

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL BROTHERHOOD OF PAINTERS :
AND ALLIED TRADES, LOCAL 1968 :
:
v. : Case No. PERA-C-07-14-W
:
ERIE CITY SCHOOL DISTRICT :

FINAL ORDER

The International Brotherhood of Painters and Allied Trades, Local 1968 (Union) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board), challenging a Proposed Decision and Order (PDO) issued on November 5, 2007. In the PDO, the Board's Hearing Examiner concluded that the Erie City School District (District) did not violate Section 1201(a)(1), (3), (4) and (9) of the Public Employe Relations Act (PERA) when the District declined to appoint Debra Culver (Complainant) to a full-time bus driver position.

The facts of this case are summarized as follows. In October 2005, the District posted notice of an opening for a full-time bus driver position. Applicants for the position included the Complainant, among others, and the following substitute District bus drivers: Gregory Bailey, Anthony Cubero, Diane May and Trent Meeks. The District administered a driving test in which two bus drivers, Mark Longstreet and John Ras, graded the applicants' performances by deducting points for various driving infractions. The scores were used by the District's Director of Personnel, Mary Holliday, to determine who was best able to drive a bus. Complainant received a 28-point deduction, Bailey received a 16-point deduction and Meeks received a 14-point deduction for driving infractions found by either Ras or Longstreet. No driving infractions were found for Cubero and May.

Complainant was not appointed to the bus driver position. Thereafter, Complainant filed a grievance concerning the District's failure to appoint her to the position. Complainant presented her case to the District's School Board and spoke for approximately 20 to 25 minutes concerning the history of her position and her feelings about the grievance. The grievance was denied by the District's School Board on April 12, 2006, and was not further pursued by the Union.

On October 19, 2006, the District posted notice of openings for three full-time bus driver positions. Applicants for the positions included the Complainant, Bailey, Cubero, May and Meeks. The District allowed Complainant to retake the driving test because she had grieved the District's previous decision. The District also wanted to give Complainant the opportunity to improve her score. Ras noted that Complainant engaged in driving infractions warranting an 18-point deduction, an increase in her previous score. On November 20, 2006, the District appointed Bailey, Cubero, May and Meeks as bus drivers, after determining that the District had sufficient funds to fill four, rather than three, full-time positions.

The Union filed its Charge of Unfair Practices on January 8, 2007, alleging that the District violated Section 1201(a)(1), (3), (4) and (9) of PERA by retaliating against Complainant for filing a grievance and speaking before the District's School Board in support of her grievance. The Union also alleged that Complainant was more qualified for the bus driver positions than the applicants who had been appointed. On February 1, 2007, the Secretary of the Board declined to issue a complaint and dismissed the Union's Charge. The Union filed exceptions to the Secretary's decision not to issue a complaint. On March 20, 2007, the Board remanded the matter to the Secretary directing that a complaint be issued for further exploration of the factual and legal issues presented.

In the PDO, the Hearing Examiner concluded that the Union failed to establish a prima facie case demonstrating that the District had discriminated against Complainant because of her grievance activity. The Hearing Examiner further concluded that the Union failed to present any evidence to support its allegation that Complainant was more qualified than the other applicants who were appointed as full-time bus drivers. Citing Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 at 65 n. 5 (Final Order, 1992), the Hearing Examiner held that the Union could not rely on the evidence presented after it rested its case-in-chief in order to establish a prima facie case. The Union alleged that that evidence supports the conclusion that the District's reason for not

hiring Complainant was pretextual. The Hearing Examiner went on to conclude that even upon examination of the District's explanation for not appointing Complainant to a full-time bus driver position, i.e. Complainant's driving test score was lower than the scores of the other applicants, the District's explanation for its action was not pretextual.

Additionally, the Hearing Examiner determined that the Union had failed to state a cause of action under Section 1201(a)(4) because the Union did not allege that Complainant had filed a petition or charge with the Board. The Hearing Examiner also determined that the Union failed to state a cause of action under Section 1201(a)(9) in that the Union failed to allege that the District violated its obligation to meet and discuss. Because the Union failed to establish violations of Section 1201(a)(3), (4) and (9), the Hearing Examiner concluded that the Union failed to prove a derivative violation of Section 1201(a)(1). Accordingly, the Hearing Examiner rescinded the complaint and dismissed the Union's Charge.

In its exceptions, the Union challenges the Hearing Examiner's conclusion that the District did not violate Section 1201(a)(3) by not selecting Complainant as a full-time bus driver.¹ In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the charging party must prove that the employe engaged in protected activity, the employer knew of that activity and the employer took adverse action against the employe 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 first argues that the Hearing Examiner erred by concluding that it failed to establish that Complainant was more qualified than those appointed as bus drivers. The Union states that Complainant had more driving experience with the District and the requirements for the bus driver position indicate that prior District driving experience was an important qualifying factor.

The Union did establish that Complainant had been driving a bus for the District for a longer period of time than those appointed to the positions at issue. (N.T. 14-16, 29). The Union also established that Complainant obtained her commercial driver's license (CDL) with an endorsement for transporting students before the other applicants who were chosen for the positions. (N.T. 14-15, 29-30). However, the Union did not establish that prior District driving experience was the key factor considered by the District in determining the most qualified candidates for the full-time bus driver positions.

Indeed, the District's main requirements for the positions were that the applicants provide proof of a current CDL and that the applicants pass a physical test and a driving test. (N.T. 53-54). Both the physical and driving tests were scored in order to help the District determine who was best able to do the job. (N.T. 53-55). The District also considered factors such as whether the applicant's driving record showed any traffic violations and whether the applicant had knowledge of the regulations and laws pertaining to the operation of a school bus. (Union Exhibit B). Therefore, the fact that Complainant drove a bus for the District and had her CDL for a longer period of time does not establish that the District would have considered her more qualified than those appointed as full-time bus drivers. As such, the Hearing Examiner properly concluded that the Union failed to establish a prima facie case under Section 1201(a)(3).

The Union next contends that Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993), Teamsters Local #764 v. Montour County, 35 PPER ¶ 147 (Final Order, 2004) and Temple University, supra, do not support the proposition that rebuttal evidence cannot be considered in determining whether the charging party has established a prima facie case. The Union asserts that it could not present evidence in its case-in-chief to demonstrate that the District's explanation was pretextual until after the District presented its evidence.

¹ The Union is not challenging the Hearing Examiner's decision that it failed to establish a violation of Section 1201(a)(1), (4) and (9).

In the PDO, the Hearing Examiner did not cite Perry County and Montour County for the proposition that rebuttal evidence could not be considered in determining whether the Union established a prima facie case. Rather, the Hearing Examiner was merely explaining the burdens that each party was required to meet under a Section 1201(a)(3) charge of discrimination. Further, the Hearing Examiner properly relied on Temple University for the proposition that any evidence, including rebuttal evidence, presented after the Union rested its case-in-chief could not be considered in determining whether the Union presented a prima facie case.

Contrary to the Union's assertion, nothing prevented the Union from offering evidence during its case-in-chief challenging the District's reason for not selecting the Complainant. We agree with the Hearing Examiner that the Union failed to establish a prima facie case under Section 1201(a)(3). Thus, the burden never shifted to the District to prove a nondiscriminatory motive. Edinboro State College, supra. Accordingly, even though the Hearing Examiner proceeded to consider the District's explanation, the Board agrees that the Hearing Examiner was under no obligation to consider any evidence presented after the Union rested its case-in-chief. Temple University, supra.

The Union finally argues that the Hearing Examiner erred by failing to conclude that the District's explanation was pretextual. The Union asserts that there are discrepancies between Respondent Exhibit 7 (Complainant's grading sheet for the driving test), Respondent Exhibit 8 (Ras' narrative account of the driving test) and Ras' testimony, which creates a question of whether Ras' testimony can be considered credible. Specifically, the Union notes that Respondent Exhibit 8 does not contain any reference to the incident described on Respondent Exhibit 7 where Complainant allegedly failed to find the correct address. Additionally, it points out that Ras testified that Complainant had a near collision during her driving test but it was not noted on Respondent Exhibits 7 or 8.

Because the burden never shifted to the District, the District's reason for not appointing Complainant to the full-time bus driver position need not be considered by the Board. Temple University, supra. Nevertheless, the Board agrees with the Hearing Examiner that the District's explanation that Complainant was not appointed because her driving test score was lower than the scores of those appointed is not pretextual. Further, the Board will not disturb the credibility determinations made by its hearing examiners absent compelling circumstances. Colonial School District, supra. The Hearing Examiner concluded that the Union's argument concerning the alleged discrepancies was without merit because Ras credibly testified that he scored Complainant's performance on the test as set forth on the grading sheet in Respondent Exhibit 7. The Hearing Examiner credited Ras' testimony because he found that Ras "appeared as a witness with no vested interest in the outcome of the charge and ... his demeanor was impressive ..." PDO at 7. Therefore, as we find no compelling reason to reverse this credibility determination, the Union's exception in this regard is dismissed.

After a thorough review of the exceptions, the brief in support of the exceptions, and all matters of record, the Board shall dismiss the 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 Employee Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the International Brotherhood of Painters and Allied Trades, Local 1968 are dismissed and the November 5, 2007 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania 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 fifteenth day of January, 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.