

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UTILITY WORKERS UNION OF AMERICA :
LOCAL 433 AFL-CIO¹ :
 :
v. : Case No. PERA-C-08-232-W
 :
WHITE OAK BOROUGH :

PROPOSED DECISION AND ORDER

On June 25, 2008, the Utility Workers Union of America, Local 433, AFL-CIO (Union), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that White Oak Borough (Borough) violated sections 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA) by laying off Eric Johnson and Larry Robertson and sections 1201(a)(1), (3), (4) and (5) of the PERA by laying off Roger Sullivan.² On June 27, 2008, the Secretary of the Board informed the Union that the Board was unable to process the charge as filed. Noting that "[y]our charge indicates that a grievance has been filed concerning this matter," the Secretary wrote that "[i]t will be necessary for you to amend the charge to provide a copy of the grievance."³ On July 3, 2008, the Union amended the charge to provide a copy of the grievance.⁴ On July 18, 2008, the Secretary issued a complaint and notice of hearing directing that a hearing be held on September 16, 2008, if conciliation did not resolve the charge by then. On July 31, 2008, the Borough filed an answer admitting to certain factual allegations in the charge but denying that it had committed unfair practices.

On September 16, 2008, the hearing was held. At the outset of the hearing, the Union, without objection by the Borough, amended the charge to allege that the Borough also violated the PERA by laying off Tim Crawford (N.T. 5). In response to an inquiry from the hearing examiner, the Union represented that the grievance was no longer pending because the Borough had refused to process it (N.T. 12).⁵ The Union further represented that it intended to file a charge over the Borough's refusal to process the grievance⁶ but had not yet done so.⁷ Id. The hearing examiner afforded both parties a full opportunity to

¹ The caption appears as amended by the hearing examiner to reflect the correct name of the complainant.

² The Union also alleged that the Borough violated section 1201(a)(2) of the PERA, but the Union withdrew that portion of the charge at the hearing (N.T. 4). Accordingly, the charge as filed under section 1201(a)(2) is no longer before the Board and will not be addressed.

³ Providing a copy of a related grievance allows the Board to determine if it should defer processing a charge pending the disposition of the grievance under a grievance/arbitration procedure. See Pine Grove Area School District, 10 PPER ¶ 10167 (Order Deferring Unfair Practice Charge Until Further Order of the Board 1979).

⁴ The Union alleges in the grievance that the Borough violated the parties' collective bargaining agreement by laying off Mr. Johnson, Mr. Robertson and Mr. Sullivan.

⁵ In light of the Union's representation, the hearing examiner did not defer the charge. Deferral is inappropriate if a grievance is no longer pending as of the date of a hearing. Hazleton Area School District, 29 PPER ¶ 29180 (Final Order 1998).

⁶ In light of the Union's further representation, it would appear that the grievance was pending as of the date of the hearing and therefore subject to deferral. The hearing examiner nevertheless did not defer the charge. Under Pine Grove Area School District, supra, deferral is inappropriate to the extent that a charge alleges discrimination, City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989); Dauphin County, 32 PPER ¶ 32007 (Final Order 2000), so the discrimination aspect of the charge was not subject to deferral. Moreover, under Pine Grove Area School District, deferral is inappropriate if the related grievance is not expeditiously processed to arbitration, so the refusal to bargain aspect of the charge was not subject to deferral either. The Borough does not argue otherwise.

⁷ On November 3, 2008, the Union filed a charge alleging that the Borough committed unfair practices by refusing to process the grievance (Case No. PERA-C-08-426-W). Deferral is still inappropriate, however, for the reasons set forth in footnote 6, supra.

present evidence and to cross-examine witnesses. On November 7, 2008, each party filed a brief by deposit in the U.S. Mail.

