COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 66	:	
v.	:	Case No. PERA-C-09-271-W
CONNOQUENESSING TOWNSHIP	:	

PROPOSED DECISION AND ORDER

On July 13, 2009, International Union of Operating Engineers Local 66 (Union) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that Connoquenessing Township (Township) had violated sections 1201(a)(1), (3) and (5) of the Public Employe Relations Act (Act) by "refus[ing] to arbitrate grievances relating to the termination of employees Bill Chuba and Dan McGee" and by "terminat[ing] employees Bill Chuba and Dan McGee for engaging in union activity and support." On August 3, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on October 29, 2009, if conciliation did not resolve the charge by then. On August 20, 2009, the Township filed an answer denying that it had committed unfair practices by refusing to arbitrate the grievances. The hearing was held as scheduled. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses.[1] Neither party filed a brief.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. In 2005, William Chuba began working for the Township as its road superintendent. At the outset of his employment, the Township gave him a cell phone. (N.T. 21, 25)

2. On June 29, 2006, Daniel McGee began working for the Township as an equipment operator. Subsequent to his employment, the Township gave him a cell phone. (N.T. 28-30)

3. Effective January 1, 2007, the parties entered into a five-year collective bargaining agreement. Appendix A sets forth a multi-step progressive disciplinary process beginning with a verbal reprimand for the "[u]nauthorized or improper use of Township property and equipment." Appendix B provides for "five (5) days suspension up to and including discharge" for "[i]ntentionally falsifying or altering time production, or other records." (N.T. 12-13; Union Exhibit 3)

4. When the parties negotiated the collective bargaining agreement, the Township's employe handbook provided as follows:

> "Whether employees use company phone or their own device, personal phone calls should be kept to a minimum. They must not interfere with their work. Please do not abuse this privilege. Emergency calls made be made at any time. Incoming urgent calls will be directed to you."

(N.T. 34-35)

5. During 2008, Mr. Chuba filed a grievance when the Township disciplined him allegedly for harassing a secretary, and Mr. McGee filed a grievance when the Township terminated him allegedly for forging a signature on a vacation request. (N.T. 22-23, 29)

6. On October 8, 2008, the Board certified the Union as the exclusive representative of a bargaining unit that includes equipment operators and road superintendents employed by the Township. (Case No. PERA-R-08-346-W)

[1] The Township did not appear at the hearing.

7. In November 2008, an arbitrator held a hearing on the grievances filed by Mr. Chuba and Mr. McGee. The Township appeared at the hearing. The arbitrator sustained the grievances at the conclusion of the hearing. (N.T. 23-24, 29, 37; Union Exhibits 9 and 12)

8. In December 2008, the Township reinstated Mr. McKee and accused him and Mr. Chuba of improperly using their cell phones. The Township did not reissue a cell phone to Mr. McGee. The Township "turned off" Mr. Chuba's cell phone. (N.T. 26, 30-31, 46)

9. By letter dated April 2, 2009, two members of the Township's board of supervisors (Evelyn Hockenberry, chairperson, and Jack Kaltenbaugh, supervisor) wrote to Mr. Chuba as follows:

> "Please be advised that your employment with Connoquenessing Township is terminated as of April 3 as recommended in grievance of 12/17/08 by the 'unauthorized/improper use of Township equipment' and the 'falsification of records'."

(N.T. 10-11; Union Exhibit 4)

10. By letter dated April 2, 2009, Ms. Hockenberry and Mr. Kaltenbaugh wrote to Mr. McGee as follows:

> "Please be advised that your employment with Connoquenessing Township is terminated as of April 3, 2009 as recommended in grievance 12/17/08. 'unauthorized/improper use of Township equipment' and the 'falsification of records'. Further reasons, the January 13, 2009 wreck of the Township truck and failure to report same and failure to be drug tested at the time of the incident."

(N.T. 13-14, 31; Union Exhibit 1)

11. Mr. McGee did not falsify any records, wreck the Township's truck or fail to take a drug test. (N.T. 32-33)

12. By letter dated April 10, 2009, the Union's business representative (Ron Cord) wrote to Ms. Hockenberry as follows:

> "Enclosed find two grievances, 4-10-09-1 and 4-10-09-2, filed on behalf of William Chuba, and Daniel McGee for wrongful termination. In order to process these grievances in a timely manner on behalf of the Township and the employees; I suggest we proceed directly to Step II of the grievance procedure as outlined in Article Fifteen of the Collective Bargaining Agreement.
>
> Please provide me with dates and times available that we could mutually agree on to meet and discuss these grievances by no later than April 24, 2009.
>
> I can be reached at 412-968-9120, ext. 144."

(N.T. 10-15, 19; Union Exhibits 2, 5- 6)

13. Ms. Hockenberry did not respond to Mr. Cord's letter. (N.T. 14)

14. By letter dated April 28, 2009, Mr. Cord wrote to Ms. Hockenberry as follows:

> "In a letter to the Township dated April 10, 2009, the Union requested dates and times available to meet in an attempt to settle grievances 4-10-09-1, and 4-10-09-2 filed on behalf of William Chuba, and Daniel McGee for wrongful termination. To date there has been no response from the Township, therefore please be notified of the Union's intent to refer the matter to arbitration.
>
> If you have any questions, I can be reached at 412-968-9120, ext. 144"

(N.T. 16; Union Exhibit 7)

15. By letter dated April 29, 2009, Ms. Hockenberry wrote to Mr. Cord as follows:

> "Please be advised, that as of February 5, 2009 and as per your suggestion in your February 4, 2009, a meeting was scheduled for February 12 at 4:00 PM at the Connoquenessing Township Municipal Building. You were notified to notify the appropriate Union Persons that should be in attendance.
>
> The scheduled meeting was held with Solicitor Hawk, Supervisor Hockenberry and Supervisor Kaltenbaugh in attendance. The Union had no representation present.
>
> A certified letter with the recommendations that came out of the scheduled meeting on February 12, 2009 was mailed February 16, 2009 and received by your office on February 18, 2009.
>
> Connoquenessing Township has had no response from the Union in regard to the recommendations.
>
> The recommendations were discussed at an Executive session at the public meeting held in March 2009 and Bill Chuba's and Dan McGee's termination was announced at the Supervisors April public meeting.
>
> It is Connoquenessing Township's decision that the time for arbitration is past."

(N.T. 16; Union Exhibit 8)

DISCUSSION

The Union has charged that the Township committed unfair practices under sections 1201(a)(1), (3) and (5) by "refus[ing] to arbitrate grievances relating to the termination of employees Bill Chub and Dan McGee" and by "terminat[ing] employees Bill Chuba and Dan McGee for engaging in union activity and support."

The Township has filed an answer denying that it committed unfair practices by refusing to arbitrate the grievances. As set forth in its answer, the Township avers as follows:

> "The request for Arbitration was lost due to the failure of the Union to appeal from the Township's decision on grievance filed due to above by union member of cell phones provided for workers.
>
> The union did not appear for hearing on grievance, after notice, and did not file timely (10 days) appeal to preserve the right to arbitrate."

I

In PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982), the Court held that an employer commits unfair practices under sections 1201(a)(1) and (5) if it refuses to arbitrate a grievance under a collective bargaining agreement. In so holding, the Court explained that any question as to the arbitrability of the grievance is to be decided by an arbitrator in the first instance and by the courts thereafter. As the court wrote:

> "Furthermore, today's decision only returns the issue to the forum where it should have been decided at the outset; it obviously leaves open the possibility of additional review. However, were we to decide otherwise we would only encourage potential parties to such disputes to continue to follow the practice of preliminary litigating through one forum the power of another to decide the substantive issue. We condemn that practice and hold that hereafter issues involving conflicts between a public sector collective bargaining agreement and fundamental statutory policies of this Commonwealth must be presented first to arbitration for determination, subject to appropriate court review of any award in conflict with such policies."

451 A.2d at 764. See also Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), aff'd without opinion, 544 Pa. 199, 675 A.2d 1211 (1996)(same).

The record shows that the parties have entered into a collective bargaining agreement (finding of fact 3), that the Union filed two grievances (4-10-09-1 and 4-10-09-2) (finding of fact 12), that the Union requested arbitration of the grievances (finding of fact 14) and that the Township refused to arbitrate the grievances (finding of fact 15).

Under the law as set forth in Bald Eagle Area School District and Chester Upland School District, the Township was obligated to arbitrate the grievances upon the Union's request, with any question as to their arbitrability to be decided first by the arbitrator and then by the courts. See also City of Duquesne v. Duquesne Education Association, 475 Pa. 279, 380 A.2d 353 (1977)(the timeliness of a grievance is for an arbitrator to decide). Thus, regardless of whether or not the Union timely filed the grievances, the Township committed unfair practices under sections 1201(a)(1) and (5) by refusing to arbitrate them.

II

In St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977), the Court held that an employer commits an unfair practice under section 1201(a)(3) if it discriminates against an employe for having engaged in an activity protected by the Act. The filing of a grievance is a protected activity. Commonwealth of Pennsylvania, Department of Public Welfare, Somerset State Hospital, 27 PPER ¶ 27086 (Final Order 1996). "The motive creates the offense" under section 1201(a)(3). PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), quoting PLRB v. Ficon, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). Close timing between an employe's protected activity coupled with a pretextual explanation for the employer's action will support a finding that the employer was discriminatorily motivated. Lehighton Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996).

The record shows that during 2008 Mr. Chuba and Mr. McGee filed grievances (finding of fact 5), that in November 2008 the Township appeared when an arbitrator heard the grievances (finding of fact 7), that in December 2008 the Township accused Mr. Chuba and Mr. McGee of improperly using cell phones (finding of fact 8), that on April 2, 2009, the Township terminated Mr. Chuba allegedly for misusing its equipment and for falsifying records (finding of fact 9), that on April 2, 2009, the Township terminated Mr. McGee allegedly for misusing its equipment, falsifying records, wrecking a truck, failing to report the same and failing to be drug tested at the time (finding of fact 10), that Mr. McGee did not falsify any records, wreck a truck or fail to take a drug test (finding of fact 11) and that under the parties' collective bargaining agreement misusing the Township's equipment would warrant a verbal reprimand while falsifying records would warrant a 5-day suspension or discharge (finding of fact 3).

Application of the law to the facts of record leads to the conclusion that the Township terminated Mr. Chuba and Mr. McGee for having engaged in an activity protected by the Act. Notably, shortly after the grievances they filed were arbitrated, the Township initiated disciplinary procedures against them, first by accusing them of improperly using cell phones and then without further explanation of falsifying records as well. Given that the Township's initial accusation against them would only warrant a verbal reprimand if proven and that the second accusation, which might support a discharge if proven, was added without further explanation, it is apparent that the Township added the second accusation in an attempt to support its termination of Mr. Chuba and Mr. McGee when no such support existed. Moreover, Mr. McGee did not commit any of the additional offenses the Township cited in support of his termination. On that record, it is apparent that the Township's explanation for terminating Mr. Chuba and Mr. McGee was pretextual.[2]

[2] The Union contends that support for the charge also may be found in the Township's disparate treatment of similarly situated employes. As the Union points out, the Township did not discipline a third member of the bargaining unit (Charles Yank) who had made personal calls on his cell phone but had not filed a grievance (N.T. 22, 27). Although an employer's disparate treatment of similarly situated employes may support a finding of discrimination based on protected activity, City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989), given that the Township's explanation for terminating Mr. Chuba and Mr. McGee was pretextual, the Union's additional contention will not be addressed.

CONCLUSIONS

The hearing examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The Township is a public employer under section 301(1) of the Act.

2. The Union is an employe organization under section 301(3) of the Act.

3. The Board has jurisdiction over the parties.

4. The Township has committed unfair practices under sections 1201(a)(1), (3) and (5) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the County shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Cease and desist from discriminating in regard to hire or tenure of employment or any term and condition of employment to encourage or discourage membership in any employe organization.

3. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but limited to the discussing of grievances with the exclusive representative.

4. Take the following affirmative action which the hearing examiner finds necessary to effectuate the policies of the Act:

(a) Submit to the Union in writing an offer to arbitrate grievances 4-10-09-1 and 4-10-09-2;

(b) Submit to Mr. Chuba and to Mr. McGee in writing offers of reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them and make them whole for any loss of pay and benefits suffered by them from the date they were terminated up to the date of the unconditional offers of reinstatement;

(c) The backpay due shall be computed on the basis of each separate calendar quarter or portion thereof during the period stated above. The quarterly period shall begin with the first day of January, April, July and October. The pay shall be determined by deducting from a sum equal to that which they normally would have earned for each quarter or portion thereof earnings which they actually earned or with the exercise of due diligence would have earned in other employment, earnings which they would have lost through sickness and any unemployment compensation received by him. If the Township claims lack of due diligence, it shall be obligated to establish that there was substantially equivalent employment reasonably available to them and that they did not exercise due diligence to find interim employment. Earnings in one particular quarter shall have no effect on the liability for any other quarter;

(d) Pay interest at the simple rate of six per cent per annum on any backpay due from the date they would have been earned the pay up to the date it pays them;

(e) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(f) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighteenth day of November 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL 66	:	
v.	:	Case No. PERA-C-09-271-W
CONNOQUENESSING TOWNSHIP	:	

AFFIDAVIT OF COMPLIANCE

The Township hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1), (3) and (5) of the Act, that it has submitted to the Union writing an offer to arbitrate grievances 4-10-09-1 and 4-10-09-2, that it has submitted to Mr. Chuba and Mr. McGee in writing offers of reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them, that it has made them whole for any loss of pay and benefits suffered by them from the date they were terminated up to the date of the unconditional offers of reinstatement, that it has paid them any backpay due with interest as directed, that it has posted a copy of the proposed decision and order as directed and that it has served a copy of this affidavit on the Union.

_____
Signature/Date

_____
Title

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

_____
Signature of Notary Public