# COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

INTERNATIONAL BROTHERHOOD OF PAINTERS
AND ALLIED TRADES LOCAL UNION 1968

:

v. : Case No. PERA-C-07-377-W

:

ERIE CITY SCHOOL DISTRICT

#### PROPOSED DECISION AND ORDER

On August 30, 2007, Local 1968, International Union of Painters and Allied Trades (Local 1968), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the School District of the City of Erie (District) violated sections 1201(a)(1), 1201(a)(3) and 1201(a)(4) of the Public Employe Relations Act (PERA) by "refus[ing] to return David Welz to his Truck Driver position with restrictions" after he suffered a work-related injury. On September 12, 2007, the Secretary of the Board informed Local 1968 that she was not able to process the charge as filed and that it had to amend the charge "to specify the exact date or dates upon which you believe an unfair practice occurred." On September 27, 2007, Local 1968 amended the charge to allege that "[t]his charge arose in August, 2007, on which Kenneth Sambuchino was returned to work as an HVAC Technician notwithstanding the fact his restrictions appear to prevent him from fully performing his duties as an HVAC Technician."

On October 17, 2007, the Secretary issued a complaint and notice of hearing directing that a hearing be held on December 12, 2007, if conciliation did not resolve the charge by then. The hearing examiner subsequently continued the hearing sua sponte because of a scheduling conflict, upon the request of the District and without objection by the Association and upon the request of both parties. On July 11, 2008, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On September 5, 2008, each party filed a brief by deposit in the U.S. Mail.

On September 25, 2008, Local 1968 requested a conference to discuss a proposal that it had to supplement the record. Local 1968 represented that the District was opposed to the proposal. On September 30, 2008, the hearing examiner gave Local 1968 ten days to file a motion to reopen the record and the District ten days after its receipt of the motion to file a response. On October 3, 2008, Local 1968 filed a motion to reopen the record. On October 14, 2008, the District filed a response. On October 28, 2008, the hearing examiner denied the motion.

The hearing examiner, on the basis of the evidence presented at the hearing, makes the following:

## FINDINGS OF FACT

- 1. Local 1968 represents a bargaining unit that includes truck drivers employed by the District. (N.T. 69; District Exhibit 2)
- 2. In 1988, Mr. Welz began working for the District "mainly" as a truck driver delivering school and office supplies in a van. In that capacity, he lifted boxes of paper weighing in excess of 50 pounds. From "time to time," he worked as a truck driver delivering food supplies. In that capacity, he lifted containers weighing up to 70 pounds. He also lifted containers overhead. (N.T. 8-11, 13-14, 20-21, 29-30, 34-35)
- 3. In 1996, a carpenter for the District (David Smith) returned to work as a carpenter after he suffered a non-work related injury. A cast restricted his ability to perform the job at the time. (N.T. 55-58)
- 4. Effective July 1, 2003, Local 1968 and the District entered into a five-year collective bargaining agreement, article XXIV of which provides in pertinent part as follows:

#### "LIGHT DUTY POLICY

- A. Any employee disabled as a result of a work related injury may be offered a transitional work assignment if such work is available at the time.
- B. The specific duties assigned any such employee shall depend upon the following factors:
  - 1) Restrictions established by the District or approved by a physician of the District's choice.
  - 2) The qualifications, skills, and ability of the employee.
  - 3) The work requirements of the District at the time.
- C. The duration of the transitional work assignment or the light duty assignment shall be determined by the District in light of the nature of the injury, the prognosis of the physician involved and the continuing availability of appropriate work. Assignments will be reviewed from time to time to assess their duration. In no event will an employee be in light duty status on a permanent basis.

