

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

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

**FINAL ORDER**

The International Union of Operating Engineers Local 542 (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on January 14, 2008, challenging a Proposed Decision and Order (PDO) issued on December 26, 2007. Pursuant to an extension of time granted by the Secretary of the Board, the Union timely filed a brief in support of the exceptions. In the PDO, the Board's Hearing Examiner concluded that Quakertown Borough (Borough) did not violate Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA) when it changed its policy and prohibited the employes from using the Borough's equipment and garage for non-Borough work. The Borough timely filed a brief in opposition to the exceptions.

The facts of this case are summarized as follows. At a bargaining session on September 11, 2006, Frank Bankard, the Union's lead negotiator, made a proposal for the Borough to pay its mechanics a tool allowance. Bankard again proposed a tool allowance for the Borough mechanics during a bargaining session on November 2, 2006. Steven Brown, the Union Steward and Borough mechanic, was present at the November 2, 2006 bargaining session.

On November 11, 2006, David Woglom, the Borough Manager, and the Borough Council met to discuss the Union's proposals, which included the tool allowance proposal. During this meeting, Woglom discussed the Borough's policy of allowing the mechanics to use the Borough's equipment and garage to perform non-Borough work after hours.<sup>1</sup> The Borough Council directed Woglom to contact Neil Schwan, the Borough's insurance agent, to obtain his opinion about the Borough's exposure to liability for the mechanics' use of the Borough's equipment and garage to perform non-Borough work.

On November 12 or 13, 2006, Woglom contacted Schwan regarding his opinion about the Borough's exposure to liability. Schwan explained to Woglom that he was concerned that the Borough would be exposed to liability for a third party suit and a workers' compensation claim if the Borough allowed the policy to continue. Woglom subsequently sent a memorandum on November 21, 2006 to Brown and Andy Bucko, Borough mechanics, indicating that, based on Schwan's recommendation, the employes would no longer be allowed to use the Borough's equipment and garage for non-Borough work.

The Union filed its Charge of Unfair Practices on November 27, 2006, alleging that the County violated Section 1201(a)(1), (3) and (5) of PERA by unilaterally changing its policy concerning the employes' use of the Borough's equipment and garage in retaliation for the Union's position during bargaining regarding a tool allowance. In the PDO, the Hearing Examiner concluded that the Union failed to establish a prima facie case demonstrating that the Borough discriminated against the Borough mechanics because of the Union's tool allowance proposal. The Hearing Examiner further determined that the Borough's change to its policy permitting use of the Borough's equipment and garage was an inherent managerial policy not subject to bargaining, relying on Abington Transportation Association, PSSPA/PSEA v. Abington School District, 18 PPER ¶ 18188 (Proposed Decision and Order, 1987), 19 PPER ¶ 19067 (Final Order, 1988), aff'd sub nom., Abington Transportation Association, PSSPA/PSEA v. PLRB, 570 A.2d 108 (Pa. Cmwlth.

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<sup>1</sup> On October 21, 1993, Woglom forwarded a memorandum to Borough employes indicating that the employes would be allowed to borrow Borough tools and use the Borough's equipment and garage for non-Borough work. (Union Exhibit 3).

1990)(work rule prohibiting the performance of personal work with employer equipment was an inherent managerial policy); AFSCME, Council 13 v. Department of Transportation, 21 PPER ¶ 21108 (Proposed Decision and Order, 1990), 22 PPER ¶ 22015 (Final Order, 1990)(work rule prohibiting the use of employer tools, equipment and facilities was an inherent managerial policy). Therefore, the Hearing Examiner held that the Borough did not violate Section 1201(a)(1), (3) or (5) of PERA.

In its exceptions, the Union challenges the Hearing Examiner's conclusion that it did not present a prima facie case under Section 1201(a)(3) of PERA. In order to sustain a charge of discrimination under Section 1201(a)(1) and (3), the charging party must prove that the employees engaged in protected activity, that the employer was aware of the employees' protected activity, and that the employer took adverse action against the employees because of a discriminatory motive or anti-union animus. Cameron County Educational Support Personnel Association PSEA/NEA v. Cameron County School District, 37 PPER ¶ 45 (Final Order, 2006)(citing St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977)). The charging party must demonstrate that all three elements are present in order to establish a prima facie case under Section 1201(a)(3). Colonial Food Service Educational Personnel Association v. Colonial School District, 36 PPER ¶ 88 (Final Order, 2005). The burden then shifts to the respondent to rebut the charging party's prima facie case. PLRB v. Department of Education, Edinboro State College, 14 PPER ¶ 14054 (Final Order, 1983).