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 February 22, 2005, the Board, pursuant to a joint request of the parties, certified the Union as the exclusive representative of a bargaining unit that includes street and sewer department employees of the Borough. (Case No. PERA-R-04-610-W)

2. In May 2006, a sewer department employee who was a steward for the Union at the time (Mr. Crawford) was told by his supervisor (Paul Kovac) that "Council was getting upset with all the things that were going on" and that "somebody was going to end up losing a job" if the Union "didn't stop nitpicking." (N.T. 48-52)

3. In July and August 2006, the Borough had "budget problems" and laid off two employees in the street department who were stewards for the Union (Mr. Johnson and Mr. Sullivan). (N.T. 13, 27, 34, 50-51, 70, 82-83, 123)

4. In October 2006, the parties began negotiations for a successor collective bargaining agreement. Mr. Johnson and Mr. Sullivan appeared at the bargaining table as members of the Union's bargaining team. (N.T. 13-14, 34, 83)

5. By December 23, 2006, the Borough reached an agreement to sell its sewer department to the Municipal Authority of Westmoreland County (Authority). There were two employees in the sewer department at the time (Mr. Crawford and Mr. Robertson). Combined, their wages and fringe benefits totaled approximately \$140,000.00 per year. The Borough paid their wages and fringe benefits from sewer department revenues. (N.T. 93-99)

6. For 2007, the Borough transferred \$266,000.00 from its surplus account to its general fund to balance its budget. (N.T. 89)

7. On January 16, 2007, the parties entered into a collective bargaining agreement that was effective by its own terms from January 1, 2007, through December 31, 2007. (N.T. 14-15, 57; Complainant Exhibit 2)

8. The collective bargaining agreement provides in an addendum as follows:

"The parties hereby agree that there shall be no layoff of the eight Public Works Employees six (6) Former Street Department Employees and two (2) former Sewer Department Employees from January 1 through December 31, 2007.

The parties further agree that if during 2007 both of the two (2) former sewer department employees, Tim Crawford and Larry Robertson, are separated from their employment with White Oak Borough, then this collective bargaining agreement shall be reopened for negotiation of all terms with the exception of medical insurance for the year of 2007."

(Complainant Exhibit 2)

9. In January 2007, the Borough sold its sewer department to the Authority for \$3,325,000.00. The Borough's council has restricted the use of those funds since then. (N.T. 23, 52, 93-94, 96, 111-112)

10. On September 7, 2007, the parties met to negotiate a successor collective bargaining agreement. Mr. Johnson and Mr. Sullivan were members of the Union's bargaining team. (N.T. 44-46, 63, 100-101)

11. For 2008, the Borough transferred \$594,000.00 from its surplus account to its general fund to balance its budget, leaving it with \$54,000.00 in its surplus account; budgeted for two replacement police officers; hired one replacement police officer; eliminated a secretarial position; stopped repaving its streets; gave a 3% wage increase

to a supervisor (Jim McCabe); gave a 2% wage increase to some of its secretarial staff; and cut from its budget \$30,000.00 for a new dump truck. (N.T. 89-92, 110-111, 113)

12. On March 24, 2008, the Union filed with the Board a charge of unfair practices alleging that the Borough violated the PERA by not reimbursing Mr. Sullivan for a medical co-pay. The Board docketed the charge to Case No. PERA-C-08-106-W. (N.T. 37; Complainant Exhibit 7)

13. On April 17, 2008, the parties executed an agreement under which the Borough in settlement of the charge filed to Case No. PERA-C-08-106-W "agree[d] to pay the sum of \$150.00 to bargaining unit employee Roger S. Sullivan to reimburse him as per an invoice submitted for his medical copay." A member of the Borough's council (Kenneth Robb) authorized the settlement because "[i]t wasn't worth the time or expense we would have to go through to process the claim." (N.T. 38-39, 80, 86-88; Complainant Exhibit 8)

14. In May 2008, the Borough reimbursed Mr. Sullivan \$150.00 for the medical copay. (N.T. 38-39)

15. On June 13, 2008, the Borough laid off Mr. Johnson, Mr. Sullivan and Mr. Robertson and terminated their insurance benefits. They were the least senior employees at the time. (N.T. 17-19, 27, 35, 39, 54, 85, 117; Complainant Exhibits 3a and 3b)

