COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 542	:	
v.	:	Case No. PERA-C-06-570-E
QUAKERTOWN BOROUGH	:	

PROPOSED DECISION AND ORDER

On November 27, 2006, the Int'l Union of Operating Engineers Local 542 (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Quakertown Borough (Borough) violated sections 1201(a)(1), 1201(a)(3) and 1201(a)(5) of the Public Employe Relations Act (Act) by discriminatorily and unilaterally changing its policy regarding the use of its facilities. On December 15, 2006, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 8, 2007, if conciliation did not resolve the charge by then. The hearing examiner subsequently continued the hearing upon the request of both parties, upon requests by the Borough without objection by the Union and upon requests by the Union without objection by the Borough. On September 24, 2007, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of the Union's case in chief, the Borough moved to dismiss the discrimination portion of the charge on the ground that the Union had not presented a prima facie case (N.T. 136). The hearing examiner took the motion under advisement pending a review of the record and any briefs the parties might file (N.T. 138). On December 3, 2007, each party 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 July 3, 2006, the Board certified the Union as the exclusive representative of a bargaining unit that includes blue-collar employes of the Borough. (Case No. PERA-R-06-203-E)

2. On September 11, 2006, during negotiations for a collective bargaining agreement, the Union's lead negotiator (Frank Bankard) raised the issue of a tool allowance for the Borough's mechanics. (N.T. 11, 18)

3. At a bargaining session on November 2, 2006, Mr. Bankard raised the issue of a tool allowance for the mechanics again. A mechanic who had been using the Borough's garage to repair vehicles for a fee (Steven L. Brown) was present at the session. (N.T. 11-13, 21-22, 110, 114-115, 117-118)

4. On November 11, 2006, the Borough's council discussed a tool allowance for the mechanics and the mechanics use of the Borough's garage to perform non-Borough work. Council also directed the Borough's then manager (David Woglom) to contact the Borough's insurance agent (Neil Schwan) to get his opinion about the Borough's exposure to liability for the mechanics use of the garage to perform non-Borough work. (N.T. 38, 49-53, 73-77)

5. On November 12 or 13, 2006, Mr. Woglom asked Mr. Schwan for his opinion about the Borough's exposure to liability for the mechanics use of the garage to perform non-Borough work. Mr. Schwan expressed concern to Mr. Woglom that the Borough was exposed to liability for a third party suit and for a workers' compensation claim. (N.T. 78-81)

6. By memorandum dated November 21, 2006, Mr. Woglom wrote to the Borough's mechanics (Andy Bucko and Mr. Brown) as follows:

> "Recently Borough Council has discussed the fact that from time to time each of you use the Borough garage and Borough-owned equipment and facilities for your own personal use and business. Prior to their discussion, Council was not aware that this

had been going on. In accordance with that discussion, the Borough asked our insurance agent about the exposure that the Borough incurs from this use of Borough-owned equipment and facilities that is not related to Borough work. Our agent has advised that the Borough should stop this practice immediately as it exposes the Borough to a liability above that which we experience during normal work hours.

Therefore, in accordance with our insurance agent's recommendation, effective immediately no employee of the Borough is to use any Borough-owned equipment, facilities or garage unless it is part of the Borough's normal work. No employee is to conduct any kind of personal after hours work using any Borough owned equipment, facilities or the garage. You will have the Borough's approval to get access to those tools after hours, but you may not use your personal tools on personal business in the Borough-owned garage or using other Borough-owned equipment or facilities. The only authorized use of Borough-owned equipment, facilities or the garage is to (sic) on Borough equipment. Recognizing that you do store the tools on Borough-owned property, the Borough will continue to insure the tools for fire and casualty only as it relates to their storage on Borough property.

If you should have any questions, please see me."

(N.T. 28, 119; Union Exhibit 2)

7. The Borough subsequently let PennDOT use its garage. (N.T. 130-131)

DISCUSSION

The Union has charged that the Borough committed unfair practices under sections 1201(a)(1), 1201(a)(3) and 1201(a)(5) of the Act by discriminatorily and unilaterally changing its policy regarding the use of its facilities. As to the discrimination portion of the charge, the Union alleges that the Borough changed the policy in retaliation against its employes in general and the Union's chief steward (Mr. Brown) in particular for their "position during bargaining regarding tool allowance" (specification of charges). According to the Union, the timing of events coupled with a pretextual explanation for the Borough's action supports a finding that the Borough was discriminatorily motivated. As to the unilateral change portion of the charge, the Union contends that the Borough's policy regarding the use of its facilities is a mandatory subject of bargaining that the Borough was obligated to bargain before changing.

As set forth in its motion to dismiss, the Borough contends that the discrimination portion of the charge should be dismissed because the Union did not present a prima facie case during its case in chief. In the alternative, the Borough contends that the discrimination portion of the charge should be dismissed because in rebuttal to any prima facie case the Union may have presented it established that it changed the policy for a legitimate business reason. The Borough contends that the unilateral change portion of the charge should be dismissed because the policy is a matter of inherent managerial policy that it had the managerial prerogative to change unilaterally.

I. The alleged discrimination.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(3) if it discriminates against employes for having engaged in an activity protected by the Act. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). "The motive creates the offense." PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), quoting PLRB v. Ficon, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). Participating in collective bargaining is a protected activity. Indiana Area School District, 34 PPER 133 (Final Order 2003). Close timing between an employe's protected activity and an employer's action coupled with a pretextual explanation for the employer's action will support a finding that the employer was discriminatorily motivated. Lehighton Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005). An employer does not violate section 1201(a)(3) if it takes an employment action for a legitimate business reason. Indiana Area

School District, 34 PPER 133 (Final Order 2003). Speculation is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

In order to prove a discrimination charge, the charging party must present a prima facie case during its case-in-chief. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993). If the charging party does not present a prima facie case during its case-in-chief, the charge is to be dismissed, and the employer's defense to the charge need not be addressed. Montour County, 35 PPER 147 (Final Order 2004).

A close review of the Union's case in chief does not show that the Union presented a prima facie case. Accordingly, the Borough's motion to dismiss the charge must be granted, and the Borough's defense to the charge need not be addressed.

During its case-in-chief, the Union presented testimony by its lead negotiator (Mr. Bankard) that at a November 2, 2006, bargaining session he raised the issue of a tool allowance for the Borough's mechanics (N.T. 11-13) and that on November 21, 2006, the Borough's then manager (Mr. Woglom) issued a memorandum explaining that upon the advice of the Borough's insurance agent (Mr. Schwan) the mechanics would no longer be allowed to use the Borough's garage to perform non-Borough work as they had in the past because their use of the garage for that purpose exposed the Borough to liability (N.T. 16-17; Union Exhibit 2). The Union also presented testimony by Mr. Woglom that he contacted Mr. Schwan for advice about the Borough's exposure to liability only after Mr. Bankard raised the issue of a tool allowance for the mechanics (N.T. 49-53). On cross-examination, Mr. Woglom further testified that before he issued the memorandum Mr. Schwan expressed concern to him that the mechanics use of the garage to perform non-Borough work exposed the Borough to liability for a third party suit and for a workers' compensation claim (N.T. 78-81).[1] The Union presented additional testimony by its then chief steward (Mr. Brown) that as a mechanic he used the garage to repair the vehicles of fellow employes for a fee before Mr. Woglom issued the memorandum (N.T. 114-115), that he "probably" was present at the November 2, 2006, bargaining session (N.T. 117-118) and that PennDOT was allowed to use the garage after Mr. Woglom issued the memorandum (N.T. 130-131).

In support of its contention that the Borough discriminatorily changed the policy regarding the use of its facilities, the Union points out that Mr. Bankard raised the issue of a tool allowance for the mechanics before Mr. Woglom issued the memorandum explaining that the mechanics would no longer be allowed to use the Borough's garage to perform non-Borough work as they had in the past. The timing of events alone, however, provides an insufficient basis for finding a discriminatory motive on the part of an employer. Pennsylvania State Park Officers Association, supra. Moreover, the Union overlooks that after Mr. Bankard raised the issue of a tool allowance Mr. Schwan expressed concern to Mr. Woglom that the mechanics use of the garage to perform non-Borough work exposed the Borough to liability for a third party suit and for a workers' compensation claim and that Mr. Woglom only thereafter issued the memorandum. On that record, the timing of events militates against rather than in favor of a finding that the Borough was discriminatorily motivated.

The Union also points out that after Mr. Woglom issued the memorandum PennDOT was allowed to use the garage. The Union would have the Board find his explanation for not allowing the mechanics to use the garage to be pretextual under the circumstances. PennDOT's use of the garage hardly implicates the same liability concerns that the use of the garage by the mechanics to perform non-Borough work does, however, so there is no basis for finding his explanation for not allowing the mechanics to use the garage to be pretextual. Thus, the Union's contention finds no support in the record.

II. The alleged unilateral change.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it unilaterally changes a mandatory subject of bargaining, Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978), but not if it unilaterally changes a

[1] The Union contends that Mr. Schwan's expressed concern was hearsay and thus inadmissible. As an exception to the hearsay rule, however, an out-of-court statement is admissible if offered to prove the state of mind of the person hearing the statement. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order 1997). Thus, although Mr. Schwan's expressed concern was hearsay, it was admissible to show Mr. Woglom's state of mind.

matter of inherent managerial policy. Joint Bargaining Committee of PSSU and PESEA v. PLRB, 503 Pa. 236, 469 A.2d 150 (1983). If, as here, neither section 701 of the Act (defining mandatory subjects of bargaining) nor section 702 of the Act (defining matters of inherent managerial policy) expressly applies, the balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 507, 337 A.2d 262, 268 (1975), is to be applied to determine if an employer has changed a mandatory subject of bargaining or a matter of inherent managerial policy. If the Board has previously applied the State College balancing test to determine if an employer has changed a mandatory subject of bargaining or a matter of inherent managerial policy, its determination is binding in subsequent cases unless a party presents new or different facts to warrant a contrary result. City of Wilkes-Barre, 33 PPER ¶ 33087 (Final Order 2002).

As the Borough points out in its brief, in Abington School District, 18 PPER ¶ 18188 (Proposed Decision and Order 1987), aff'd, 19 PPER ¶ 19067 (Final Order 1988), aff'd sub nom. Abington School District v. Commonwealth of Pennsylvania, PLRB, 570 A.2d 108 (Pa. Cmwlth. 1990), the Board, applying the State College balancing test, found that a rule prohibiting unauthorized personal work with the employer's equipment "preserve[s] integrity in government and [] foster[s] public confidence in government" and therefore is a matter of inherent managerial policy. 18 PPER at 532. As the Borough also points out in its brief, in Commonwealth of Pennsylvania, Department of Transportation, 21 PPER ¶ 21108 (Proposed Decision and Order 1990), aff'd on other grounds, 22 PPER ¶ 22105 (Final Order 1990), a hearing examiner, applying the State College balancing test, found that a rule prohibiting the "[u]nauthorized use of [the employer's] . . . property [and] facilities" is a matter of inherent managerial policy for the same reason.

The Union contends that the Borough's policy regarding the use of its facilities is a mandatory subject of bargaining that the Borough was obligated to bargain before changing because the Borough treated the policy as such during the parties' negotiations for a collective bargaining agreement. As the Union points out, its lead negotiator (Mr. Bankard) and its then chief steward (Mr. Brown) testified that the Borough rejected Mr. Bankard's proposal for a tool allowance in part because the mechanics enjoyed the "benefit" of using the Borough's garage to perform non-Borough work (N.T. 12-15, 17-19, 113-115, 118).[2] A close review of their testimony does not reveal that the Borough treated its policy regarding the use of its facilities as a mandatory subject of bargaining, however; rather, a close review of their testimony shows that the Borough treated a tool allowance for mechanics as a mandatory subject of bargaining. Thus, there is no factual basis for the Union's contention. Moreover, although an employer is under no obligation to bargain over a matter of inherent managerial policy, it nonetheless may do so. Commonwealth of Pennsylvania, 16 PPER ¶ 16172 (Final Order 1985). Thus, to the extent that the Borough may have treated its policy regarding the use of its facilities as a mandatory subject of bargaining, there is no legal basis for finding the policy to be a mandatory subject of bargaining for that reason alone in any event. Accordingly, as the Union has not presented new or different facts to warrant a contrary result, the same result as in Abington School District and Commonwealth of Pennsylvania, Department of Transportation, obtains.

CONCLUSIONS

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

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

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

3. The Board has jurisdiction over the parties.

[2] The Union overlooks that it also presented testimony by the Borough's then manager (Mr. Woglom) that the Borough did not reject Mr. Bankard's proposal for a tool allowance as Mr. Bankard and Mr. Brown testified (N.T. 42-43). No attempt has been made to resolve the conflict in the testimony, however, because under either version of the facts the result is the same.

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

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 twenty-sixth day of December 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

Direct Dial
717-783-3050

Fax Number
717-783-2974

December 26, 2007

LOUIS AGRE
INTL UNION OF OPERATING ENGINEERS
1375 VIRGINIA DRIVE SUITE 100
FORT WASHINGTON, PA 19034

JOEL S BARRAS ESQUIRE
REED SMITH LLP
2500 ONE LIBERTY PLACE
1650 MARKET STREET
PHILADELPHIA, PA 19103-7301

BUCKS COUNTY
Case No. PERA-C-06-570-E

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Frank Bankard
Joseph C. Rudolf, Esquire
Quakertown Borough