The Union established that Union Steward/Mechanic Brown attended negotiation sessions and that the Borough was aware of Brown's presence and participation at the bargaining sessions. However, the Union failed to demonstrate that the Borough changed its policy in retaliation for the Union's proposal of a tool allowance. Further, Borough Manager Woglom testified that the Borough was concerned that allowing the mechanics to use the Borough's equipment and garage for non-Borough work would subject the Borough to liability.<sup>2</sup>

In its exceptions, the Union cites to numerous National Labor Relations Board cases that link the timing of events to anti-union animus. However, as stated by the Hearing Examiner, this Board has consistently held that timing alone is insufficient to show an anti-union motive on the part of the employer. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), appeal denied, 582 Pa. 704, 871 A.2d 194 (2005); Colonial School District, supra; Chester-Upland Professional Association, PSEA/NEA v. Chester-Upland School District, 29 PPER ¶ 29179 (Final Order, 1998). In addition, as noted by the Hearing Examiner:

[T]he Union overlooks that after Mr. Bankard raised the issue of a tool allowance Mr. Schwan expressed concern to Mr. Woglom that the mechanics use of the garage to perform non-Borough work exposed the Borough to liability for a third party suit and for a workers' compensation claim and that Mr. Woglom only thereafter issued the memorandum. On that record, the timing of events militates against rather than in favor of a finding that the Borough was discriminatorily motivated.

(PDO at 4). Therefore, the Hearing Examiner did not err in concluding that the Union failed to establish a prima facie case of discrimination under Section 1201(a)(1) and (3) of PERA.

The Union further argues that the Hearing Examiner erred in his application of the balancing test set forth in PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), and relied on precedent that is not applicable to this case. A public

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<sup>2</sup> The Union argues that the Hearing Examiner relied on inadmissible hearsay in reaching his determination that the Borough did not discriminate against the employees. Specifically, the Union asserts that Borough Manager Woglom's testimony regarding the concerns expressed by the Borough's insurance agent is inadmissible hearsay. However, the Hearing Examiner properly considered this evidence under the state of mind exception to the hearsay rule. Pa. R. Evid. 803(3); Zavala-Lopez v. Kaolin Mushroom Farms, Inc., 29 PPER ¶ 29025 (Final Order, 1997)(an out-of-court statement offered to prove the state of mind of the person hearing the statement is not hearsay).

employer does not violate Section 1201(a)(1) and (5) of PERA if it unilaterally changes a matter of inherent managerial policy. Lackawanna County Area Vo-Tech Federation of Teachers, Local #3876 v. Lackawanna County Area Vo-Tech School, 25 PPER ¶ 25140 (Final Order, 1994). In determining whether a disputed item is a mandatory subject of bargaining or a matter of inherent managerial policy, the Board properly relies on its prior application of the State College balancing test to the disputed item, unless a party presents new or different facts to warrant a contrary result. Pennsylvania State Corrections Officers Association v. Department of Corrections, Fayette SCI, 35 PPER ¶ 84 (Final Order, 2004).

The Union attempts to distinguish Abington School District and Department of Transportation from the present case by arguing that those cases changed a policy of unauthorized use of the employer's property, whereas the Borough changed a policy of authorized use of its property. However, it is of no moment whether the use was previously authorized or not because, in either case, the issue to be decided by the Board is whether the employer must bargain over its decision to prohibit use of its property.<sup>3</sup> In Abington School District and Department of Transportation, the Board determined that a public employer's decision to implement a work rule prohibiting the use of its property for the employees' personal benefit was a matter of inherent managerial policy. The Union has not presented new or different facts to warrant a contrary result. Thus, the Hearing Examiner properly relied on Board precedent in concluding that the Borough's rescission of its prior policy permitting use of the Borough's equipment and garage was an inherent managerial policy not subject to bargaining.

After a thorough review of the exceptions, the briefs of the parties, and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the International Union of Operating Engineers Local 542 are dismissed, and the December 26, 2007 Proposed Decision and Order be and the same is hereby made absolute and final.

SIGNED, SEALED, DATED and MAILED this seventeenth day of June, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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L. DENNIS MARTIRE, CHAIRMAN

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ANNE E. COVEY, MEMBER

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JAMES M. DARBY, MEMBER

<sup>3</sup> The Union also asserts that the use of the Borough's equipment and garage should be considered wages because it was a quid pro quo for the Borough employees not receiving a tool allowance. The Hearing Examiner did not find, and the Union did not establish, that the Borough's policy of allowing the use of its equipment and garage was the result of such a quid pro quo.