COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LAKELAND EDUCATIONAL SUPPORT PROFESSIONALS, PSEA/NEA	:	
v.	:	Case No. PERA-C-06-54-E
LAKELAND SCHOOL DISTRICT MARGARET BILLINGS-JONES	:	

FINAL ORDER

The Lakeland Educational Support Professionals, PSEA/NEA (Union) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on March 11, 2009. The Union excepts to a February 19, 2009 Proposed Decision and Order (PDO) of a Board Hearing Examiner dismissing its Amended Charge of Unfair Practices against the Lakeland School District and Superintendent Margaret Billings-Jones (collectively the District). The Secretary of the Board granted the Union a thirty-day extension of time for filing its brief in support of exceptions, which was timely filed on April 9, 2009. The District filed a brief in response to the exceptions on April 30, 2009.

This case arises out of a ten-day suspension given to John Larkin, a maintenance employe and member of the Union. As found by the Hearing Examiner, the events prior to the November 16, 2006 suspension are summarized as follows.

On May 27, 2005, the Union was certified by the Board as the exclusive bargaining representative for the District's secretaries, aides, and custodial/maintenance employes. Mr. Larkin is a maintenance worker for the District at Mayfield Elementary School, and after joining the Union, became a member of the Union negotiating team. On July 26, 2006, Mr. Larkin was counseled by Superintendent Billings-Jones regarding submission of leave requests, and was specifically directed to notify his supervisor, John Thomas, and submit the appropriate leave slips for any future absences.

November 10, 2006 was an in-service day for professional employes. On that day nonprofessional staff, such as the employes represented by the Union, were to report to their assigned buildings, and all other employes reported to the high school. However, while at Mayfield Elementary School on November 10, 2006, the Mayfield Principal, John Sullivan, observed that Mr. Larkin was not at work. Upon further investigation, the District discovered that it did not have a leave slip indicating that Mr. Larkin would be absent that day.

Thereafter, the District held a meeting with Mr. Larkin on November 16, 2006. At the meeting, Mr. Larkin admitted that he was not at work on November 10, 2006, but contended that before November 10, he had filled out a leave slip and placed it on the counter at Mayfield Elementary School where it was supposed to be picked up by a person transporting interoffice mail and delivered to the District's main office. Mr. Larkin, however, had also completed and turned in a District time sheet indicating that he was at work on November 10, 2006. Because Mr. Larkin did not notify his supervisor of his leave as he had previously been directed, and the District did not have a leave slip for Mr. Larkin's November 10, 2006 absence, the District suspended Mr. Larkin without pay for ten days.

To support a claim of discrimination, the charging party must establish that the employe engaged in an activity protected by the Public Employe Relations Act (PERA); that the employer was aware of that activity; and that the employer took adverse action against the employe because of anti-union reasons. St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977). There is no dispute that Mr. Larkin engaged in protected activity of which the District was aware. The issue here is the District's motive in suspending Mr. Larkin from employment. Motive creates the offense under Section 1201(a)(3) of PERA. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969). However, even where the charging party offers evidence that could support a finding of a

discriminatory motive, the employer may nevertheless 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), *affirmed*, Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993); Wattsburg Education Association v. Wattsburg Area School District, 35 PPER 54 (Final Order, 2004); Wright Line, Inc., 251 NLRB 150, 105 LRRM 1169 (1980).

Based on the testimony[1] and documentary evidence presented, the Hearing Examiner found as fact that because of an earlier incident, Mr. Larkin was specifically directed to call his supervisor and submit leave slips prior to taking days offs, and he failed to do so for November 10, 2006. Accordingly, because the District believed that Mr. Larkin failed to follow its directives regarding leave requests, the Hearing Examiner found that the District established a credible, nondiscriminatory, legitimate business reason for issuing Mr. Larkin a ten-day suspension.