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- E. The objective of the program shall be to return the employee to his regular assignment at the earliest possible time with due regard for the safety of the employee."
- (N.T. 71; District Exhibit 2)
- 5. In 2004, Mel Himes retired as an engineer for the District. He has worked on a per diem basis performing a variety of tasks since then. If he is unable to perform a task, he so informs the District. The District then assigns him another task. (N.T. 59-61)
- 6. On May 23, 2004, a custodian for the District (Nino Laverso) suffered a work related injury. He has been on light duty as a custodian ever since. If a custodial task requires heavy lifting, he does not perform the task. (N.T. 52-55, 86; District Exhibit 3)
  - 7. In the fall of 2005, the District discharged Mr. Welz. (N.T. 10)
  - 8. Mr. Welz grieved his discharge. (N.T. 10)
- 9. On August 5, 2006, an engineer for the District (John Leone) suffered an injury. He subsequently returned to work as an engineer on a light duty basis. He is licensed as an engineer. (N.T. 85; District Exhibit 3)
- 10. On September 8, 2006, an HVAC technician for the District (Mr. Sambuchino) suffered a work-related injury. He returned to work first as a substitute for an engineer and then as a bus driver. (N.T. 38-39, 42, 81; District Exhibit 3)
- 11. In the fall of 2006, an arbitrator issued an award resolving the grievance. The arbitrator directed that Mr. Welz be reinstated and made whole. (N.T. 10)
- 12. The parties met to discuss Mr. Welz's reinstatement. The District was prepared to reinstate him as a truck driver delivering school and office supplies until his supervisor (Tom Scalzitti), referring to himself, said that he "looked like an elephant," had "a memory like an elephant" and could not forget that Mr. Welz made "some derogatory remarks" when he said hello to Mr. Welz while Mr. Welz was discharged. (N.T. 12-13, 65-66, 78)
- 13. The District reinstated Mr. Welz as a truck driver delivering food supplies. It has not reimbursed him for parking, meal or mileage expenses that he incurred when seeking medical services for his wife while he was discharged. (N.T. 10-14, 22-26, 29, 73, 84; Local 1968 Exhibit C)

- 14. On February 12, 2007, a substitute nurse who traveled from school to school for the District (Debbie Nellis) returned to work following an injury. She performed other duties at a school on a light duty basis for six weeks. (N.T. 85; District Exhibit 3)
- 15. On February 19, 2007, Mr. Welz underwent surgery for a work-related injury.  $(N.T.\ 16-17)$
- 16. On April 20, 2007, Mr. Welz's physician (Dr. Mark Bloomstine) indicated that Mr. Welz could return to work with lifting restrictions on an indefinite basis. The restrictions were as follows: "Below Waist 50 #" and "Above Waist 5 #." (N.T. 17; Local 1968 Exhibit B)
- 17. The District's employe benefits manager (Christine Longo) reviewed the lifting restrictions and found a light duty position for Mr. Welz. (N.T. 17, 74-76, 83, 87-88)
- 18. The District returned Mr. Welz to work first in a stock room at the service center, then at the administration building where he "watched the door for security reasons," then at the service center and then as a custodian. He has worked as a custodian on a temporary basis ever since. (N.T. 18, 73, 87; District Exhibit 3)
- 19. As a custodian, Mr. Welz is not eligible for overtime that truck drivers may work. He is otherwise paid the same as a truck driver. (N.T. 18-19, 80)
- 20. On June 18, 2007, a bus driver for the District (Linda Maurer) returned to work with restrictions following an injury. She initially worked "the radio job" at the service center. (N.T. 86; District Exhibit 3)
- 21. On August 8, 2007, a physician indicated that Mr. Sambuchino was restricted on an indefinite basis from lifting from floor to waist weights in excess of 30 to 35 pounds, carrying weights in excess of 30 pounds except on occasion, bending on occasion and working from a ladder. Mr. Sambuchino has worked as an HVAC technician ever since. He is licensed to work with boilers and freon. (N.T. 41-44, 81; District Exhibit 3)
- 22. In October 2007, an electrician for the District (Lewis Ross) returned to work as an electrician after he suffered an injury. A cast restricted his ability to perform the job at the time. He is licensed as a journeyman. (N.T. 44-47, 50)
- 23. On March 10, 2008, Dr. Bloomstine wrote to the District's workers' compensation carrier as follows:
  - "I reviewed the FCE and lengthy review of [Mr. Welz's] job description and addendum to job analysis. I would concur with the consideration of allowing 100 pounds of floor to waist lifting. I would however, continue any limitation on lifting above waist level. I believe he can do much of the duties that were listed in the addendum to the van driver job analysis. However, side-to-side lifting may be limited at times.
  - It appears that any of his job activities which do not require any overhead activity or heavier lifting at the waist level should be acceptable."
- (N.T. 35-36; Local 1968 Exhibit D)
- 24. In May 2008, Mr. Ross returned to work as an electrician after he suffered an injury. He was not able to kneel or climb at the time. (N.T. 48-49)

