COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 764	:	
	:	
v.	:	Case No. PERA-C-07-48-E
	:	
BERWICK AREA JOINT SEWER AUTHORITY	:	

FINAL ORDER

The Berwick Area Joint Sewer Authority (Authority) filed timely[1] exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) challenging a Proposed Decision and Order (PDO) issued on October 5, 2007. In the PDO, the Board Hearing Examiner concluded that the Authority violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA) by unilaterally ceasing an established practice of permitting employes to make up time when they are less than ten minutes late for work, and discriminating against an employe for having participated in the arbitration of a successful grievance. Teamsters Local No. 764 (Teamsters) filed a timely response to the exceptions and a supporting brief on November 13, 2007. Upon review of the exceptions, response thereto, and all matters of record, the Board makes the following:

ADDITIONAL FINDINGS OF FACT

26. Michael Hartman, President of Teamsters Local No. 764, memorialized notice of the Authority's change in policy in a letter of January 12, 2007, to Gloria Bobersky, Authority Manager, where he stated:

> On December 22, 2006 Bruce Michaels, Dennis Walck, you and I met for a third (3rd) step meeting on Samantha Tracy's suspension grievance. During that meeting I had asked when the [Authority] began writing up and disciplining employees for late arrivals of less than ten (10) minutes since we have an agreement signed in 2001 stating that tardiness of ten (10) minutes or less were to "make up time" at the end of that day which has been the practice since the signing of the 2001 agreement. Neither you nor Mr. Michaels could tell me when the change in conditions of work was made, however you and Bruce did admit that neither the Union nor the bargaining unit was notified of any such change but did give official notification during that meeting that the [Authority] will no longer honor the aforementioned 2001 agreement.

(Joint Exhibit 4-V).

27. Article XXXII of the January 1, 2003 – December 31, 2005 collective bargaining agreement between the Teamsters and the Authority provides as follows:

> **WAIVER**
>
> **SECTION 1.** Parties acknowledge that during negotiations prior to the signing of this Agreement, they have the unlimited right to make proposals with respect to any matter which could be the subject of collective bargaining and that the understandings and agreements were arrived at by the parties in good faith thereafter. The exercise of that right and opportunity are set forth herein. Further, and for the life of this Agreement, the [Authority] and the [Teamsters], each voluntarily and unqualifiedly agree that except for [a] written agreement signed by both parties, all matters concerning wages, hours, benefits, and conditions of employment for the unit of employes as defined herein, shall remain as set forth herein.

[1] Although the Board received the Authority's exceptions on October 26, 2007, the envelope containing the exceptions was postmarked October 25, 2007 by the United States Postal Service. We find this to be substantial compliance with the Board's rules and regulations concerning the filing of exceptions within twenty days of the issuance of a proposed decision. Homer-Center School District, 12 PPER ¶12169 (Final Order, 1981).

SECTION 2. All verbal agreements, procedures or any other understandings, written or verbal, which are not contained herein or attached hereto, shall be null or void.

(Joint Exhibit 1).

28. On November 14, 2005, the Authority and Teamsters executed the collective bargaining agreement, effective January 1, 2006 through December 31, 2008, which carried over Article XXXII from the previous contract. (Joint Exhibit 2).

DISCUSSION

In its exceptions, the Authority does not challenge any of the Hearing Examiner's Findings of Fact.[2] Accordingly, for purposes of the legal arguments, as raised in the Authority's brief,[3] the facts of this case are summarized as follows.

Since 1998, the Authority has had a practice of allowing employes who arrive late within the first ten minutes of their scheduled start time to make up those minutes after the end of their shift. In October 2001, the Authority and the Teamsters memorialized this practice into a written agreement dealing with disciplinary matters, wherein it was agreed that there would be no discipline of an employe who is late under the practice.

Thereafter, the parties negotiated a collective bargaining agreement effective January 1, 2003 through December 31, 2005, which stated the start and end times for each shift, and contained a "waiver" clause that provided that "[a]ll verbal agreements, procedures or any other understandings, written or verbal, which are not contained herein or attached hereto, shall be null or void." Despite these provisions in the 2003-2005 contract, the Authority continued the practice of allowing employes to arrive late and make up the time without being disciplined.

On November 14, 2005, the Authority and the Teamsters negotiated a successor collective bargaining agreement effective January 1, 2006 through December 31, 2008. This agreement carried over the exact language from the 2003-2005 contract regarding start and end times, and the waiver provision. Again, despite this language, the Authority continued the practice of allowing employes to arrive late and make up the time, without discipline, well into the term of the 2006-2008 contract.

In April 2005, the Teamsters filed a grievance asserting that a bargaining unit employe should be performing the office-cleaning work that Gloria Bobersky, Authority Manager, was doing at the time. The Teamsters identified bargaining unit employe Samantha Tracy as the grievant who was interested in performing the work. The Authority denied the grievance, and a grievance arbitration award was issued on December 9, 2005. In the award, the arbitrator directed that the office-cleaning work be assigned to Ms. Tracy and ordered the Authority to pay Ms. Tracy lost wages for the period in which Ms. Bobersky performed the bargaining unit work. After the award was issued, the Authority's Superintendent, Allan Fish, warned Ms. Tracy that "the Supervisors had it out for her", and thereafter Ms. Tracy noticed that Ms. Bobersky's attitude toward her had changed.

In this regard, although employes continued to report to work late under the practice without discipline, on August 29, 2006, Ms. Tracy received a written warning for reporting late for work on August 23 and 25. Ms. Tracy was again two minutes late on September 25, 2006, and as before, she made up that time at the end of her shift. On September 27, 2006, Ms. Tracy knew she would be late for work, and before the start of

[2] Section 95.98(a) of the Board's Rules and Regulations provide in relevant part that exceptions shall "state the specific issues of procedure, fact or law, or other portion of the proposed decision to which each exception is taken … [and] state the grounds for each exception." 34 Pa. Code §95.98(a)(1); Jean Campbell v. Ambridge Area School District, 33 PPER ¶ 33041 (Final Order, 2002) (issues which are not sufficiently raised in the exceptions are waived).

[3] While the Authority's exceptions, standing alone, lack the specificity required by Section 95.98 of the Board's Rules, the Authority concurrently filed a brief with its exceptions, in which it adequately states the nature of its exceptions to permit Board review.

her shift, called Ms. Bobersky. Ms. Bobersky advised Ms. Tracy that if she again reported late for work, the next step of progressive discipline for tardiness would be discharge. Ms. Tracy was led to believe that she could retain her employment by taking an unexcused absence, as opposed to arriving at work late. On September 28, 2006, the Authority suspended Ms. Tracy for three days for this second absence on September 27, 2006. On October 3, 2006, the Authority issued another three-day suspension as discipline for Ms. Tracy having reported to work two minutes late on September 25, 2006, despite her compliance with the practice by making up the time. Even while Ms. Tracy was being disciplined for tardiness, other employes continued to report to work late under the practice and were not disciplined. On October 30, 2006, Ms. Tracy was discharged from her employment with the Authority for her alleged third unexcused absence on October 29, 2006, although she, in fact, worked seven hours that day.

A grievance was immediately filed over Ms. Tracy's discharge from employment. On December 22, 2006, Michael Hartman, President of the Teamsters, met with members of management at a third-step grievance meeting, and requested time records for all employes since 2003. The Teamsters requested the information as relevant to its review of the Authority's treatment of Ms. Tracy as regards the practice of allowing employes to report to work late without discipline. At that meeting on December 22, 2006, Ms. Bobersky indicated that she was unaware when the Authority officially took the position that reporting to work late warranted discipline, but acknowledged that the employes and the union were not made aware of a change in the practice. Ms. Bobersky also gave notice to Mr. Hartman that effective that date, the Authority would no longer follow the practice of allowing employes to report late within the first ten minutes of their start time, and make up that time at the end of their shift.

On January 30, 2007, the Teamsters filed a Charge of Unfair Practices with the Board alleging that the Authority violated Section 1201(a)(1), (3) and (5) of PERA. In the Specification of Charges, the Teamsters alleged that the Authority unilaterally changed its practice regarding disciplinary rules and was applying those rules in a discriminatory manner. The Teamsters further alleged that the Authority unlawfully refused to provide requested information relevant to the processing of a grievance. On March 26, 2007, the Teamsters filed timely exceptions to a March 8, 2007, decision of the Secretary of the Board declining to issue a Complaint. In its exceptions, the Teamsters clarified its allegation of discrimination under Section 1201(a)(3) by alleging that Ms. Tracy engaged in protected activity when she participated in an arbitration in 2005, and was thereafter discriminatorily disciplined contrary to the existing practice. On May 15, 2007, the Board directed a remand to the Secretary for issuance of a Complaint.

A hearing on the Charge, as amended, was held before a Board Hearing Examiner on July 24, 2007. Based on the testimony, documentary evidence, and demeanor of witnesses at the hearing,[4] the Hearing Examiner concluded that the Authority violated Section 1201(a)(1), (3) and (5) of PERA. Specifically, the Hearing Examiner found that the Authority failed to negotiate its unilateral rescission of a binding practice that it had continued to follow well into the term of the present collective bargaining agreement. The Hearing Examiner also determined that the Authority discriminated against Ms. Tracy because of her participation in a grievance arbitration by disciplining her for tardiness, which contributed to her termination from employment. The Hearing Examiner dismissed the Teamsters' claim regarding the refusal to supply information, finding that Mr. Hartman was provided an opportunity to review the requested timecards.

The Authority filed exceptions, and a supporting brief, in which it argues that the Hearing Examiner erred in failing to find that it was not until October 10, 2006, that the Authority or Teamsters were aware of the 2001 agreement memorializing the practice about late arrivals. We note that a Hearing Examiner need not render findings on every alleged fact, especially where the proposed findings are not relevant to the issue to be decided. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). Whether either party was "aware" of the 2001 document memorializing the late arrival practice is

[4] It is the function of the Hearing Examiner, in the first instance, to resolve conflicts in evidence and decide issues of credibility, and the Board will not disturb those determinations absent the most compelling of circumstances. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order 2004).

irrelevant to the finding of a binding past practice consistent with the written agreement. In this regard, the Pennsylvania Supreme Court has spoken on what constitutes a binding practice:

> A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to the underlying circumstances presented.

County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 34 n.12, 381 A.2d 849, 852 n.12 (1978) (Allegheny County) (*quoting* Sylvester Garrett, Chairman, Board of Arbitration, U.S. Steel -- Steelworkers, Grievance No. NL-453, Docket No. N-146, January 31, 1953. Reported at 2 Steelworkers Arbitration Bulletin 1187).

A binding past practice is not created solely through written words on a piece of paper, as the Authority would have us hold. Instead, as recognized in the labor law community and by our Supreme Court, a binding practice evolves through employer and employe actions. There is no dispute concerning the Hearing Examiner's finding that the timecards for Ms. Tracy and other Authority employes establish that the Authority recognized and maintained a practice of permitting employes to arrive within ten minutes late for the start of their shift and make up those minutes after the end of their shift. The Authority permitted this conduct through multiple collective bargaining agreements up to and including the current 2006-2008 collective bargaining agreement. (PDO Finding of Fact 6). This finding clearly establishes that independent of the 2001 written agreement, there is a recognized course of conduct creating a binding past practice between the Authority and the Teamsters. Where, as here, the record establishes that the Authority was aware of and participated in the practice, a finding regarding the parties' awareness of the 2001 writing, is not necessary to the decision. Therefore, the Hearing Examiner did not err in failing to make the finding proposed by the Authority.

The Authority next argues that there could not be a continuing past practice due to the waiver provisions in the 2006-2008 collective bargaining agreement. While generally a waiver or "integration" clause may affect prior agreements or understandings which are discontinued as of the effective date of the parties' new agreement, the Hearing Examiner found, based on substantial evidence of record, that the past practice here continued during the term of the 2006-2008 contract.

As the Pennsylvania Supreme Court held in Allegheny County, 476 Pa. at 38, 381 A.2d at 854 (*emphasis* added):

> [W]here a collective bargaining agreement not only makes no mention whatever of past practices but does include a broad integration clause, an [arbitration] award which incorporates into the agreement, as separately enforceable conditions of the employment relationship, past practices which *antedate* the effective date of that agreement cannot be said to "draw its essence from the collective bargaining" agreement.

The Supreme Court's holding is consistent with general principles of labor arbitration law, which are discussed in a leading treatise as follows:

> Though a contract provided that it "cancels all previous Agreements, both written and oral, and constitutes the entire Agreement between the parties," an arbitrator declared that the provision "has no magical dissolving effect upon practices or customs which are continued in fact unabated and which span successive contract periods." Nor would such a provision negate practices that cast light upon ambiguous contract language.

Elkouri & Elkouri, How Arbitration Works, 5th Ed. At 646. The binding nature of past practices which continue into a successor collective bargaining agreement was recognized by the Supreme Court in Allegheny County, 476 Pa. at 39, 381 A.2d at 855, where the Court stated:

> Nor do we intend to say that an arbitrator's reliance on past practices to clarify ambiguous language in the collective bargaining agreement, to implement general contract language or to show that a specific provision in the contract has been waived by the parties, would be improper although the agreement in question included an integration clause.

Thus, a practice that is continued unabated into the term of a new collective bargaining agreement continues to remain binding, despite an "integration" or "waiver clause" in the contract. Allegheny County, supra.

Here, it cannot be disputed that the practice of allowing employes to report up to ten minutes late, and make up that time at the end of their shift without discipline, was recognized and maintained well into the term of the 2006-2008 collective bargaining agreement. The timecards of record establish unequivocally that in 2006, six employes were late approximately 175 times. In many of these instances, the timecard was reviewed by a supervisor. During this period no employe, other than Ms. Tracy, received discipline for being late within the first ten minutes of their shift. Accordingly, the Hearing Examiner did not err in finding that a binding practice existed into the 2006-2008 collective bargaining agreement. The Authority's exception is therefore dismissed as without merit.[5]

As may be discerned from the brief in support of the exceptions, the Authority also argues that the Teamsters failed to allege a cause of action for discrimination until its legal counsel filed exceptions to the Secretary's decision declining to issue a complaint. To timely raise a cause of action for an unfair practice, the facts alleged in the charge must place the employer on notice of the matters at issue, and arguably support an unfair labor practice as defined by PERA. Pennsylvania Social Services Union Local 668 v. Pennsylvania Labor Relations Board, 481 Pa. 81, 392 A.2d 256 (1978); Harrisburg International Airport Police Officers Association v. Susquehanna Area Regional Airport Authority, 33 PPER 33066 (Order Directing Remand to Secretary for Further Proceedings, 2002); Schmehl v. City of Reading, 20 PPER ¶20069 (Final Order, 1989); Bleistein v. Zerbe Township, 16 PPER ¶16093 (Order Directing Remand to Secretary for Further Proceedings, 1985).

Although the Teamsters' allegation of discrimination may have been inartfully drafted, the Teamsters did allege a violation of Section 1201(a)(3) of PERA and assert that the Authority was "applying discipline in a discriminatory manner." Seven letters attached to the Charge clearly identify that the discipline of Ms. Tracy was being asserted as discriminatory in violation of Section 1201(a)(3) of PERA. Upon review of the Charge as initially filed, we find again that the Charge warranted the issuance of a complaint, preserving, as of January 30, 2007, the Teamsters' cause of action for discrimination against Ms. Tracy.

The Authority next argues that the Hearing Examiner erred in finding an unlawful motive for Ms. Tracy's discipline, because Ms. Tracy was late for work "hundreds of times" during the term of her employment and had unexcused absences. We acknowledge that an employer may defend a claim of discrimination by showing that it had an independent basis for its actions. Wright Line, Inc., 251 NLRB 150, 105 LRRM 1169 (1980).[6]

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[5] In Allegheny County, the Supreme Court recognized four instances where past practices may be used in labor law. A past practice may 1) clarify ambiguous contract language; 2) be used to implement contract language that establishes a general rule; 3) modify or amend apparently unambiguous contract language which has been arguably waived by the parties; or 4) create or establish a separate enforceable condition of employment which cannot be derived from the express language of the collective bargaining agreement. We note that the Authority does not contend in its exceptions that there was no past practice as defined by Allegheny County, supra. Even had such a claim been raised and preserved by the Authority, the record indicates that the past practice at issue effectively waived compliance with the start and end times for each shift set forth in Article XIX of the contract.

[6] The Authority's argument itself supports the questionable bona fides of the Authority's motive. For over sixteen years, Ms. Tracy was late hundreds of times, but yet only recently received discipline for tardiness following a successful grievance arbitration.

However, such is not the case presented here, as the record evidence establishes that the discipline of Ms. Tracy for tardiness was facially, and patently disparate, as no other employe received discipline for being less than ten minutes late for work. Moreover, while Ms. Tracy may have also incurred alleged unexcused absences, the Authority does not dispute the Hearing Examiner's Finding of Fact 15. This unchallenged finding is that Ms. Tracy would not have incurred her second unexcused absence but for the Authority's purported application of progressive discipline for lateness, and her supervisor's suggestion to take the unexcused absence rather than face additional progressive discipline for lateness. The Authority does not dispute that it was indeed Ms. Tracy's tardiness in conjunction with her unexcused absences that resulted in her termination of October 30, 2006. As fully discussed above, Ms. Tracy's discipline for tardiness was discriminatory and unlawful. The Authority did not argue on exceptions, nor did it sustain its evidentiary burden of establishing any lawful independent basis for Ms. Tracy's termination. Thus, on this record, in the absence of her unlawful discipline, Ms. Tracy would not have been terminated.

Lastly, the Authority suggests that there was no evidence of unlawful motive because the Authority never discussed or considered the fact that Ms. Tracy was successful in her grievance when disciplining her in 2006. However, as the Second Circuit Court of appeals aptly stated in response to a similar argument:

> Implicit in petitioner's argument is a basic objection to reliance upon so-called "circumstantial evidence". But courts and other triers of facts, in a multitude of cases, must rely upon such evidence, i.e., inferences from testimony as to attitudes, acts and deeds; where such matters as purpose, plans, designs, motives, intent, or similar matters, are involved, the use of such inferences is often indispensable. Persons engaged in unlawful conduct seldom write letters or make public pronouncements explicitly stating their attitudes or objectives; such facts must usually be discovered by inference; the evidence does not come in packages labelled, "Use me", like the cake, bearing the words "Eat me", which Alice found helpful in Wonderland.

F.W. Woolworth Co. v. NLRB, 121 F.2d 658, 660 (2nd Cir. 1941). Here indeed, the testimony reveals that Ms. Tracy was warned by a Mr. Fish that the "Supervisors had it out for her", and that Ms. Bobersky's attitude toward Ms. Tracy had changed after the successful grievance arbitration. Further, as noted above, Ms. Tracy only began receiving discipline for lateness after the successful grievance arbitration and other employes who were late were not disciplined. This substantial evidence of record supports the Hearing Examiner's inference of a discriminatory motive. See City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). Accordingly, after a thorough review of the exceptions and all matters of record, the Board shall dismiss the Authority's exceptions and make the Proposed Decision and Order final.

ORDER

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 Berwick Area Joint Sewer Authority are hereby dismissed, and the October 5, 2007 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this nineteenth day of February, 2008. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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v.	:	Case No. PERA-C-07-48-E
	:	
BERWICK AREA JOINT SEWER AUTHORITY	:	

AFFIDAVIT OF COMPLIANCE

The Berwick Area Joint Sewer Authority hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act; that it has rescinded the unilateral change in the past practice of permitting employes a ten-minute tardiness grace period, provided they make up that time at the end of their shift, without suffering any discipline; that it has offered Samantha Tracy unconditional reinstatement, in writing, to her former position without prejudice to any rights or privileges enjoyed by her; that it has paid, and made Samantha Tracy whole for, all wages and benefits that she would have earned from the date of discharge to the date of unconditional offer of reinstatement, including but not limited to wage increases received by the bargaining unit during the backpay period, seniority, out of pocket dental, medical and optical expenses for herself and responsible family members that would have been covered during her employment, holiday pay and accrued sick and vacation time; that it has paid interest at the simple rate of six percent per annum on any and all backpay due Samantha Tracy from the date of her discharge until the date of the written offer of unconditional reinstatement to her former position; that it has posted a copy of the final order and proposed decision and order as directed; and that it has served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____
Signature of Notary Public