result of this unilateral change were the proximate cause for her discharge. The evidence is clear that the fusillade of progressively more severe discipline that the Authority was mounting against Ms. Tracy caused her to take an unexcused absence, which directly contributed to her discharge, even though Ms. Tracy was not in fact absent from work on the day that precipitated her discharge. Therefore, the Authority violated Section 1201(a)(1) and (5) when it unilaterally changed a binding past practice by disciplining Samantha Tracy in August, 2006, and Ms. Tracy must be reinstated as a result of the Authority's bargaining violation.

⁴ The Article XXXII waiver language provides, in relevant part, that "[a]ll verbal agreements, procedures or any other understandings, written or verbal which are not contained herein or attached hereto, shall be null or void." (Joint Exhibits 1 & 2, Article XXXII).

⁵ Although the Authority does not contest that the change in disciplinary policy for tardiness within the grace period is a mandatory subject of bargaining, the change in disciplinary policy affecting personnel records, hours and tenure of employment, as here, has been held to constitute a mandatory subject of bargaining. Fairview Township Police Officers Ass'n v. Fairview Township, 31 PPER 31019 (Final Order, 1999), aff'd unreported, No. 133 C.D. 2000 (Pa. Cmwlth. 2000); PLRB v. Hazleton Area School District, 15 PPER ¶ 15170 (Final Order, 1984).

III. Discrimination

The Union additionally claims that the Authority discriminated against Ms. Tracy by making the unilateral change for the purpose of disparately applying it to her alone, which resulted in her discharge, because of protected activity. In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew that the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra. Teamsters Local 312 v. Upland Borough, 25 PPER 25195 (Final Order, 1994). A pre-eminent factor in sustaining a charge of discrimination is a determination that the employe in question was the victim of disparate treatment by the employer. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989).

The Union met its burden of establishing discrimination under St. Joseph's, supra. The record clearly shows that the Authority possessed actual knowledge of Ms. Tracy's involvement in the arbitration proceedings and that she received backpay for the office cleaning work as a result. Although timing is remote in this case, the record as a whole demonstrates that management, like a stalking lion invisibly crouched in the tall grass, awaited the opportunity to strike. By waiting eight-to-ten months to begin its campaign of discriminatory action against Ms. Tracy, the Authority attempted to conceal its unlawful motives.

The Authority and the Union did not at any time in the history of their relationship have a grievance go to arbitration before the office cleaning work grievance. The examiner, based on observing the demeanor and attitude of the witnesses, does not credit the testimony of Ms. Bobersky, who indicated that she lacked interest in whether the work was in the bargaining unit. The examiner also does not credit the testimony of Mr. Morris, who testified that he believed the office cleaning work probably belonged in the unit. If these statements were true, the Authority would have settled the grievance at earlier stages rather than having spent time and money going to arbitration. It appears from the record that, notwithstanding whether the Authority cared about retaining the work, management did not like the Union confronting them through the grievance procedure and demanding that the work be given back to the unit. Additionally, Superintendent Fish, told Ms. Tracy that "the Supervisors had it out for her." Also, Ms. Tracy noticed that the attitude of Authority Manager Bobersky had negatively changed toward her.

Although three other employes were given oral warnings for tardiness, the Authority expunged all their records. Mr. Coolbaugh requested that his record be expunged because the electric gate at the entrance to the premises malfunctioned causing his delay the night for which he was disciplined for reporting late on third shift. However, the Authority also expunged the records of Mr. Dent and Mr. Comstock, neither of whom requested that their records be expunged and both of whom lacked a valid excuse for being late. Upon learning that three other employes were excused from their punishment for being late, Ms. Tracy wrote a letter asking the Authority to erase her disciplinary record for tardiness, as it did for her coworkers. The Authority refused her request. Clearly, Ms. Tracy was being held to a different standard than her coworkers. Indeed, it appears that the discipline of the three coworkers was merely an attempt by the Authority to provide a pretext for concealing its adverse action against Ms. Tracy.

The proverbial elephant in the room here is the harsh disparate treatment of Ms. Tracy as compared to all other similarly situated employes who were never disciplined for tardiness and the three other employes whose records were expunged. Although other employes reported late for their shifts during the time that Ms. Tracy also reported late for her shifts, only Ms. Tracy was continuously and progressively disciplined, which ultimately caused her discharge. No other employe was treated this harshly in violation of a past

practice that dates back sixteen years. Moreover, the record shows that the event that precipitated Ms. Tracy's discharge was characterized as an unexcused absence by the Authority, when in fact Ms. Tracy was late but actually worked for seven hours that day. The Authority, intent on discharging Ms. Tracy for pretextual reasons, has not acknowledged that mistaken fact or withdrawn the resulting discharge, as it was forced to do with the other mistaken fact regarding the accusation that she left the premises on August 25, 2006.

Having established a prima facie case of discrimination, the burden shifted to the Authority to establish that, despite the existence of unlawful motive, the Authority discharged Ms. Tracy for legitimate business reasons. Indiana Area Education Ass'n v. Indiana Area School District, 34 PPER 133 (Final Order, 2003). Here, the Authority has failed to establish, with any evidence, a valid business reason for disciplining and discharging Ms. Tracy. There simply is no more of an insubstantial explanation than no explanation at all. The Authority has not rebutted the Union's prima facie case or explained the reasons for its disparate treatment of Ms. Tracy.

The Authority introduced Employer Exhibit 1H, which was admitted over the Union's objection. The document is unsigned and undated, although the Authority has represented that it was received on July 11, 2006. However, the Authority has not submitted any argument explaining why it introduced the unauthenticated document or what factual basis the document may support. Exhibit 1H provides as follows:

The last week in June, S.T. was caught sleeping in her car by management during work hours. Nothing was done about it. Plus you should check her timecard. This is just one example of SOME 1st shift employees wasting time not doing their job.

(Employer Exhibit 1H). First, this examiner has no way of knowing whether, on this record, there are other employees with the initials "S.T." If introduced to show notice, by the letter's terms, management already knew about Ms. Tracy allegedly sleeping during her shift. Yet there is no record that management disciplined Ms. Tracy for sleeping during work hours, while there is a record of discipline for reporting to work two minutes late after making up the time. Seemingly, Ms. Tracy would have been disciplined for sleeping, if it were true, since she was disciplined for being two minutes late. The obvious inconsistencies created by the document raise more questions than provide answers. Without the benefit of argument, the examiner is simply unable to determine the factual premise the Authority wishes to support with this document. Accordingly, this examiner gives no credibility or weight to Employer Exhibit 1H.

Similarly, Employer Exhibit 1I, which was also admitted over the Union's objection, will not be considered. Again, without the benefit of argument from the Authority, the examiner is unable to determine the factual premise that the document is supposed to support. Presumably, the document, which simply provides a list of five employees "who commented on Samantha's work ethics," does not establish anything factual. The examiner does not know what is meant by "commented on Samantha's work ethics." Such a statement could refer to Ms. Tracy's job performance during her shift and not her tardiness. Moreover, none of the listed employees testified at the hearing to establish, with first-hand knowledge, that there was a problem with "Samantha's work ethics." Also, the Union was unable to test or flesh out the nature of these employees' so-called "comment[s]" to Authority management. Absent specific testimony regarding the existence, meaning and nature of the alleged complaints about Ms. Tracy, this document is unreliable to establish that employees at the Authority were complaining about Ms. Tracy's work performance, hours, tardiness, absences or any fairness or morale issues that arguably could have arisen from such complaints. Also, the document was prepared after Ms. Tracy's discharge, and there is no substantial competent evidence on the record that these employees gave statements before August, 2006 to establish that the Authority was perhaps responding to employee complaints as the underlying motive for initiating their disciplinary campaign against Ms. Tracy.

Accordingly, the Authority discriminated against Ms. Tracy in violation of Section 1201(a)(1) and (3) when it disciplined and subsequently discharged her for engaging in protected activity, under the pretext of being tardy, which further caused at least one

unexcused absence and led to ultimate discharge. As set forth herein, the Authority must reinstate Ms. Tracy with full make whole relief as a result of the unilateral change in past practices and its discriminatory mistreatment of Ms. Tracy.

CONCLUSIONS

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

1. The Berwick Area Joint Sewer Authority is a public employer within the meaning of Section 301(1) of PERA.
2. The Teamsters, Local Union Number 764 is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The Authority has committed unfair practices in violation of Section 1201(a)(1), (3) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Berwick Area Joint Sewer Authority shall

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but limited to the discussing of grievances with the exclusive representative.

3. Cease and desist from discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization.

4. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Rescind the unilateral change in the past practice of permitting employes a ten-minute tardiness grace period, provided they make up that time at the end of their shift, without suffering any discipline;

(b) Offer Samantha Tracy unconditional reinstatement, in writing, to her former position without prejudice to any rights or privileges enjoyed by her;

(c) Pay Samantha Tracy and make her whole for all wages and benefits that she would have earned from the date of discharge to the date of unconditional offer of reinstatement, including but not limited to wage increases received by the bargaining unit during the backpay period, seniority, out of pocket dental, medical and optical expenses for herself and responsible family members, holiday pay and accrued sick and vacation time.

(d) The back pay due the Samantha Tracy shall be computed on the basis of each separate calendar quarter or portion thereof during the period stated above. The quarterly period shall begin with the first day of January, April, July and October.

The pay shall be determined by deducting from a sum, equal to that which Ms. Tracy normally would have earned for each quarter or portion thereof, earnings which she actually earned or with the exercise of due diligence would have earned in other employment during that period; earnings which she would have lost through sickness; and any unemployment compensation received by her. Where an employer claims lack of due diligence, it shall be the employer's obligation to establish that there was substantially equivalent employment reasonably available and that due diligence was not exercised to find interim employment. Earnings in one particular quarter shall have no effect on the liability for any other quarter.

(e) Pay interest at the simple rate of six percent per annum on any and all backpay due Samantha Tracy from the date of her discharge until the date of the written offer of unconditional reinstatement to her former position;

(f) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(g) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

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 fifth day of October 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 764 :
 :
 :
 v. : Case No. PERA-C-07-48-E
 :
 BERWICK AREA JOINT SEWER AUTHORITY :

AFFIDAVIT OF COMPLIANCE

The Berwick Area Joint Sewer Authority hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1), (3) and (5) of the Public Employee Relations Act; that it has rescinded the unilateral change in the past practice of permitting employes a ten-minute tardiness grace period, provided they make up that time at the end of their shift, without suffering any discipline; that it has offered Samantha Tracy unconditional reinstatement, in writing, to her former position without prejudice to any rights or privileges enjoyed by her; that it has paid, and made Samantha Tracy whole for, all wages and benefits that she would have earned from the date of discharge to the date of unconditional offer of reinstatement, including but not limited to wage increases received by the bargaining unit during the backpay period, seniority, out of pocket dental, medical and optical expenses for herself and responsible family members that would have been covered during her employment, holiday pay and accrued sick and vacation time; that it has paid interest at the simple rate of six percent per annum on any and all backpay due Samantha Tracy from the date of her discharge until the date of the written offer of unconditional reinstatement to her former position; that it has posted a copy of the decision and order as directed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public