The Union's arguments on exceptions are principally centered around the claim that the Hearing Examiner erred in rejecting Mr. Larkin's testimony and crediting the testimony of Superintendent Margaret Billings-Jones. It is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986). The Union claims that compelling circumstances exist here because in Case No. PERA-C-07-358-E, the Board rejected Superintendent Billings-Jones' testimony and accepted Mr. Larkin's testimony to find that the District harbored a discriminatory motive in terminating Mr. Larkin prior to the 2007-2008 school year.

In that regard, the Union argues in exception number 4 that in Case No. PERA-C-07-358-E, the Board found that "Larkin credibly testified that Billings-Jones approached him after a bargaining session and advised him that because he was an employe, there may be problems with his private contract with the District that he had held for sixteen years. Larkin testified that there was no mention of fiscal concerns made to him." Joan F. Smith, et al, 39 PPER at 519. Therefore, the Association posits that in this case the Hearing Examiner erred in stating that "[b]ased on [the testimony in this case] it is hard to conclude that this exchange between Dr. Billings-Jones and Mr. Larkin was a threat of retaliation against Mr. Larkin." (PDO at 5).

In Case No. PERA-C-07-358-E, neither the Hearing Examiner nor the Board concluded that the conversation between Superintendent Billings-Jones and Mr. Larkin was evidence of union animus. Indeed, the Hearing Examiner based his finding of a discriminatory motive on (1) the elimination of union leadership through the terminations; (2) the failure of the employer to adequately explain its reasons for the terminations; and (3) the timing of the terminations. Further, the Hearing Examiner and the Board only declined to credit Superintendent Billings-Jones' assertion that the District's motivation for terminating Mr. Larkin's employment in 2007 was alleged fiscal concerns.

Moreover, the factual record in this case is more fully developed with respect to Mr. Larkin's ten-day suspension. What was at issue in Case No. PERA-C-07-358-E was the District's reasons for terminating Mr. Larkin and others in 2007. Both the Hearing Examiner and the Board repeatedly stressed in Case No. PERA-C-07-358-E that Mr. Larkin's earlier 2006 suspension was the subject of a separate charge of unfair practices. Joan F. Smith, et al, 39 PPER at 522 n. 1 and 4. At issue in this case is not the legitimacy of the District's fiscal concerns for terminating Mr. Larkins' employment, but whether the District's assertion that it lacked a leave slip from Mr. Larkin and that Mr. Larkin failed to notify his supervisor of his absence is a legitimate non-discriminatory reason for issuing a ten-day suspension to Mr. Larkin for his absence on November 10, 2006.

[1] The Hearing Examiner allowed the Union to incorporate Mr. Larkin's October 10, 2007 testimony in Case No. PERA-C-07-358-E, in which the Board concluded that the District had discriminatorily discharged Mr. Larkin and others prior to the 2007-2008 school year. Joan F. Smith, Gabriel H. Petorak, John F. Larkin, And Ellen E. Kozlosky v. Lakeland School District, 39 PPER 148 (Final Order, 2008).

The Union claims that the Hearing Examiner's finding that Mr. Larkin did not submit a leave slip for November 10, 2006 (Finding of Fact 15) is not supported by substantial evidence of record and is contrary to the Board's findings in Case No. PERA-C-07-358-E. However, a fair reading of the PDO in this case and the decisions in Case No. PERA-C-07-358-E reveals that while the Board credited Mr. Larkin's testimony that he left a leave slip at Mayfield Elementary School, the District Superintendent's testimony that the leave slip was not received by the District was also credited. The Hearing Examiner further credited the District Superintendent's testimony in this case that the District's reason for imposing the suspension was non-discriminatory. In doing so, the Hearing Examiner stated as follows:

> In this conflict of testimony over whether Mr. Larkin submitted a leave slip, I credit the testimony of the District Superintendent that the District never received the leave slip from Larkin and that this was the reason, not his activities on behalf of the Association, for disciplining him. Mr. Larkin testified that he told the superintendent that a Robert Bednash saw him fill out a leave slip, although he did not see Mr. Larkin submit it. Mr. Bednash, who could have provided corroborating testimony, did not appear at this hearing to corroborate Mr. Larkin's testimony.

