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	:	

FINAL ORDER

The International Brotherhood of Painters and Allied Trades, Local Union 1968 (Union) filed exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on December 3, 2008. The Union challenges a November 13, 2008 Proposed Decision and Order (PDO), in which the Board Hearing Examiner dismissed the Union's Charge of Unfair Practices alleging that the Erie City School District (District) violated Section 1201(a)(1), (3) and (4) of the Public Employe Relations Act (PERA) by refusing to return David Welz to a truck driver position after he suffered a work-related injury and was medically cleared to return to work with restrictions that prevented full performance of the duties of the position. The facts of this case, based on the testimony and documentary evidence of record, have been found by the Hearing Examiner, and the relevant findings are summarized as follows.

Mr. Welz began working for the District in 1988 as a truck driver. He mainly delivered school and office supplies, which required lifting boxes of paper weighing in excess of fifty pounds. Occasionally, he delivered food supplies, and had to lift containers weighing up to seventy pounds, including some overhead lifting. In the fall of 2005, the District discharged Mr. Welz, who then grieved his discharge. In the Fall of 2006, an arbitrator issued an award resolving the grievance, directing that Mr. Welz be reinstated and made whole. During a meeting to discuss Mr. Welz's reinstatement, Mr. Welz's 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 Mr. Scalzitti said hello to Mr. Welz while Mr. Welz was off work due to his discharge. The District thereafter reinstated Mr. Welz as a truck driver delivering food supplies.

On February 19, 2007, Mr. Welz underwent surgery for an injury that occurred while working in the truck driver position. On April 20, 2007, Mr. Welz's physician (Dr. Mark Bloomstine) released Mr. Welz to return to work with restrictions on an indefinite basis. Dr. Bloomstine advised that Mr. Welz was unable to lift more than fifty pounds below the waist or more than five pounds above waist high. The District's employe benefits manager (Christine Longo) reviewed the lifting restrictions and found a light duty position for Mr. Welz. The District placed Mr. Welz on light duty work, at the truck driver pay rate, first in a stock room at the service center, then at the administration building where he "watched the door for security reasons," then back at the service center, and then as a custodian. He has worked as a custodian on a temporary basis ever since.[1]

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[1] 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.
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> 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.

As pointed out by the Hearing Examiner, because Dr. Bloomstine's updated medical restrictions were issued after the filing of the Charge of Unfair Practices, they cannot be considered in this case as evidence of the District's motive in declining to return Mr. Welz to a truck driver position. Indeed, the Charge of Unfair Practices filed August 30, 2007 alleges that the District discriminated against Mr. Welz by refusing to return him to a truck driver position within his April 20, 2007 medical restrictions. Accordingly, the March 10, 2008 restrictions are irrelevant to the disposition of the Charge.

At all relevant times, the Union and the District were parties to a collective bargaining agreement, which provided:

> LIGHT DUTY POLICY
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> 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.
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> B. The specific duties assigned any such employee shall depend upon the following factors:
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> 1) Restrictions established by the District or approved by a physician of the District's choice.
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> 2) The qualifications, skills, and ability of the employee.
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> 3) The work requirements of the District at the time.
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> 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.

A carpenter for the District (David Smith) was returned to work as a carpenter after he suffered a non-work related injury, even though a cast restricted his ability to perform the job. A custodian for the District (Nino Laverso) suffered a work related injury in 2005, and has been on light duty as a custodian ever since. In his light duty capacity, Mr. Laverso is not required to perform any custodial task that requires heavy lifting. An electrician for the District (Lewis Ross) returned to work as an electrician after he suffered an injury, although a cast restricted his ability to perform the job. Mr. Ross was again returned to work as an electrician after he suffered a subsequent injury, and was not able to kneel or climb. On August 8, 2007, an HVAC technician (Kenneth Sambuchino) returned to work in that position for the District despite being restricted on an indefinite basis from lifting more than thirty-five pounds from floor to waist, carrying weights in excess of thirty pounds except on occasion, bending on occasion and working from a ladder. Mel Himes was an engineer for the District until he retired, and continues to work for the District on a per diem basis performing a variety of tasks, including those associated with the truck driver position. If he is unable to perform a task, he so informs the District and the District then assigns him another task.

The Union contends that the District's light duty policy requires that an employe be returned "to his regular assignment at the earliest possible time", and therefore the District's failure to assign Mr. Welz to the truck driver position with restrictions is inconsistent with its policy and evidences discrimination for Mr. Welz having engaged in the protected activity of pursuing his grievance to arbitration. Based on the testimony and documentary evidence presented at the hearing, the Hearing Examiner concluded that the Union failed to establish a prima facie case of discrimination. In reaching this conclusion, the Hearing Examiner rejected the Union's claim that the District's light duty policy established that the District's reason for not returning Mr. Welz to the truck driver position was pretextual. Although the Hearing Examiner noted that the Union did not introduce the light duty policy during its case in chief, the Hearing Examiner further noted that even if the light duty policy was considered, it would support the District's defense that it had a legitimate business reason for not assigning Mr. Welz to a truck driver position, because it provided that the assignment of an injured employe would be with due regard for the safety of the employe.