## DISCUSSION

Local 1968 has charged that the District committed unfair practices under sections 1201(a)(1), 1201(a)(3) and 1201(a)(4) by "refus[ing] to return David Welz to his Truck Driver position with restrictions" after he suffered a work-related injury. Specification of charges ¶¶ 3 and 6. Local 1968 alleges that the District's "refusal to allow David Welz to return to his Truck Driver job is a result of its anti-union animus toward David Welz as a result of his successful assertion of his bargaining rights" before an

arbitrator after he was discharged by the District in late 2005. Specification of charges ¶¶ 1 and 10. Local 1968 would have the Board find that the District's disparate treatment of Mr. Welz and another employe who returned to work with restrictions after he suffered a work-related injury (Mr. Sambuchino) is evidence of its anti-union animus toward Mr. Welz. Specification of charges ¶¶ 8-9. According to Local 1968, "[t]his anti-union animus toward David Welz is also demonstrated by the School District's delay in making David Welz financially whole for nearly a year since his return to work following the decision in his favor by the labor arbitrator." Specification of charges ¶ 11.

The District contends that the charge should be dismissed for lack of proof. According to the District, it refused to return Mr. Welz to work as a truck driver because its review of the restrictions set forth by his treating physician led it to believe that he was not able to work as a truck driver and would reinjure himself if he tried to work as a truck driver. The District also submits that it treated him the same as any other employe consistent with a light duty policy it negotiated with Local 1968.

An employer commits an unfair practice under section 1201(a)(3) if it discriminates against an employe for having engaged in an activity protected by the PERA. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The filing of a grievance is a protected activity. Commonwealth of Pennsylvania, Department of Public Welfare, Somerset State Hospital, 27 PPER ¶ 27086 (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 employer's disparate treatment of similarly situated employes may support a finding that the employer was discriminatorily motivated. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). An overt display of anti-union animus may, too. City of Erie, 29 PPER ¶ 29001 (Final Order 1997). An employer does not violate section 1201(a)(3) if it discriminates against an employe for a legitimate business reason. Indiana Area School District, 34 PPER 133 (Final Order 2003). 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).

In order to prevail on a charge under sections 1201(a)(1) and 1201(a)(3), the charging party must show by substantial evidence during its case-in-chief that the employe engaged in a protected activity, that the employer knew that the employe engaged in the protected activity and that the employer discriminated against the employe 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 employe had not engaged in the protected activity. Id. Evidence introduced after the 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. Welz engaged in a protected activity by successfully asserting his bargaining rights before an arbitrator after the District discharged him in the fall of 2005 (findings of fact 7-8). There also is no dispute that the District was aware that he had engaged in the protected activity: the District reinstated him as a truck driver after the arbitrator issued an award in the fall of 2006 (findings of fact 11-12). Nor is there a dispute that on February 12, 2007, he underwent surgery for a work-related injury (finding of fact 15), that on April 20, 2007, his treating physician (Dr. Bloomstine) indicated that he could return to work with restrictions (finding of fact 16) and that the District returned him to work as a custodian rather than as a truck driver (finding of fact 18). The dispositive question, then, is whether or not the District was motivated by antiunion animus when it refused to return Mr. Welz to work as a truck driver.

As explained below, during its case-in-chief, Local 1968 did not present a prima facie case that the District was motivated by anti-union animus when it refused to return Mr. Welz to work as a truck driver. Accordingly, the charge must be dismissed.

During its case-in-chief, Local 1968 presented the following evidence: (1) that when the parties were discussing Mr. Welz's reinstatement as directed by the arbitrator

in the fall of 2006 the District was prepared to reinstate him as a truck driver delivering school and office supplies as he had before he was discharged but reinstated him as a truck driver delivering food supplies instead after his supervisor (Mr. Scalzitti), referring to himself, said that he "looked like an elephant" and had "a memory like an elephant" (findings of fact 12-13); (2) that the District has not reimbursed Mr. Welz for the parking, meal and mileage expenses that he incurred when seeking medical services for his wife while he was discharged (finding of fact 13); (3) that Dr. Bloomstine indicated on April 20, 2007, that Mr. Welz could return to work with restrictions (findings of fact 16); (4) that on March 10, 2008, Dr. Bloomstine modified the restrictions (finding of fact 23); (5) that Mr. Welz believes that as modified the restrictions do not prevent him from performing the work of a truck driver so long as he delivers school and office supplies rather than food supplies (N.T. 19-22, 30); (6) that the District returned other employes (Mr. Smith, Mr. Laverso, Mr. Sambuchino and Mr. Ross) to their former positions after they suffered injuries restricting them (findings of fact 3, 6, 10, 22, 24); and (6) that the District has not required another employe (Mr. Himes) to perform all of the tasks of his position (finding of fact 5).