Lakeland Educational Support Professionals, PSEA/NEA v. Lakeland School District and Margaret Billings-Jones, 40 PPER 21, at p.98. Accordingly, the Union's allegation of inconsistency between the two decisions is baseless, and on this record there are no compelling reasons to disturb the Hearing Examiner's credibility determinations.

The Union also excepts to the Hearing Examiner's failure to find that the District did not have a policy of requiring employes to notify their supervisor in advance of taking leave, as well as submitting a leave slip. However, a hearing examiner need not summarize all of the evidence presented, but makes findings of fact that are relevant to the determination of the unfair practice charge before the Board. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975). Here, the Union does not dispute Findings of Fact 17 and 18 insofar as Mr. Larkin was directed in July 2006 that he was to notify his supervisor of absences in addition to submitting leave slips.[2]

With respect to this exception, it should be noted that in the previous case the facts relevant to the suspension were not developed to the extent they are here. Indeed, in that case, there was no explanation as to why Mr. Larkin "couldn't leave the building unless I told someone." (Case No. PERA-C-07-358-E, N.T. October 10, 2007 at 160). What is made clear, and is undisputed from the testimony presented in this case, however, is that because of an earlier issue concerning leave, Mr. Larkin was specifically directed on July 26, 2006 that he must advise his supervisor when taking leave from his assigned building, and therefore "couldn't leave the building unless [he] told someone." (Findings of Fact 17 and 18).

In determining whether an employer has a non-discriminatory reason for the action that is alleged to be an unfair practice, the Board will not delve into the question of whether the employer had "just cause" for its action. Teamsters, Local 110 v. Adams Township, 36 PPER 162 (Final Order, 2005). The Board's concern is whether the employer's proffered reason is a mere pretext for a discriminatory motive. Lehighton Area School District v. Pennsylvania Labor Relations Board, 682 A.2d 439 (Pa. Cmwlth. 1996).

On this record, Mr. Larkin was previously counseled on July 26, 2006 about being absent without properly submitting a leave slip, and was directed to advise his supervisor of future absences, as well as submit the appropriate leave slip. The District's belief, based on undisputed facts, that Mr. Larkin's supervisor was not notified prior to his November 10, 2006 absence and that the District did not have a

[2] Moreover, a point of fact which was not established in the prior proceeding, but is undisputed here, is that after allegedly turning in a leave slip for November 10, 2006, Mr. Larkin thereafter filled out a District time sheet purporting that he was at work that day. (Finding of Fact 11). This additional fact lends credence to the District's belief that Mr. Larkin did not comply with its prior directive regarding taking days off.

leave slip for Mr. Larkin's absence, is a legitimate, non-discriminatory reason for the District to impose discipline for Mr. Larkin's absence without leave on November 10, 2006. Accordingly, the Hearing Examiner did not err in concluding that the District did not violate Section 1201(a)(3) of PERA, and the Union's exceptions thereto shall be dismissed.

Moreover, on this record, disciplining Mr. Larkin for failing to notify his supervisor and submit a leave slip for an absence on November 10, 2006, would not tend to interfere, restrain or coerce a reasonable employe from engaging in protected activities in violation of Section 1201(a)(1). Accordingly, the Union's exception thereto shall be dismissed as well. SEIU Local #585 AFL-CIO v. Blair County Valley View Home, 31 PPER ¶31043 (Proposed Decision and Order, 2000) (employer's legitimate business reason was a defense to a charge of interference and coercion under 1201(a)(1)); *see also* AFSCME, Council 13 v. Commonwealth, Department of Agriculture, Case No. PERA-C-06-581-E (Final Order, April 17, 2007) (employer's legitimate application of a managerial policy was not a violation of 1201(a)(1) of PERA).

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the Union's exceptions and make the February 19, 2009 Proposed Decision and Order 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 Lakeland Educational Support Professionals, PSEA/NEA, are hereby dismissed, and the February 19, 2009 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 November, 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.