The Union argues on exceptions to the PDO that the Hearing Examiner erred in finding that it failed to establish a prima facie case of discrimination. The Union asserts that it established a prima facie case of discrimination even without consideration of the District's light duty policy. The Union further argues that the Hearing Examiner erred in concluding that even if the Union presented a prima facie case, it was rebutted by the District's introduction of its light duty policy. According to the Union, the District's light duty policy itself demonstrates that the stated reason for not returning Mr. Welz to a truck driver position is a pretext for an unlawful motive.

To sustain the burden of proving discrimination the complainant must prove that the employe engaged in protected activity, that the employer knew of that activity and that the employer took adverse action against the employe because of the protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). It is the anti-union motive that creates the unfair practice. PLRB v. Ficon, Inc., 434 Pa. 383, 254 A.2d 3 (1969). Because union animus is rarely overt, an unlawful motive may be inferred from the totality of the circumstances. Dauphin County Peace Officers Association, Local 125 I.U.P.A. v. Dauphin County Court of Common Pleas, 27 PPER ¶27004 (Final Order, 1995).

When the charging party establishes a prima facie case of discrimination, the employer may still prevail by demonstrating that it had a credible, non-discriminatory, legitimate business reason for its action. Teamsters Local 776 v. Perry County, 23 PPER ¶23201 (Final Order, 1992), aff'd. sub nom., Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993); Lehighton Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996). However, the complainant may show that the employer's stated reason for its action is not credible, resulting in the finding that the employer's alleged legitimate reason is a mere pretext. Perry County, supra; Lehighton Area School District, supra; Sanders v. Philadelphia Housing Authority, 36 PPER 66 (Final Order, 2005), aff'd. sub nom., Philadelphia Housing Authority v. PLRB, 37 PPER 21 (Philadelphia Court of Common Pleas, 2005); Falls Township, supra. However, because an inference of anti-union motivation must be based on more than a mere suspicion, Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974), showing that the employer's stated reason was pretextual alone cannot support an inference of unlawful union animus. Scott Township Police Association v. Scott Township, 27 PPER ¶27206 (Final Order, 1996).

Accordingly, the Hearing Examiner was correct here in noting that he need not look to evidence that may support a showing that the District offered a pretextual reason for its action, where it would have been the only evidence from which to infer motive. The rejection of the employer's proffered reason for its personnel action does not, in and of itself, establish an unlawful motive under PERA. Rather, such an inference may be drawn only if there is some additional evidence of record demonstrating that the employe's protected activity was a contributing factor in the employer's action. Scott Township, supra. On this record, a showing of pretext would have been the only evidence from which to infer an unlawful motive, thereby resulting in the Union's failure to prove union animus, or that an unfair practice has been committed. It is well recognized by the Board that a hearing examiner need not make a finding about every fact presented at the hearing where such findings would be irrelevant to the outcome. Teamsters Local No. 463 v. Penn Delco School District, 29 PPER ¶29062 (Final Order, 1998). Thus, where there is no other direct or circumstantial evidence from which to infer an unlawful motive that was offered by the charging party, the Board need not consider evidence of the employer's defense, or claims that it is pretextual, in deciding whether the charging party has sustained its burden of establishing discrimination under Section 1201(a)(3) of PERA.

On exceptions, the Union here claims that there is other substantial evidence of record which supports a prima facie case and showing of an unlawful discriminatory motive. The Union points to testimony regarding a supervisor's remark to "get even" with Mr. Welz, the timing of the employer's action following Mr. Welz's successful grievance arbitration, and allegations of disparate treatment.

The Union proffers that Supervisor Scalzitti's statement that he "looked like an elephant" and had "a memory like an elephant", made during a meeting to discuss Mr. Welz's reinstatement, could only be evidence of animosity because of Mr. Welz's protected activity. However, Mr. Scalzitti's statement continued that he could not forget that Mr.

Welz made "some derogatory remarks" when Mr. Scalzitti said hello to him. As found by the Hearing Examiner, this statement taken in complete context is an expression of personal animosity, not unlawful discriminatory motive. Furthermore, the evidence of record does not support a contention that Mr. Scalzitti made any recommendation, or played any significant role in the decision to assign Mr. Welz to the light-duty custodial position. Indeed, to the contrary, Ms. Longo, the District's benefits manager, testified that supervisors such as Mr. Scalzitti would not suggest where to assign an employe who is returning to work following an injury. (N.T. 88). The Hearing Examiner's rejection of the Union's assertion that Mr. Scalzitti's statement is circumstantial evidence of union animus was not in error, and will not be disturbed. See Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order 2004) (it is the function of the Hearing Examiner, in the first instance, to resolve conflicts in evidence and decide issues of credibility; the Board will not disturb those determinations absent the most compelling of circumstances).

Likewise the totality of the circumstances surrounding the timing of the District's failure to place Mr. Welz in the truck driver position does not support an inference of a discriminatory motive. Here Mr. Welz successfully arbitrated his reinstatement with the District in the Fall of 2006. Shortly thereafter, he was reinstated by the District as a truck driver in accordance with the arbitration award. In February 2007, Mr. Welz underwent surgery for a work related injury, and was released to come back to work with restrictions in April 2007. The District provided Mr. Welz with light-duty work within his restrictions as a custodian, where he has worked since his injury. The Union filed its Charge alleging discrimination in August 2007. Given that the alleged unfair practice occurred nearly a year after the protected grievance activity, and the intervening circumstances of Mr. Welz's work-related injury, the timing of events does not support an inference of a discriminatory motive. Scott Township, supra.

The Union also contends that the District treated Mr. Welz differently than other injured workers who were returned to their regular jobs with restrictions. However, as noted by the Hearing Examiner, none of the other employes offered as comparables by the Union were full-time truck drivers as was Mr. Welz. Mr. Sambuchino was an HVAC technician; Mr. Ross, an electrician; Mr. Smith is a carpenter; Mr. Laverso is a custodian; and Mr. Himes is a per diem employe performing various jobs for the District. This difference in jobs alone undermines any claim that Mr. Welz and the other employes were similarly situated, and thus militates against finding an inference of unlawful discriminatory disparate treatment of Mr. Welz in not returning him to the truck driver position. See Chester-Upland Professional Association, PSEA/NEA v. Chester-Upland School District, 29 PPER ¶29179 (Final Order, 1998)(an unfair practice arising from disparate treatment may only be found when an employer treats similarly situated employes differently based on their support or lack of support for the union).

Moreover, Mr. Welz's circumstances are in other ways unique, further preventing any possible inference of union animus as being the District's motive. Unlike Mr. Welz, Mr. Sambuchino is a licensed HVAC technician and Mr. Ross is a licensed electrician. Both Mr. Sambuchino and Mr. Ross were able to work alongside other licensed technicians upon their return to work. Mr. Welz held no special licensing, and the Union presented no evidence that truck drivers worked in teams or with partners. Mr. Smith, the carpenter, suffered a non-work related injury in an accident with his boat. Mr. Smith's injury was not caused by the performance of his duties with the District, unlike Mr. Welz's injuries, which were covered by workers' compensation and were caused by the lifting requirements of the truck driver position. Mr. Himes is a per diem employe and is not required to perform the truck driver duties on a daily basis unlike Mr. Welz who was a full-time truck driver. The custodian, Mr. Laverso, was returned to his job as a custodian on light duty, where he does not have to lift if unable to do so. It is unclear whether the requirements of the truck driver position would similarly permit an employe to simply not lift a delivery if unable to do so. Accordingly, the Union has failed to establish that there were any employes similarly situated to Mr. Welz. Given the clear differences between those employes referenced by the Union and Mr. Welz, their circumstances do not support an inference that Mr. Welz was accorded disparate treatment because of his protected activity. Scott Township, supra.

Indeed, to the contrary, Mr. Welz was treated in a similar fashion as Mr. Himes and Mr. Laverso. Mr. Himes testified that when he is unable to perform the duties of a job to which he has been assigned, he notifies the District and the District gives him a different job assignment. That is precisely what the District has done for Mr. Welz. Mr. Welz testified that under the April 20, 2007 medical restrictions he was unable to perform the duties of the truck driver position. Like Mr. Himes, the District therefore gave Mr. Welz a different job assignment. The other job given to Mr. Welz is the same position given to Mr. Laverso, light-duty custodial work. On this record, there is no evidence from which to establish disparate treatment, nor to infer an unlawful discriminatory motive in failing to return Mr. Welz to a truck driver position.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the Union failed to present a prima facie case of discrimination under Section 1201(a)(1), (3) and (4) of PERA, and dismissing the Union's Charge. Therefore, the Union's exceptions shall be dismissed, and the November 13, 2008 PDO shall be made absolute and 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 International Brotherhood of Painters and Allied Trades Local Union 1968 are hereby dismissed, and the November 13, 2008 Proposed Decision and Order, be and hereby is 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 seventeenth day of February, 2009. 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.

CHAIRMAN L. DENNIS MARTIRE DISSENTS.