16. By letter dated September 10, 2008, the Borough laid off Mr. Crawford and terminated his insurance benefits effective September 14, 2008. He was the least senior employee at the time. (N.T. 47-48, 51, 53, 85, 117; Complainant Exhibit 3c)

17. The parties have not reached a successor collective bargaining agreement. (N.T. 115, 118)

18. The employees have not engaged in a work stoppage. (N.T. 35, 58, 117-118)

DISCUSSION

The Union has charged that the Borough violated sections 1201(a)(1), (3) and (5) by laying off Mr. Crawford, Mr. Johnson and Mr. Robertson and sections 1201(a)(1), (3), (4) and (5) by laying off Mr. Sullivan. The Union contends that the Borough committed unfair practices under sections 1201(a)(1) and (5) because it unilaterally changed the status quo following the expiration of the parties' collective bargaining agreement by laying them off in violation of a no layoff clause in the collective bargaining agreement. The Union contends that the Borough committed unfair practices under sections 1201(a)(1) and (3) because it laid them off in retaliation for Mr. Johnson and Mr. Sullivan having been stewards for the Union and members of its bargaining team. The Union contends that the Borough committed unfair practices under sections 1201(a)(1) and (4) because it laid off Mr. Sullivan in retaliation for his having filed a charge with the Board.

The Borough denies that it has committed any unfair practices. The Borough contends that it did not unlawfully change the status quo when it laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson because it exercised a matter of inherent managerial prerogative in laying them off and because it was contractually privileged to lay them off. The Borough also contends that it did not unlawfully lay them off. According to the Borough, it laid them off for budgetary and operational reasons.

The charge as filed under sections 1201(a)(1) and (5)

Following the expiration of a collective bargaining agreement, an employer is obligated to maintain the status quo as to a mandatory subject of bargaining covered by the collective bargaining agreement while the parties negotiate for a successor collective bargaining agreement. 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) (construing analogous provisions of the Pennsylvania Labor Relations Act). Thus, following the expiration of a collective bargaining agreement, an employer violates sections 1201(a)(1) and (5) if it changes a mandatory subject of bargaining

covered by the collective bargaining agreement unless it has proposed the change to the mandatory subject of bargaining, the parties are at impasse in their negotiations for a successor collective bargaining agreement and the employees are engaged in a work stoppage. Philadelphia Housing Authority v. PLRB, 620 A.2d 594 (Pa. Cmwlth. 1993), petition for allowance of appeal denied, 536 Pa. 634, 637 A.2d 294 (1993); Clinton County, 24 PPER ¶ 24144 (Final Order 1993); Housing Authority of the City of Pittsburgh, 21 PPER ¶ 21076 (Final Order 1990).

An employer is, however, under no obligation to bargain over a matter of inherent managerial policy. Joint Bargaining Committee of PSSU and PESEA v. PLRB, 503 Pa. 236, 469 A.2d 150 (1983). Thus, no violation of sections 1201(a)(1) and (5) may be found if the employer changes the status quo following the expiration of a collective bargaining agreement by exercising a matter of inherent managerial policy covered by the collective bargaining agreement. Pennsylvania State Park Officers Association, *supra*.

Nor may a violation of sections 1201(a)(1) and (5) be found if the employer was contractually privileged to act as it did. Port Authority of Allegheny County, Case No. PERA-C-07-323-W (Final Order, October 21, 2008), citing Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000). As the court explained in Pennsylvania State Troopers Association:

"The [Board] has recognized 'contractual privilege' as an affirmative defense to a charge of unfair labor practices alleging a refusal to bargain in good faith. The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible under the agreement. See [Ellwood City Police Wage and Policy Unit v. Ellwood City Borough], 29 PPER ¶ 29213 (Final Order 1998), *aff'd*, 736 A.2d 707 (Pa. Cmwlth. 1999)]; [Delaware County Lodge #27 of the Fraternal Order of Police on behalf of the Members of the Police Force of the Borough of Prospect Park v. Prospect Park Borough], 27 PPER [¶] 27222 (Final Order 1996); [Jersey Shore Area Education Association v. Jersey Shore Area School District], 18 PPER [¶] 18117 (Final Order 1987)(quoting NCR Corp., 271 N.L.R.B. 1212 (1984) as saying that 'where an employer has a sound arguable basis for ascribing a particular meaning to his contract and his action is in accordance with the terms of the contract as he construes it, the [National Labor Relations Board] will not enter the dispute to serve the function of arbitrator in determining which party's interpretation is correct')." "

761 A.2d at 651. In such a case, the employer satisfied its statutory obligation to bargain in good faith when it entered into the collective bargaining agreement.

As more fully explained below, the record shows that the Borough was exercising a matter of inherent managerial policy when it laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson following the expiration of the parties' collective bargaining agreement, so there is no basis for finding that it changed the status quo as to a mandatory subject of bargaining at the time. As also more fully explained below, the record shows that the Borough was contractually privileged to lay them off as it did, so even if it changed the status quo as to a mandatory subject of bargaining when it laid them off, there is no basis for finding that it did so unilaterally. Accordingly, the charge as filed under sections 1201(a)(1) and (5) must be dismissed for lack of proof.

In support of its contention that the Borough unilaterally changed the status quo following the expiration of the parties' collective bargaining agreement by laying off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson, the Union points out that the collective bargaining agreement contains a no layoff clause (finding of fact 8) and that the employees were not engaged in a work stoppage when the Borough laid them off (finding of fact 18). The Union also posits that an employer unilaterally changes the status quo following the expiration of a collective bargaining agreement if it violates any provision in the collective bargaining agreement, regardless of whether the provision involves a matter of inherent managerial policy or a mandatory subject of bargaining, so long as the parties have not reached impasse and the employees are not engaged in a work stoppage.

In Pennsylvania State Park Officers Association, *supra*, however, the court opined that in a case of this nature "[t]he threshold determination is whether a contract term is a mandatory subject of bargaining[.]" 854 A.2d at 679. Thus, contrary to the Union's contention, the dispositive inquiry is whether or not the Borough unilaterally changed the status quo as to a mandatory subject of bargaining when it laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson following the expiration of the parties' collective bargaining agreement.⁸

Under Board case law, a layoff is a matter of inherent managerial policy, not a mandatory subject of bargaining. Cornell School Service Personnel Association, PSSPA/PSEA v. Cornell School District, 14 PPER ¶ 14147 (Court of Common Pleas of Allegheny County 1983); Commonwealth of Pennsylvania, Department of Agriculture, 19 PPER ¶ 19175 (Final Order 1988); Commonwealth of Pennsylvania, Department of Labor and Industry, 14 PPER ¶ 14264 (Final Order 1983); Harrisburg School District, 13 PPER ¶ 13077 (Final Order 1982); Northampton County, 38 PPER 62 (Proposed Decision and Order 2007). See also Schuylkill Borough v. Schuylkill Borough Police Officers Association, 914 A.2d 936 (Pa. Cmwlth. 2006)(a no layoff clause for police officers is a managerial prerogative under Act 111 of 1968). Thus, the Borough did not change the status quo as to a mandatory subject of bargaining when it laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson following the expiration of the parties' collective bargaining agreement. There is, therefore, no basis for finding that that the Borough violated sections 1201(a)(1) and (5) when it laid them off.

The Union cites Commonwealth of Pennsylvania v. PLRB, 557 A.2d 1112 (Pa. Cmwlth. 1989), SERB v. Cuyahoga County Commissioners, 1988 OPER (LRP) LEXIS 3049 (1989), and NLRB v. Frontier Homes Corporation, 371 F.2d 974, 64 LRRM 2320 (8th Cir. 1967), for the proposition that a lay off is a mandatory subject of bargaining, not a matter of inherent managerial policy. In Commonwealth of Pennsylvania, however, the court did not hold that a layoff is a mandatory subject of bargaining; rather, the court held that the transfer of bargaining unit work to non-members of the bargaining unit is a mandatory subject of bargaining. The Union's reliance on that case is, therefore, misplaced. In Cuyahoga County Commissioners, the Ohio State Employment Relations Board found that a layoff is a mandatory subject of bargaining, but as noted above Board case law is that a layoff is a matter of inherent managerial policy, so the Union's reliance on Cuyahoga County Commissioners is misplaced as well. In Frontier Homes Corporation, the court held that the procedure for laying off employes is a mandatory subject of bargaining; it did not hold that a layoff is a mandatory subject of bargaining. Thus, the Union's reliance on that case is misplaced, too. Moreover, to the extent that a layoff may be a mandatory subject of bargaining under federal law, see Lapeer Foundry and Machine, Inc., 289 NLRB No. 126, 129 LRRM 1001 (1988), any reliance on federal law is equally misplaced because Board case law is, as noted above, that a layoff is a matter of inherent managerial policy.

The Union also points out that the Borough terminated Mr. Crawford's, Mr. Johnson's, Mr. Sullivan's and Mr. Robertson's insurance benefits when it laid them off. An insurance benefit is, of course, a mandatory subject of bargaining. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). In City of Philadelphia, 28 PPER ¶ 28048 (Final Order 1997), however, the Board explained that an employer is under no obligation to bargain over a change to a mandatory subject of bargaining where the change to the mandatory subject of bargaining inevitably results from and therefore is non-severable from its exercise of the matter of inherent managerial policy. The termination of Mr. Crawford's, Mr. Johnson's, Mr. Sullivan's and Mr. Robertson's insurance benefits inevitably resulted from and therefore was non-severable from the Borough's exercise of its managerial right to lay them off. Thus, the Borough was under no obligation to bargain over the termination of their insurance benefits.

⁸ The same analysis applies even if a provision in a collective bargaining agreement is not at issue. See Hazleton Area School District, *supra* (employer violated sections 1201(a)(1) and (5) when it changed mandatory subjects of bargaining during a hiatus between collective bargaining agreements); Hazleton Area School District, 28 PPER ¶ 28209 (Proposed Decision and Order 1997)(employer did not violate sections 1201(a)(1) and (5) when it changed a matter of inherent managerial policy during a hiatus between collective bargaining agreements). Thus, to the extent that the Union may be contending that an employer changes the status quo by taking any unilateral action following the expiration of the parties' collective bargaining agreement, there is no basis for any such contention.

Even if there were a basis for finding that the Borough changed the status quo as to a mandatory subject of bargaining when it laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson, there is no basis for finding that it did so unilaterally. Notably, in providing that "there shall be no layoff of the eight Public Works Employees six (6) Former Street Department Employees and two (2) former Sewer Department Employees from January 1 through December 31, 2007," the no layoff clause in the parties' collective bargaining agreement expressly references a discrete period of time (finding of fact 8). Given that reference to a discrete period of time through December 31, 2007, the Borough has a sound basis for interpreting the collective bargaining agreement to mean that it could lay them off after that December 31, 2007. Moreover, the record shows that the Borough laid them off after December 31, 2007 (findings of fact 15-16), so it is apparent that the Borough acted in conformity with that interpretation of the collective bargaining agreement. Thus, it was contractually privileged to lay them off as it did.⁹ Under the analysis set forth in Pennsylvania State Troopers Association, then, there is no basis for finding that the Borough acted unilaterally when it laid them off.

On a substantially similar record in Bristol Township School District, 25 PPER ¶ 25031 (Final Order 1994), the Board employed the same analysis in dismissing a charge alleging that an employer committed unfair practices under sections 1201(a)(1) and (5) by entering into a subcontract in violation of a collective bargaining agreement. In that case, a clause in the parties' collective bargaining agreement provided as follows:

"Nothing herein shall prevent the [employer] from subcontracting during the life of this Agreement except that the [employer] agrees not to consider subcontracting during the first six (6) months following ratification so as to give [a cost containment] committee an opportunity to work."

Noting the discrete period of time referenced in the clause, the Board reasoned that the employer had a sound basis for interpreting the collective bargaining agreement to mean that it could enter into a subcontract after that discrete period of time had passed. Noting further that the employer only entered into the subcontract after that discrete period of time had passed, the Board found that the employer was contractually privileged to subcontract as it did and therefore did not act unilaterally when it entered into the subcontract.

The charge as filed under sections 1201(a)(1) and (3)

An employer commits an unfair practice under section 1201(a)(3) if it discriminates against employees for having engaged in an activity protected by the PERA. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Representing an employee organization is a protected activity. SEPTA, 28 PPER ¶ 28025 (Final Order 1996). "The motive creates the offense" under section 1201(a)(3). 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 anti-union animus by an employer may support a finding that the employer was discriminatorily motivated. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). The timing of events alone, however, may not. Pennsylvania State Park Officers Association, *supra*. An employer violates section 1201(a)(1) on a derivative basis if it violates section 1201(a)(3). PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). An employer does not violate section 1201(a)(3) if it takes an employment action for budgetary reasons. Kennett Consolidated School District, 37 PPER 89 (Final Order 2006).

In order to prevail on a charge under sections 1201(a)(1) and (3), the charging party must show by substantial evidence during its case-in-chief that the employees engaged in a protected activity, that the employer knew that the employees engaged in the protected activity and that the employer discriminated against the employees for having engaged in the protected activity. Perry County, 634 A.2d 808 (Pa. Cmwlth. 1994). If the charging party presents a prima facie case 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 employees had not engaged in the protected activity. Id. Evidence introduced after the

⁹ In finding that the Borough was contractually privileged to lay off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson, the hearing examiner expresses no opinion as to whether or not the Borough violated the no layoff clause in the parties' collective bargaining agreement. Under the circumstances of this case, only an arbitrator may decide that question.

charging party presents its case-in-chief is not to be considered in deciding whether or not the charging party presented a prima facie case. Erie City School District, 39 PPER 8 (Final Order 2008). Speculation is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

There is no dispute that Mr. Johnson and Mr. Sullivan engaged in protected activity by representing the Union. There also is no dispute that the Borough knew that Mr. Johnson and Mr. Sullivan engaged in protected activity by representing the Union. The dispositive question, then, is whether or not the Borough laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson because Mr. Johnson and Mr. Sullivan engaged in protected activity by representing the Union.

As more fully explained below, the record does not show that the Union presented a prima facie case during its case in case-in-chief. The record also shows that in rebuttal to any prima facie case that the Union may have presented the Borough established that it would have laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson even if Mr. Johnson and Mr. Sullivan had not engaged in protected activity. Accordingly, the charge as filed under sections 1201(a)(1) and (3) must be dismissed for lack of proof.

During its case-in-chief, the Union established that when Mr. Crawford was a steward for the Union in May 2006 his supervisor (Mr. Kovac) told him that "Council was getting upset with all the things that were going on" and that "somebody was going to end up losing a job" if the Union "didn't stop nitpicking" (N.T. 48-50); that in 2006 Mr. Johnson and Mr. Sullivan were stewards for the Union and appeared at the bargaining table as members of the Union's bargaining team during the parties negotiations for a collective bargaining agreement for 2007 (N.T. 13-14, 34; Complainant Exhibit 2); that Mr. Sullivan and Mr. Robertson have been members of the Union's bargaining team during the parties ongoing negotiations for a successor collective bargaining agreement (N.T. 61, 63); that on June 13, 2008, the Borough laid off Mr. Johnson, Mr. Sullivan and Mr. Robertson (N.T. 17, 19, 27, 35, 54; Complainant Exhibits 3a and 3b); and that by letter dated September 10, 2008, the Borough laid off Mr. Crawford effective September 14, 2008 (N.T. 47-48; Complainant Exhibit 3c).¹⁰

According to the Union, Mr. Kovac's comment and the timing of events are substantial evidence that the Borough was motivated by anti-union animus when it laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson. As set forth in Pennsylvania State Park Officers Association, *supra*, however, the timing of events alone will not support a discrimination charge, so any support for the charge must be found in the overt display of anti-union animus as reflected in Mr. Kovac's comment. Notably, however, Mr. Kovac made his comment more than two years before the Borough laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson. On a substantially similar record in Cameron County School District, 37 PPER 45 (Final Order 2006), the Board found no basis for concluding that an employer was motivated by anti-union animus when it refused to promote an employe who had engaged in protected activity. Noting that the employe had engaged in the protected two years before the employer refused to promote her, the Board reasoned that the passage of time between the time she had engaged in protected activity and the time the employer refused to promote her militated against a finding that the employer was motivated by anti-union animus. Moreover, as a close review of the parties' collective bargaining agreement for 2007 reveals, the Borough agreed to a no layoff clause after Mr. Kovac made his comment (Complainant Exhibit 2). No anti-union animus on the part of the Borough is apparent under the circumstances.¹¹

¹⁰ The Union also established that in 2006 the Borough laid off Mr. Johnson and Mr. Sullivan during the parties' negotiations for the collective bargaining agreement for 2007 (N.T. 27, 50-51, 70) and that nonmembers of the bargaining unit performed bargaining unit work after the Borough laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson (N.T. 71-72).

¹¹ Although the Union does not argue otherwise, the fact that the Borough laid off Mr. Johnson and Mr. Sullivan in 2006 does not compel a contrary result. Again, the passage of time between the lay offs in 2006 and the lay offs in 2008 militates against a finding that the Borough was motivated by anti-union animus in 2008. Moreover, the fact that nonmembers of the bargaining unit performed bargaining unit work after the Borough laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson does not compel a contrary result either. The performance of bargaining unit work by nonmembers of the bargaining unit might be evidence of a unilateral change to a mandatory subject of bargaining, but standing alone it is not evidence of anti-union animus.

Even if the Union had presented a prima facie case during its case-in-chief, the result would be the same. In rebuttal to any prima facie case that the Union may have presented and in support of its contention that it laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson for budgetary and operational reasons, the Borough presented testimony by a member of its council (Kenneth Robb, Esquire) as follows: that in January 2007 the Borough sold its sewer department (N.T. 84, 93-94); that Mr. Crawford and Mr. Robertson had been working in the sewer department and had been paid from sewer department revenues (N.T. 96-99); that for 2007 the Borough transferred \$266,000.00 from its surplus account to its general fund to balance its budget (N.T. 89); that for 2008 the Borough transferred \$594,000.00 from its surplus account to its general fund to balance its budget, leaving it with \$54,000.00 in its surplus account (N.T. 89-90); that for 2008 the Borough budgeted for two replacement police officers but only hired one, eliminated a secretarial position, stopped repaving its streets and cut \$30,000.00 for a new dump truck from its budget (N.T. 90-92); and that Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson were the least senior employes when the Borough laid them off (N.T. 83-85). On that record, it is apparent that the Borough would have laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson for budgetary and operational reasons even if Mr. Johnson and Mr. Sullivan had not engaged in protected activity.

The Union contends that Mr. Robb's testimony should be discredited because it was not corroborated by documentary evidence and because the Borough's economic plight was not as grave as he testified. The Union points out that the Borough realized \$3,325,000.00 from the sale of its sewer department (finding of fact 9), had \$266,000.00 in surplus funds and gave a 3% wage increase to a supervisor (Mr. McCabe) and a 2% wage increase to some of its secretarial staff (finding of fact 13).

Mr. Robb's testimony was unrebutted, however, and has been credited accordingly. Moreover, although the Borough realized \$3,325,000.00 from the sale of its sewer department, the fact remains that the work Mr. Crawford and Mr. Robertson performed there no longer exists, so to the extent that the Borough contends that it laid them off for operational reasons, its contention finds support in the record. Beyond that, an employer has the managerial prerogative to determine the level of services it provides, so the mere fact that it lays off employes while funds are available for other matters does not compel a finding that it was motivated by anti-union animus where the totality of circumstances dictates otherwise. Youngwood Borough, 17 PPER ¶ 17006 (Proposed Decision and Order 1985), 18 PPER ¶ 18006 (Final Order 1986), aff'd sub nom. Youngwood Borough Police Department v. Commonwealth of Pennsylvania, PLRB, 539 A.2d 26 (Pa. Cmwlth. 1988). Thus, although the Borough did not spend the \$3,325,000.00 to retain all of its employes, given that the \$3,325,000.00 was from a one time sale of a capital asset, that the Borough has experienced substantial shortfalls in operating revenues over the past two years and that the Borough undertook a number of other cost saving measures to balance its budget for 2008, the totality of circumstances supports the Borough's contention that it laid off Mr. Crawford, Mr. Johnson, Mr. Sullivan and Mr. Robertson for budgetary reasons. Furthermore, although the Borough had \$266,000.00 in surplus funds at one time, it spent them to meet its operating expenses for 2007 (finding of fact 6) just as it spent \$594,000.00 more in surplus funds to meet its operating expenses for 2008 (finding of fact 11). Finally, given the number of other cost saving measures undertaken by the Borough to balance its budget for 2008, the fact that it granted marginal pay increases to some of its employes for 2008 is unexceptional.

The charge as filed under sections 1201(a)(1) and (4)

An employer commits unfair practices under sections 1201(a)(1) and (4) if it retaliates against an employe for having filed a charge with the Board. Lebanon County, 32 PPER ¶ 32006 (Final Order 2000). The analysis to be employed in disposing of a charge under section 1201(a)(4) mirrors the analysis to be employed in disposing of a charge under section 1201(a)(3). Id. Again, the discriminatory motivation creates the offense. Id.

During its case-in-chief, the Union established that on behalf of Mr. Sullivan it filed a charge on March 24, 2008 (finding of fact 12) and that the Borough laid him off on June 13, 2008 (finding of fact 15). The Union also presented testimony by Mr. Sullivan as to why he thought that the Borough laid him off. Mr. Sullivan testified as follows:

"I contacted the Union, we filed these charges and through the charges, they agreed to pay me. Shortly after that, I was laid off.

Hopefully, that had no bearing on it, but it sure seemed like, you know, if I didn't charge them, maybe I wouldn't have been laid off, or it could be that being I was Union steward and filed the charges, I was laid off."

(N.T. 39).

The Union did not thereby present a prima facie case, however. As set forth in Pennsylvania State Park Officers Association, supra, the timing of events alone will not support a discrimination charge, so the mere fact that the Borough laid off Mr. Sullivan after the Union filed the earlier charge on his behalf provides no support for the instant charge. Moreover, Mr. Sullivan's testimony is based on speculation. Speculation is not substantial evidence, Shive, supra, so Mr. Sullivan's testimony provides no better support for the instant charge. Accordingly, the charge as filed under sections 1201(a)(1) and (4) must be dismissed for lack of proof.

Even if the Union had presented a prima facie case, the result would be the same. In view of Mt. Robb's testimony noted above, it is apparent that the Borough would have laid off Mr. Sullivan for budgetary reasons even if the Union had not filed the earlier charge on his behalf.

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 PERA.
2. The Union is an employe organization under section 301(3) of the PERA.
3. The Board has jurisdiction over the parties.
4. The Borough has not committed unfair practices under sections 1201(a)(1), (3), (4) or (5) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, 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 fifth day of December 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner