COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DAN AZAR	:	
	:	
v.	:	Case No. PERA-C-06-389-E
	:	
COMMONWEALTH OF PENNSYLVANIA DEPARTMENT OF TRANSPORTATION	:	

PROPOSED DECISION AND ORDER

On August 16, 2006, Dan Azar filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that PennDot District 5-3 violated sections 1201(a)(1), 1201(a)(2), 1201(a)(3) and 1201(a)(4) of the Public Employe Relations Act (Act) by refusing to allow him to return to work following a work-related injury. On August 24, 2006, the Secretary of the Board, construing the charge as having been filed against the Commonwealth of Pennsylvania, Department of Transportation (Commonwealth), issued a complaint and notice of hearing directing that a hearing be held on November 8, 2006.

The hearing was held as scheduled. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. At the conclusion of Mr. Azar's case-in-chief, the Commonwealth moved to dismiss the charge as filed under sections 1201(a)(2) and 1201(a)(4) on the ground that the charge did not state a cause of action under either of those sections (N.T. 90). The Commonwealth also moved to dismiss the charge as filed under sections 1201(a)(1) and 1201(a)(3) on the ground that Mr. Azar had not presented a prima facie case of discrimination (N.T. 91). Upon Mr. Azar's request, the hearing examiner took both motions under advisement pending the receipt of briefs (N.T. 90-91). At the conclusion of the hearing, Mr. Azar requested that anyone in the hearing room who had been invited by the Commonwealth or by "someone with an interest in the case" be ordered to identify themselves for the record (N.T. 121). The hearing examiner denied the request on the ground that only those members of the public who appear as witnesses may be required to identify themselves for the record (N.T. 122).[1]

On November 14, 2006, Mr. Azar requested that the record be reopened for the presentation of testimony that "someone from District 5-3 called [James] Brown's district and informed persons there that Mr. Brown had served as a witness at the hearing" and that "the caller inquired whether Mr. Brown had secured proper documentation and permission to attend our hearing." Mr. Azar contended that the proferred testimony would establish "a pattern of prohibited conduct which is likely to affect the outcome of the case[.]" On November 17, 2006, the hearing examiner gave the Commonwealth ten days to respond to the request. Based on the Commonwealth's representation that it had not received a copy of the request and would need additional time to respond to the request, the hearing examiner provided the Commonwealth with a copy of the request and extended by four days the deadline for responding to the request.[2] On November 30, 2006, the Commonwealth filed a response to the request. The Commonwealth contended that the request should be denied for lack of proper service and because the proferred testimony was irrelevant. On December 7, 2006, the hearing examiner denied the request.[3]

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[1] Section 95.91(a) of the Board's rules and regulations provides that "[h]earings shall be open to the public unless otherwise ordered by the Board." 34 Pa. Code § 95.91(a). Nothing in the Board's rules and regulations requires members of the public who attend a hearing to identify themselves for the record.

[2] The hearing examiner extended the deadline for responding to the request because no prejudice to Mr. Azar was apparent under the circumstances.

[3] In Minersville Area School District v. Minersville Area School Service Personnel Association, 518 A.2d 874 (Pa. Cmwlth. 1986), the court held that a record should only be reopened for the receipt of after-discovered evidence if, among other things, the evidence is relevant and non-cumulative and is likely to compel a different result. See also Commonwealth of Pennsylvania (Department of Corrections), 37 PPER 8 (Final Order 2005)(same). An inquiry into whether or not Mr. Brown had secured proper documentation and permission to attend the hearing is hardly prohibited conduct, so the proferred testimony is neither relevant nor likely to compel a different result. The hearing examiner denied the request accordingly. Although not dispositive, it is noted that any defect in service was cured when the hearing examiner, upon the request of the Commonwealth, provided the Commonwealth with a copy of the request.

On January 25, 2007, the Commonwealth filed a brief, and Mr. Azar requested an extension of the briefing schedule. The Commonwealth objected to the request because it had already sent its brief to Mr. Azar. Upon the representation of Mr. Azar that he would return the Commonwealth's brief unopened, the hearing examiner extended the briefing schedule to January 29, 2007.[4] On February 2, 2007, Mr. Azar filed a brief by U.S. Mail. On February 5, 2007, Mr. Azar represented that he returned a second copy of the Commonwealth's brief unopened and requested that his brief be accepted nunc pro tunc. Over the objection of the Commonwealth, the hearing examiner granted Mr. Azar's request.[5]

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 August 10, 1992, the Commonwealth hired Mr. Azar to work for the Department of Transportation (PennDOT). (N.T. 8)

2. By August 1, 2002, Mr. Azar was working as a transportation equipment operator B within PennDOT's district 5. As part of his job duties, he was required to operate heavy highway construction and maintenance equipment, including a truck. (N.T. 32-33, 35, 37, 39; Complainant Exhibit 5)

3. Effective July 1, 2003, the Commonwealth and Council 13, American Federation of State, County and Municipal Employees, AFL-CIO, entered into a four-year collective bargaining agreement covering transportation equipment operators B and providing at article 26, work-related injuries, as follows:

> "**Section 7**. An employee has the right to return to a position in the same or equivalent classification held before being disabled, for a period of up to three years from the date the injury occurred provided the employee is fully capable of performing the duties of that position, subject to the furlough provisions of Article 29, Seniority. This guarantee expires if the disability ceases prior to the expiration of the three year period and the employee does not return to work immediately or if the employee retires or otherwise terminates employment. During the period of time between the end of the leave under Section 1 or Section 13, where applicable, and the end of the guarantee in this Section, the employee will be on leave without pay.
>
> During the three-year period, employees who are not fully capable of performing the duties of their position shall have, upon request, a right to return to an available position in a lower classification, within the same geographical/organizational limitation as the seniority unit, to which there are no seniority claims and which the agency intends to fill, provided the employee meets the minimum requirements and qualifications essential to the work of the classification and the employee is fully capable of performing the duties of the position. If an employee returns to a position in a lower classification, the employee will be demoted in accordance with the Commonwealth's Personnel Rules, but shall maintain the right to return to a position in the same or equivalent classification held before being disabled, for a period of up to three years from the date the injury occurred, provided the employee is fully capable of performing the duties of that position, subject to the furlough provisions of Article 29, Seniority.
>
> Disabled employees receiving workers' compensation will be notified 90 days prior to the expiration of the three-year period. The notification will include information concerning the employee's right to apply for disability retirement, if eligible. If the employee does not receive 90 days notice, the employee's right to return will not be extended. However, the leave without pay will be extended for 90 days to enable the employee, if eligible, to apply for disability retirement.

[4] The hearing examiner granted the request because no prejudice to the Commonwealth was apparent under the circumstances.

[5] See footnote 4.

The right of return for temporary employees shall be limited to the scheduled duration of the temporary employment."

(Employer Exhibit 2)

4. On August 14, 2003, Mr. Azar sustained a work-related injury. Thereafter, he began receiving workers' compensation and, with the exception of two periods when the manager of PennDOT's district 5 (James Kirkland) called him back to work a temporary assignment as a dispatcher during the winter months, was on leave without pay. (N.T. 14-15, 40-41, 61-62, 64)

5. By letter dated March 27, 2006, an IME coordinator (Andrew Flenner) for Occupational Resource Specialists, Inc., acting on behalf of the administrator of workers' compensation claims against the Commonwealth (CompServices, Inc.), scheduled Mr. Azar for an independent medical examination with Dr. Pedro Beredjiklian on May 10, 2006. (N.T. 43, 83, 96-97, 105-106; Employer Exhibit 1)

6. By letter dated May 9, 2006, the Commonwealth's safety coordinator at PennDOT's district 5 (Dennis J. McArdle), upon the direction of the Commonwealth's workers' compensation coordinator for PennDOT (Kathy Brilla), wrote to Mr. Azar as follows:

"On August 14, 2003, you sustained a work-related injury. The three-year period of eligibility for work-related injury leave expires on August 12, 2006. **Your Workers' Compensation benefits are not affected by the termination of injury leave without benefits.** You now have the following options.

RETURN TO WORK. You may return to work if medically able to do so. Upon return to work, you must provide medical documentation releasing you to return to full, unrestricted duties. If modified duties are temporarily necessary, we will work with you to make appropriate arrangements for a specified period of time. The concurrence of the treating doctor must be secured prior to your return.

RETIREMENT. If your disability appears to be long-term and if you meet the eligibility requirements, you may wish to apply for a disability or regular retirement. Accumulated, unused annual and personal leave and a portion of sick leave, if you qualify, will be paid if you choose retirement. To determine if you are eligible to retire, contact the State Employees' Retirement System at 1-800-633-5461.

RESIGNATION. You may resign your position. In addition to the return of retirement contributions (if you are not eligible for retirement benefits), you will be paid for accumulated, unused annual and personal leave.

APPLY FOR OTHER COMMONWEALTH EMPLOYMENT. You may apply for other Commonwealth employment with job duties within your current medi[c]al restrictions. You may contact the Bureau of State Employment at (717) 787-5703 or the State Civil Service Commission at (717) 783-3058 for additional information.

Please provide notification in writing by May 19, 2006 of your decision. If you do not respond, you will be terminated from your position with the Commonwealth on August 12, 2006. If you have any questions, please contact me at []."

(N.T. 15-16, 93-95; Complainant Exhibit 1)

7. Ms. Brilla directed Mr. McArdle to write the letter to Mr. Azar so the Commonwealth would be in compliance with the 90-day notice provision set forth in article 26 of the collective bargaining agreement. Ms. Brilla was not aware at the time that Mr. Azar had been a union representative or had filed grievances on behalf of himself or other employes. (N.T. 95-96)

8. On May 10, 2006, Dr. Beredjiklian conducted an independent medical examination of Mr. Azar. (N.T. 16, 43; Complainant Exhibit 3))

9. On May 18, 2006, Mr. Azar submitted to PennDOT district 5 notice that he had opted to return to work and an excuse slip from his physician (Mark J. Cerciello, M.D.) indicating that he was released to return to work on May 22, 2006, with no restrictions. The excuse slip did indicate when Mr. Azar was last seen by Dr. Cerciello. An employe at PennDOT's district 5 (Martha Torbey) forwarded the notice and the excuse slip to Ms. Brilla for processing. Ms. Brilla was not aware at the time that Mr. Azar had been a union representative or had filed grievances on behalf of himself or other employes. Mr. Kirkland had no role in deciding whether or not Mr. Azar would be allowed to return to work. (N.T. 16-18, 58-60, 64-65, 97-98, 101; Complainant Exhibit 2)

10. Upon receiving the notice and excuse slip, Ms. Barilla reviewed the billing records for CompServices and determined that Dr. Cerciello had not submitted a bill for treatment for Mr. Azar for the past year. She also reviewed a preliminary report from Dr. Beredjiklian indicating that Mr. Azar's prognosis for recovery was fair and that Mr. Azar could return to work with restrictions. She decided to wait for Dr. Beredjiklian's full report to see what those restrictions were before deciding if Mr. Azar would be allowed to return to work. (N.T. 97-104; Employer Exhibits 3, 5)

11. By email dated May 18, 2006, Ms. Brilla wrote to Ms. Torbey and the human resource director at PennDOT's district 5 (Denise M. Levchak) as follows:

> "Attached is the initial evaluation that we received from Dr. Pedro Beridlian (I believe pronounced as Bear-id-lee-ann), who evaluated Mr. Azar on May 10, 2006. We are awaiting his complete report. Based on the attached documentation, we must inform Mr. Azar that he cannot return to work because we have been informed that the expert doctor, Dr. Beridjlian, who evaluated him on May 10, does not feel that he is fully recovered, and is indicating that he will have physical restrictions. For his own safety, we do not want to put him in jeopardy of further injuring himself, especially now that we have knowledge that he will have restrictions from the orthopedic evaluation he had on May 10.
>
> We must stand behind the opinion of our expert doctor.
>
> As soon as the official IME report comes in, I'll forward it on."

(N.T. 102-103; Employer Exhibit 4)

12. On May 26, 2006, Ms. Brilla received from Dr. Beredjiklian his full report of his independent medical examination of Mr. Azar. Among other things, Dr. Beredjiklian wrote as follows:

> "I reviewed the job description of the claimant. I do not feel at this point that he is capable of operating any heavy equipment or a large truck. Because this job description includes the use of heavy equipment I do not believe the claimant can perform the job duties as described in the job description. Nevertheless, it is my opinion that he can return to work in a restricted capacity."

Based on her review of the report and on her understanding that article 23 of the collective bargaining agreement requires that an employe be able to fully perform the duties of their position in order to have the right to return to work from a work-related injury, Ms. Barilla decided not to allow Mr. Azar to return to work. Ms. Brilla was not aware at the time that Mr. Azar had been a union representative or had filed grievances on behalf of himself or other employes. (N.T. 107-109, 111; Complainant Exhibit 3)

13. In June 2006, Mr. Azar received from the Commonwealth a letter indicating that he would not be allowed to return to work because Dr. Beredjiklian's independent medical examination of him indicated that he could not perform the duties of his job. (N.T. 17-18)

14. At the request of Senator Patrick Brown, the Commonwealth thereafter scheduled Mr. Azar for an independent medical examination with Dr. Todd Kelman to get a second opinion. (N.T. 109-112)

15. On August 11, 2006, Ms. Barilla received from Dr. Kelman a preliminary report indicating that Mr. Azar's prognosis was good and that he could return to work with restrictions, including "no highly repetitive elbow flexion/extension" and "avoidance to prolonged vibration left upper extremity." Based on her review of the report and understanding that article 23 of the collective bargaining agreement requires that an employe be able to fully perform the duties of their position in order to have the right to return to work from a work-related injury, Ms. Barilla reaffirmed her decision not to allow Mr. Azar to return to work. Ms. Brilla was not aware at the time that Mr. Azar had been a union representative or had filed grievances on behalf of himself or other employes. (N.T. 111-113; Employer Exhibit 7)

16. On August 12, 2006, the Commonwealth terminated Mr. Azar. (N.T. 22, 109)

DISCUSSION

Mr. Azar has charged that the Commonwealth committed unfair practices under sections 1201(a)(1), 1201(a)(2), 1201(a)(3) and 1201(a)(4) by refusing to allow him to return to work following a work-related injury. As set forth in the specification of charges, Mr. Azar alleges that the Commonwealth's refusal was in "retaliation for [his] enthusiastic service as a Shop Steward[.]" Although he further alleges in the specification of charges that the Commonwealth deemed his physician's release of him to full, unrestricted duty to be invalid because his physician is a chiropractor when his physician in fact is a medical doctor and that the Commonwealth provided "bogus" job descriptions to two physicians who opined that he could no longer perform the duties of his job, he only contends in his brief that proof of a discriminatory motive on the part of the Commonwealth may be found in testimony that the manager of PennDOT's district 5 (Mr. Kirkland) reacted with hostility toward him in particular when he processing grievances as a shop steward and toward union representatives in general, in testimony that the Commonwealth subjected him to disparate treatment and in testimony that the Commonwealth's refusal to allow him to return to work was inexplicable because his physician released him to full, unrestricted duty and because he passed a functional capacity evaluation conducted by his physician.

The Commonwealth contends that the charge should be dismissed because it does not state a cause of action under either section 1201(a)(2) or section 1201(a)(4) and has moved to dismiss the charge under those sections accordingly. The Commonwealth also contends that Mr. Azar did not present a prima facie case of discrimination during his case-in-chief and has moved to dismiss the charge under sections 1201(a)(1) and 1201(a)(3) accordingly. The Commonwealth further contends that the charge under sections 1201(a)(1) and 1201(a)(3) should be dismissed in any event because it established that it would not have allowed Mr. Azar to return to work even if he had not processed grievances as a shop steward. According to the Commonwealth, it refused to allow Mr. Azar to return to work because its review of two independent medical examinations of him and its review of the collective bargaining agreement governing his right to return from his work-related injury led it to believe that he was not sufficiently recovered from his injury to perform the duties of his job without restriction as required by the collective bargaining agreement in order for him to return to work.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(3) if it discriminates against an employe for having engaged in an activity protected by the Act. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). In order to prevail on a charge of discrimination, the charging party has the burden of proving by substantial evidence that the employe engaged in a protected activity, that the employer knew that the employe engaged in the protected activity and that the employer took action against the employe because the employe engaged in the protected activity. Id. If the charging party presents a prima facie case of discrimination during its case-in-chief, the charge is to be sustained unless the employer shows that it would have taken the same action even if the employe had not engaged in the protected activity. Perry County, 634 A.2d 808 (Pa. Cmwlth. 1994). If the charging party does not present a prima facie case of discrimination during its case-in-chief, the charge is to be dismissed. Id. "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). An overt display of union animus will support a finding that an employer was discriminatorily motivated. City of Erie, 29 PPER ¶ 29001 (Final Order 1997). So will an employer's disparate treatment of

similarly situated employes. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). An insubstantial explanation for an employer's action taken shortly after an employe engaged in protected activity will, too. Lehighton Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). Speculation is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

During his case-in-chief, Mr. Azar testified that he processed grievances as a shop steward (N.T. 9) and that he dealt with the manager of PennDOT's district 5 (Mr. Kirkland) when he did so (N.T. 9-11). Thus, he established that he engaged in a protected activity, see SEPTA, 28 PPER ¶ 28025 (Final Order 1996)(serving as a shop steward is a protected activity), and that the Commonwealth knew that he engaged in a protected activity. The Commonwealth does not argue otherwise. By the end of his case-in-chief, however, Mr. Azar had not established that the Commonwealth refused to allow him to return to work "in retaliation for [his] enthusiastic service as a Shop Steward." The Commonwealth's motion to dismiss the charge under sections 1201(a)(1) and 1201(a)(3) is, therefore, granted.

Preliminarily, it is noted that Mr. Azar does not contend in his brief as he alleged in his specification of charges that the Commonwealth deemed his physician's release of him to full, unrestricted duty to be invalid because his physician is a chiropractor when his physician in fact is a medical doctor or that the Commonwealth provided "bogus" job descriptions to two physicians who opined that he could no longer perform the duties of his job. An argument not made to a hearing examiner is, of course, waived. SSHE, 32 PPER ¶ 32118 (Final Order 2001). In any event, a close review of the record reveals no factual support for any such contention.

Mr. Azar contends in his brief that proof of a discriminatory motive on the part of the Commonwealth may be found in testimony he presented during his case-in-chief that Mr. Kirkland reacted with hostility toward him in particular when he processed grievances as a shop steward and toward other union representatives in general. Mr. Azar points out that he testified that Mr. Kirkland once told him to "take [two] grievances and stick them up your butt" (N.T. 12) and would terminate a grievance hearing "[i]f it wasn't going his way" (N.T. 13). Mr. Azar also points out that a former local president (Mr. Brown) testified that Mr. Kirkland has angry or upset with the local in general and twice treated him unfairly (N.T. 48-51). Mr. Brown further testified, however, that Mr. Kirkland was never angry or upset with Mr. Azar alone (N.T. 48-49) and was not hostile toward union representatives in general (N.T. 51-52). Moreover, during Mr. Azar's case-in-chief, Mr. Kirkland credibly testified that he played no role in the decision not to allow Mr. Azar to return to work (N.T. 58-60, 64-65) and that Mr. Azar was a highly-trained and skilled employe who he would love to have back if he were returned to work (N.T. 60-61). No discrimination is apparent on that record.

Mr. Azar further contends in his brief that proof of a discriminatory motive on the part of the Commonwealth may be found in testimony he presented during his case-in-chief that the Commonwealth subjected him to disparate treatment. According to Mr. Azar, the Commonwealth did not allow him to return to work following his work-related injury yet allowed other employes to return to work following their work-related injuries. Mr. Azar points out that he testified that another employe with a work-related injury drove a truck even though he had an air cast on his ankle (N.T. 28-30) and that with one exception other employes with work-related injuries returned to work (N.T. 27, 31). Mr. Azar also points out that Mr. Brown testified that employes with work-related injuries worked at the whim of Mr. Kirkland (N.T. 53-55). Mr. Azar further testified, however, that he was on workers' compensation and had an independent medical examination indicating that he was not able to return to work without restrictions (N.T. 16, 19, 41, 43; Complainant Exhibit 3). Notably, Mr. Azar did not show that the other employes who returned to work following their work-related injuries were on workers' compensation as he was or had independent medical examinations as he did. Thus, there is no basis for finding that he and those other employes were similarly situated. No disparate treatment is apparent under the circumstances. See Montour County, 35 PPER 147 (Final Order 2004)(no disparate treatment found where the employes involved were not similarly situated).

Mr. Azar finally contends in his brief that proof of a discriminatory motive on the part of the Commonwealth may be found in testimony that the Commonwealth's refusal to

allow him to return to work was inexplicable because his physician (Dr. Cerciello) released him to full, unrestricted duty and because he passed a functional capacity evaluation conducted by Dr. Cerciello. Mr. Azar points out that he testified that he gave to the Commonwealth an excuse slip from Dr. Cerciello indicating that he was able to return to work without any restrictions (N.T. 16-17; Complainant Exhibit 2), that he passed a functional capacity evaluation conducted by Dr. Cerciello (N.T. 20-21, 36; Complainant Exhibit 4) and that he is able to perform all of the duties set forth in his job description (N.T. 36; Complainant Exhibit 5). Mr. Azar also points out that an expert witness (MaryKay Rauenzahn, Esquire) testified that it is unusual for an employe to present a return to work slip from a treating physician as he did and not be allowed to return to work (N.T. 71-73) and that no employe on workers' compensation could reasonably expect not to return to work if they passed a functional capacity evaluation as he did (N.T. 75-78). In addition, Mr. Azar points out that Ms. Rauenzahn testified that someone with an interest in the outcome of his independent medical examination obviously contacted the physician who conducted it (Dr. Beredjiklian) to answer specific questions regarding his injury (N.T. 73-75). According to Mr. Azar, that someone must have been someone from PennDOT's district 5 who did not want him to return to work because of his service as a shop steward and who set up Dr. Beredjiklian to opine that he was not able to return to work without restrictions.

Mr. Azar's contention finds no support in the record. A close review of the excuse slip from Dr. Cerciello (Complainant Exhibit 2) reveals that it does not indicate when Dr. Cerciello last treated Mr. Azar. There is, therefore, no basis for finding that the Commonwealth should have regarded Dr. Cerciello as Mr. Azar's treating physician. Moreover, Mr. Azar testified that he never gave the functional capacity evaluation to the Commonwealth (N.T. 22, 39), so there is no basis for finding that the Commonwealth should have relied on it. Ms. Rauenzahn testified that there was nothing unusual about the independent medical examination of Mr. Azar by Dr. Beredjiklian (N.T. 73), so there is no basis for finding that someone from PennDOT's district 5 who did not want Mr. Azar to return to work because of his service as a shop steward set up Dr. Beredjiklian to opine that Mr. Azar was not able to return to work without restrictions. Furthermore, as noted above, Mr. Kirkland credibly testified that he had no role in deciding whether or not Mr. Azar would be allowed to return to work (N.T. 58-60, 64-65). No discrimination is apparent on that record.

Even if Mr. Azar had presented a prima facie case of discrimination during his case-in-chief, the result would be the same. As set forth in findings of fact 6-7, 9-10, 12 and 15, the Commonwealth established that its workers' compensation coordinator for PennDOT (Ms. Brilla) decided that Mr. Azar would not be allowed to return to work, that she had no knowledge of Mr. Azar's service as a shop steward when she made that decision and that she made that decision based on her review of the independent medical examination of Mr. Azar by Dr. Beredjiklian indicating that he could not return to work without restrictions, her review of a subsequent independent medical examination of Mr. Azar by another physician (Dr. Kelman) indicating that he could not return to work without restrictions and her understanding that article 23 of the collective bargaining agreement governing Mr. Azar's right to return from his work-related injury requires that an employe be able to fully perform the duties of their position in order to return to work. Thus, the Commonwealth established that it would not have allowed Mr. Azar to return to work even if he had not served as a shop steward. Accordingly, the charge as filed under sections 1201(a)(1) and 1201(a)(3) must be dismissed for that reason as well. See Commonwealth of Pennsylvania, Department of General Services, 36 PPER 170 (Proposed Decision and Order), 37 PPER 139 (Final Order 2006)(discrimination charge dismissed where the charging party did not show that the members of an interview panel who did not recommend an employe for a promotion were aware of his protected activities).

Mr. Azar contends that no reliance should be placed on Ms. Brilla's testimony as to why she decided not to allow him to return to work. Mr. Azar points out that Ms. Brilla admitted that she did not know what questions Dr. Beredjiklian was asked to answer in his independent medical examination of him (N.T. 116, 119) and that the Commonwealth has a financial interest in returning an employe on workers' compensation to work (N.T. 117). According to Mr. Azar, because Ms. Brilla did not know what questions Dr. Beredjiklian was asked to answer in his independent medical examination of him, she was in no position to refute that someone from PennDOT district 5 who did not want him to return to work because

of his service as a shop steward set up Dr. Beredjiklian to opine that he was not able to return to work without restrictions. According to Mr. Azar, because the Commonwealth had a financial interest in returning him to work, it necessarily follows that Ms. Brilla did not return him to work because of his service as a shop steward. Mr. Azar overlooks, however, that there is no basis for finding that anyone from PennDOT district 5, much less someone who did not want him to return to work because of his service as a shop steward, set up Dr. Beredjiklian to opine that he was not able to return to work without restrictions. Moreover, given that the collective bargaining agreement governing Mr. Azar's right to return to work (Employer Exhibit 2) provides that he must be fully capable of performing the duties of his position in order to return to work and that two physicians (Dr. Beredjiklian and Dr. Kelman) opined that he was only able to return to work with restrictions (Complainant Exhibit 3, Employer Exhibit 7), Ms. Brilla's admission that the Commonwealth has a financial interest in returning an employe on workers' compensation to work is unremarkable. Ms. Brilla's testimony has been credited accordingly.

Section 1201(a)(2) relates to the formation of company unions, Kennett Consolidated School District, 37 PPER 89 (Final Order 2006), while section 1201(a)(4) relates to discrimination based on the filing of a charge or petition with the Board. Id. The charge does not state a cause of action under either of those sections. Mr. Azar does not contend otherwise. The Commonwealth's motion to dismiss the charge as filed under those sections is, therefore, granted.

CONCLUSIONS

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

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

2. Mr. Azar is a public employe under section 301(2) of the Act.

3. The Board has jurisdiction over the parties.

4. The Commonwealth has not committed unfair practices under sections 1201(a)(1), 1201(a)(2), 1201(a)(3) or 1201(a)(4) 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 fifteenth day of February 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

Direct Dial
717-783-6025

Fax Number
717-783-2974

February 15, 2007

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COMMONWEALTH OF PENNSYLVANIA, DEPARTMENT OF TRANSPORTATION
Case No. PERA-C-06-389-E

Enclosed is a copy of my proposed decision and order.

Sincerely,

DONALD A. WALLACE
Hearing Examiner

Enclosure

cc: Donald Adams
Department of Transportation
Frank Fisher, Esquire