Local 1968 contends that Mr. Scalzitti's remark about looking and having a memory like an elephant is evidence that the District was motivated by anti-union animus when it refused to return Mr. Welz to work as a truck driver. Local 1968 submits that Mr. Scalzitti's remark was made "in the context of what he would do if David Welz won his arbitration." Brief at 15. The record does not show that to be the case, however. To the contrary, in remarking that he looked and had a memory like an elephant, Mr. Scalzitti also remarked that he could not forget that Mr. Welz made "some derogatory remarks" when he said hello to Mr. Welz while Mr. Welz was discharged (finding of fact 12). A close review of Mr. Scalzitti's remark in context, then, reveals that any animus by him toward Mr. Welz was personal in nature. Personal animus is not anti-union animus. Scott Township, 27 PPER ¶ 27206 (Final Order 1996). Thus, Mr. Scalzitti's remark provides no support for the charge.

Local 1968 apparently contends that the District's refusal to reimburse Mr. Welz for the parking, meal and mileage expenses that he incurred when seeking medical services for his wife while he was discharged is evidence that the District was motivated by antiunion animus when it refused to return him to work as a truck driver. Local 1968 seems to be of the view that the District is obligated to reimburse him for those expenses because the arbitrator directed that he be made whole. Under a make whole order in a discharge case, however, an employer is to pay for the expenses that would have been covered by the employer had the employe not been discharged. City of Philadelphia, 30 PPER ¶ 30204 (Final Order 1999). The record does not show that the District would have paid Mr. Welz for the parking, meal and mileage charges that he incurred when seeking medical services for his wife had he not been discharged. The District, then, was under no obligation to reimburse him for those expenses. Thus, the District's refusal to reimburse him for those expenses provides no support for the charge.

Local 1968 apparently contends that Dr. Bloomstine's indication on April 20, 2007, that Mr. Welz could return to work with restrictions is evidence that the District was motivated by anti-union animus when it refused to return him to work as a truck driver. A close review of the restrictions, however, reveals that Mr. Welz was not to lift 50

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Local 1968 has not charged that the District committed an unfair practice by refusing to comply with the reinstatement provision of the arbitration award even though it reinstated Mr. Welz as a truck driver delivering food supplies rather than as a truck driver delivering school and office supplies. Nor has Local 1968 charged that the District committed an unfair practice by discriminatorily reinstating Mr. Welz as a truck driver delivering food supplies rather than as a truck driver delivering school and office supplies. The Board, of course, only has jurisdiction to find the unfair practice(s) charged. Iroquois School District, 37 PPER 167 (Final Order 2006); Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974). Thus, whether or not the District committed unfair practices when it reinstated Mr. Welz as a truck driver delivering food supplies rather than as a truck driver delivering school and office supplies is not before the Board and will not be addressed.

<sup>&</sup>lt;sup>2</sup> Local 1968 has not charged that the District committed an unfair practice by refusing to comply with the make whole provision of the arbitration award. As set forth in footnote 1, <u>supra</u>, the Board only has jurisdiction to find the unfair practice(s) charged. Thus, whether or not the District committed an unfair practice by refusing to comply with the make whole provision of the arbitration award is not before the Board and will not be addressed.

pounds below the waist or five pounds above the waist (finding of fact 16). By his own testimony, he lifted boxes of paper weighing in excess of 50 pounds as a truck driver delivering school and office supplies and containers weighing up to 70 pounds as a truck driver delivering food supplies (finding of fact 2). It is apparent, then, that the restrictions did not allow him to return to work as a truck driver. Thus, Dr. Bloomstine's indication on April 20, 2007, that Mr. Welz could return to work with restrictions provides no support for the charge.

Local 1968 apparently contends that Dr. Bloomstine's modification of the restrictions on March 10, 2008, is evidence that the District's refusal to return Mr. Welz to work as a truck driver was motivated by anti-union animus. Notably, the charge was filed on August 30, 2007, and amended on September 5, 2007, so the modification was a post-charge event. A post charge event may be reviewed to shed light on the true character of the employer's conduct at issue in a charge, PLRB v. General Braddock School District, 380 A.2d 946 (Pa. Cmwlth. 1977), but may not be remedied absent the filing of an amended charge. Commonwealth of Pennsylvania, Pennsylvania State Police, 37 PPER 4 (Final Order 2006). A close review of the modification casts no light on the character of the District's conduct at issue in the charge, however, because the fact remains that when the charge was filed Mr. Welz was subject to the restrictions set forth by Dr. Bloomstine on February 20, 2007. As noted above, those restrictions did not allow him to return to work as a truck driver. Thus, Dr. Bloomstine's modification of the restrictions on March 10, 2008, provides no support for the charge.

Local 1968 apparently contends that Mr. Welz's belief that as modified the restrictions do not prevent him from performing the work of a truck driver so long as he delivers school and office supplies rather than food supplies is evidence that the District's refusal to return him to work as a truck driver was motivated by anti-union animus. His belief is based on a post-charge event, however, which casts no light on the true character of the District's conduct at issue in the charge. Thus, his belief provides no support for the charge.

Local 1968 contends that the District's return of Mr. Smith, Mr. Laverso, Mr. Sambuchino and Mr. Ross to their former positions with restrictions after they suffered injuries is evidence that the District was motivated by anti-union animus when it refused to return Mr. Welz to work as a truck driver. An employer's disparate treatment of similarly situated employes will support an inference that the employer was motivated by anti-union animus. City of Reading, supra. Neither Mr. Smith, nor Mr. Laverso, nor Mr. Sambuchino nor Mr. Ross was working as a truck driver as Ms. Welz was, however; rather, Mr. Smith was working as a carpenter (finding of fact 3), Mr. Laverso as a custodian (finding of fact 6), Mr. Sambuchino as an HVAC technician (finding of fact 10) and Mr. Ross as an electrician (finding of fact 22). Moreover, Mr. Smith and Mr. Ross were not subject to restrictions on an indefinite basis as Mr. Welz was (findings of fact 3, 16, 22). That being the case, Mr. Smith, Mr. Laverso, Mr. Sambuchino and Mr. Ross were not similarly situated with Mr. Welz. No inference of anti-union animus based on the District's disparate treatment of them and Mr. Welz may be drawn under the circumstances. See Montour County, 35 PPER 12 (Final Order 2004)(where employes were not similarly situated, an employer's disparate treatment of them did not support an inference that it was motivated by anti-union animus). Furthermore, like Mr. Welz, Mr. Sambuchino worked in different positions immediately after he suffered his injury (findings of fact 10 and 18). He only returned to his former position approximately eleven months later (findings of fact 10 and 21). Thus, the District's return of Mr. Smith, Mr. Laverso, Mr. Sambuchino and Mr. Ross to their former positions with restrictions after they suffered injuries provides no support for the charge.

Local 1968 apparently contends that the District's assignment of other tasks to Mr. Himes when he is unable to perform the functions of his job is evidence that the District was motivated by anti-union animus when it refused to return Mr. Welz to work as a truck driver. Mr. Himes is a retired employe who works a variety of jobs on a per diem basis, however (finding of fact 5). As was the case with Mr. Smith, Mr. Laverso, Mr. Sambuchino

<sup>&</sup>lt;sup>3</sup> Local 1968 has not charged that the District committed an unfair practice by refusing to return Mr. Welz to work as a truck driver after Dr. Bloomstine modified the restrictions on March 10, 2008. As set forth in footnote 2, <a href="mailto:supra">supra</a>, the Board only has jurisdiction to find the unfair practice(s) charged. Thus, whether or not the District committed an unfair practice by refusing to return Mr. Welz to work as a truck driver after Dr. Bloomstine modified the restrictions on March 10, 2008, is not before the Board and will not be addressed.

and Mr. Ross, then, he was not similarly situated with Mr. Welz. Thus, the District's assignment of other tasks to Mr. Himes when he is unable to perform the functions of his job provides no support for the charge.

Local 1968 contends that an admission by the District's director of human resources (Mary Holliday) that it tries to find light duty positions for employes even though it is not required to do so (N.T. 72) is evidence that it was motivated by anti-union animus when it refused to return Mr. Welz to work as a truck driver. The admission occurred after Local 1968 presented its case-in-chief, however, so under the analysis set forth in  $\underline{\text{Erie}}$   $\underline{\text{City School}}$   $\underline{\text{District}}$ ,  $\underline{\text{supra}}$ , it may not be considered in deciding whether or not Local 1968 presented a prima facie case.

Local 1968 contends that a light duty provision in the parties' collective bargaining agreement requiring the District to return an employe on light duty "to his regular assignment at the earliest possible time" (finding of fact 4) is evidence that the District was motivated by anti-union animus when it refused to return Mr. Welz to work as a truck driver. The light duty provision was introduced into evidence after Local 1968 presented its case-in-chief, however, so under the analysis set forth in <a href="Erie City School District">Erie City School District</a>, <a href="Supra">supra</a>, it may not be considered in deciding whether or not Local 1968 presented a prima facie case.

Even if Local 1968 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 Local 1968 may have presented, the District established that it only refused to return Mr. Welz to work as a truck driver after its employe benefits manager (Ms. Longo) reviewed the restrictions set forth by Dr. Bloomstine on April 20, 2007 (finding of fact 17). The District also established that the parties have negotiated a light duty policy under which employes who suffer work-related injuries may be offered available transitional work assignments depending upon, among other things, their qualifications (finding of fact 4) and that consistent with that policy it has assigned employes with licenses (Mr. Leone, Mr. Sambuchino and Mr. Ross) to their former positions on a light duty basis (findings of fact 9, 21, 22, 24) and employes without licenses (Ms. Nellis, Ms. Maurer and Mr. Welz) to other positions on a light duty basis (findings of fact 14, 18, 20). On that record, it is apparent that the District would not have returned Mr. Welz to work as a truck driver even if he had not successfully asserted his bargaining rights before an arbitrator after the District discharged him in the fall of 2005.

Local 1968 contends that the District's rebuttal finds no support in the record. In support of its contention, Local 1968 points out that the District altered the duties of Mr. Laverso to accommodate lifting restrictions for him (finding of fact 6). Local 1968 also points out that Mr. Sambuchino gets help when he works outside his restrictions (N.T. 41). Local 1968 further points out that the District offered no medical evidence to rebut Mr. Welz's assertion that he can perform the work of a truck driver delivering school and office supplies. In addition, Local 1968 points out that the District did not show that it attempted to reinstate Mr. Welz as a truck driver delivering school and office supplies when it reinstated him as directed by the arbitrator. Local 1968 finally points out that the District made no effort to accommodate Mr. Welz as a truck driver delivering school and office supplies even though it accommodated other members of Local 1968 (Mr. Sambuchino, Mr. Wells, Mr. Laverso and Mr. Smith). In summary, according to Local 1968,

"[t]he stark difference in treatment between David Welz and other members of Local 1968 is not explainable by the medical evidence. It is explainable by Supervisor Thomas Scalzitti's remark . . . about his 'elephant' memory, made when David Welz was off work during his discharge and in the context of what he would do if David Welz won his arbitration."

(Brief at 15).

Notably, however, the District accommodated Mr. Welz by assigning him to a light duty position as a custodian just as it accommodated Mr. Laverso. Also, as noted above, Mr. Sambuchino and Mr. Wells are licensed, but Mr. Welz is not, so the District's treatment of them, although disparate, is unexceptional given the parties' light duty policy under which

the qualifications of an employe is a factor to be considered in offering assignments. Further, as noted above, Mr. Welz's restrictions were of an indefinite duration, but Mr. Smith's were not, so the District's treatment of them, although disparate, is unexceptional as well. In addition, as noted above, Mr. Welz's assertion that he can perform the work of a truck driver delivering school and office supplies is based on a post-charge event that sheds no light on the conduct of the District at issue in the charge, so the District's failure to provide any medical evidence to rebut his assertion is of no moment. Moreover, the District's failure to show that it attempted to reinstate Mr. Welz as a truck driver delivering school and office supplies when it reinstated him as directed by the arbitrator is of no moment, too. As noted above, the fact remains that Mr. Welz was not able to return to work as a truck driver under the restrictions Dr. Bloomstine set forth on April 20, 2007. Given that fact, the District's post-charge failure to accommodate him as a truck driver delivering school and office supplies is likewise of no moment. Finally, as noted above, any animus by Mr. Scalzitti towards Mr. Welz was personal in nature. Local 1968's contention is, therefore, without merit.

Section 1201(a)(4) prohibits an employer from "discriminating against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under this act." Local 1968 has alleged no such discrimination, however. Accordingly, the charge under section 1201(a)(4) does not state a cause of action and, therefore, must be dismissed.

## CONCLUSIONS

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

- 1. The District is a public employer under section 301(1) of the PERA.
- 2. Local 1968 is an employe organization under section 301(3) of the PERA.
- 3. The Board has jurisdiction over the parties.
- 4. The District has not committed unfair practices under sections 1201(a)(1), 1201(a)(3) or 1201(a)(4) 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 thirteenth day of November 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner