COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UTILITY WORKERS UNION OF AMERICA AFL-CIO	:	
	:	
v.	:	Case Nos. PERA-C-09-134-W
	:	PERA-C-09-399-W
HEMPFIELD TOWNSHIP MUNICIPAL AUTHORITY	:	

PROPOSED DECISION AND ORDER

On April 10, 2009, the Utility Workers Union of America, AFL-CIO (Union), filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Hempfield Township Municipal Authority (Authority) had violated sections 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA), specifically by (1) refusing to provide the Union with requested "information about and copies of" no-smoking, sick leave and vacation policies, (2) threatening to retaliate against employes if the Union pursued its request for the no-smoking policy, (3) suggesting a reduction in force if the Union pursued a grievance involving a vacation day, (4) threatening to lay off employes if they did not change their union representation and (5) denying a "comp time" request by David Depetris. The Board docketed the charge to Case No. PERA-C-09-134-W.

On May 4, 2009, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on August 4, 2009, if conciliation did not resolve the charge by then.

On May 22, 2009, the Authority filed an answer and affirmative defenses alleging that the charge should be dismissed because (1) it posted the no-smoking policy and the parties' collective bargaining agreement contains provisions regarding sick leave and vacations, (2) it did not threaten to retaliate against employes if the Union pursued its request for the no-smoking policy but rather offered to settle a potential grievance involving the no-smoking policy, (3) staffing levels are for management to decide, (4) it did not threaten to lay off employes if they did not change their union representation and (5) Mr. Depetris's "comp time" request was not appropriate under the collective bargaining agreement.

On June 25, 2009, the hearing examiner, upon the request of the Authority and without objection by the Union, continued the hearing.

On July 17, 2009, the Union amended the charge to allege that the Authority committed unfair practices under sections 1201(a)(1), (3), (4) and (5) of the PERA, specifically by (6) "repeatedly assign[ing] more onerous and less desirable work duties to Depetris," (7) "issu[ing] a disciplinary warning to Depetris," (8) "mak[ing] derogatory comments to employees, including Depetris, relating to the filing of grievances by employees" and (9) "instigat[ing] a verbal and physical confrontation with Depetris."

On August 3, 2009, the Secretary issued an amended complaint and notice of hearing directing that a hearing be held on September 30, 2009, if conciliation did not resolve the amended charge by then, and the Authority filed an answer and affirmative defenses denying that it had committed any of the unfair practices alleged in the amended charge.

On September 30, 2009, the hearing examiner held the hearing. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. At the end of the hearing, the hearing examiner scheduled a second day of hearing for October 30, 2009.

On October 5, 2009, the Union filed a charge alleging that the Authority committed unfair practices under sections 1201(a)(1) and (5) of the PERA, specifically by (10) "attempting to impose mandates" on the processing of grievances "such as requirements to obtain management signatures on grievance submissions and to list contract sections alleged[ly] violated," (11) refusing to meet "in accordance with the grievance procedure," (12) refusing to provide and imposing "improper and unreasonable" conditions upon the provision of requested information relevant to the processing of a grievance and (13) "questioning [employes] and/or demanding information from them about the identities

of employees who may be testifying on behalf of the" Union in Case No. PERA-C-09-134-W.[1] The Board docketed the charge to Case No. PERA-C-09-399-W.

On October 16, 2009, the Authority filed objections to the specification of charges on the ground that they were too vague.

On October 20, 2009, the Secretary issued a complaint and notice of hearing directing that a hearing be held on October 30, 2009, if conciliation did not resolve the charge by then, and the hearing examiner denied the Authority's objections to the specification of charges.

On October 30, 2009, the hearing examiner held the second day of hearing in Case No. PERA-C-09-134-W and the hearing in Case No. PERA-C-09-399-W. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. At the outset of the hearing, the Union moved to amend the charge to allege that the Authority's plant manager (Timothy Kuenzig) in addition to the Authority's general manager (Regis Ranella) attempted to impose mandates on the processing of grievances (N.T. 232). The hearing examiner, upon the objection of the Authority, denied the motion because the Union was adding a new cause of action beyond the scope of the charge (N.T. 232-233).

On November 2, 2009, the Authority filed an answer denying that it had committed any of the unfair practices alleged in Case No. PERA-C-09-399-W.

On December 22, 2009, the Authority filed a brief by deposit in the U.S. Mail. On December 23, 2009, the Union filed a brief by deposit in the U.S. Mail.

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. On December 23, 1996, the Board certified the Union as the exclusive representative of a bargaining unit that includes production, maintenance and clerical employes of the Authority. (Case No. PERA-R-96-443-W)

2. Effective May 1, 2007, the parties entered into a three-year collective bargaining agreement providing at article V, section 1, as follows:

> "The Authority shall have the right, as referred to in Article II above, to adopt reasonable rules and regulations governing performance and conduct of employees while either at the workplace or on paid Authority business. The Authority shall give employees reasonable advance notice of the applicability of any and all rules by posting said rules for a period of no less than seven (7) days prior to the effective date of said rules. Any employe who feels aggrieved by the application of one or more of these rules shall have recourse to the grievance procedure in this Agreement."

(Union Exhibit 1)

3. Article VIII, section 1, of the collective bargaining agreement defines a grievance as "a dispute between the Authority and an employee with respect to the meaning, interpretation or application of any of the provisions of this Labor Agreement." (Union Exhibit 1)

4. Article VIII, section 2, of the collective bargaining agreement sets forth a multi-step grievance procedure providing at steps one and two and in pertinent part at step 3 as follows:

> "STEP 1 (Initial Proceeding)
> Between the aggrieved employee and the immediate supervisor: The parties will make a sincere and determined effort to settle grievances in this step. Within five (5) working days of the date the aggrieved employee knew or should have known of the event giving rise to the grievance, the aggrieved employee (and the employee's

[1] The Union also filed the charge under sections 1201(a)(3) and (4) of the PERA. The charge, however, does not state a cause of action under either of those sections. Those sections of the charge are dismissed accordingly.

representative if he/she wishes) shall meet with the immediate supervisor to discuss the grievance. The immediate supervisor shall reply orally and should the aggrieved employee not be satisfied with the reply, the employee shall immediately reduce the grievance to writing and shall give the grievance to the supervisor. The grievance shall be signed by the employee and shall set forth the nature of the grievance and the relief desired. The supervisor shall provide a written answer to the written grievance within five (5) working days of receipt of the written grievance.

STEP 2
If the grievance is not satisfactorily settled on the basis of the supervisor's written answer in Step I, within ten (10) working days of the immediate supervisor's written response, the employee or the employee's representative shall appeal the grievance to the General Manager. Within five (5) working days after the General Manager receives the appeal, the General Manager shall meet with the employee and a representative of the national Union or his designee. Within ten (10) working days after the meeting, the General Manger will consider the grievance and give a reply, in writing, to the aggrieved employee and to the employee's representative.

STEP 3
In the event the complaint is not settled in Step 2, the aggrieved employee and the employee representative shall file a written appeal of the grievance decision to the Board of the Hempfield Township Municipal Authority for review and consideration at its next regularly scheduled Board meeting."

(Union Exhibit 1)

5. Article XIII, section 8, of the collective bargaining agreement provides "[f]or temporary leave to attend to medical or family matters during a work day[.]" (Union Exhibit 1)

6. On December 8, 2008, the Authority's board of directors in an executive session directed the Authority's general manager (Mr. Ranella) to enforce the Clean Indoor Air Act. The Authority's plant manager and then field supervisor (Mr. Kuenzig) was on vacation at the time. (N.T. 273-274, 294, 402-405)

7. On December 15, 2008, upon Mr. Kuenzig's return from vacation, Mr. Ranella told him that based on Pennsylvania law there would be no smoking in any of the Authority's buildings effective immediately. (N.T. 294, 405)

8. On December 16, 2008, Mr. Kuenzig announced to a group of employes that the Authority's board of directors had adopted a no-smoking policy. Afterwards, a plant operator who was the Union's steward (Mr. Depetris) asked Mr. Kuenzig for a copy of the no-smoking policy. Within the next two days, Mr. Kuenzig posted a copy of a flier referencing the Clean Indoor Air Act. (N.T. 8-9, 46-47, 165, 172, 295-296, 371, 373-374, 376; Management Exhibit 1)

9. On December 17, 2008, Mr. Kuenzig announced to another group of employes that the board of directors had adopted the no-smoking policy. A plant operator (David Ellis) said that he would be filing a grievance. Mr. Kuenzig offered to resolve the grievance by providing a picnic table for employes to use while smoking outside. Mr. Kuenzig did not threaten to remove the picnic table or to expand the no-smoking policy to cover the Authority's entire property if Mr. Ellis filed the grievance. (N.T. 147-148, 174, 194, 293-295, 297-299, 371, 374, 276)

10. On January 28, 2009, Mr. Kuenzig submitted to Mr. Kuenzig a "temporary leave/make-up request" for that day. The reason Mr. Depetris gave for his request was "family." Mr. Kuenzig granted his request. (N.T. 21, 88, 90, 131, 331, 333, 427-428; Union Exhibit 6, Management Exhibit 13)

11. On February 2, 2009, Mr. Depetris submitted to Mr. Kuenzig a "temporary leave/ make-up request" for that day. The reason Mr. Depetris gave for the request was "family." Mr. Kuenzig asked Mr. Depetris what he meant by "family." Mr. Depetris said he wanted to pick up his daughter from gymnastics. Mr. Depetris withdrew the request before Mr. Kuenzig took any action on it. (N.T. 88-90, 131, 331, 334-335, 428-431; Management Exhibit 13)

12. On February 10, 2009, Mr. Depetris asked Mr. Kuenzig and Mr. Ranella to verify in writing that employes were to call off sick to the Authority's answering service. (N.T. 14-17, 19-20, 126-127, 303-304, 378; Union Exhibit 5)

13. On February 10, 2009, Mr. Depetris submitted to Mr. Kuenzig a "temporary leave/make-up request" for that day. The reason he gave for his request was "Daughter's Gymnastics." Mr. Kuenzig denied the request because he thought that Mr. Depetris was asking for flex-time beyond the scope of article XIII, section 8, of the collective bargaining agreement. (N.T. 22-24, 89-90, 131, 330-331, 335-337, 386, 429-430; Union Exhibit 7)

14. On March 4, 2009, Mr. Kuenzig posted a call-off procedure for sick leave. (N.T. 20, 306-307, 378-379)

15. On March 31, 2009, Mr. Depetris and a maintenance employe (Charles Nuss) met with Mr. Ranella and Mr. Kuenzig to discuss two grievances, one of which involved Mr. Kuenzig's denial of a vacation request by Mr. Depetris. The reason given by Mr. Kuenzig for denying Mr. Depetris's vacation request was "staffing." Mr. Nuss questioned why the Authority could not have operated a shift with fewer than ten employes on the day in question in light of the fact that only two employes worked shifts over the Thanksgiving holidays. Mr. Kuenzig and Mr. Ranella questioned why the Union would be advocating for fewer employes per shift. Neither Mr. Kuenzig nor Mr. Ranella threatened to lay off employes. (N.T. 28-35, 163, 165-167, 317-320, 379-380, 395-396, 413-415; Union Exhibits 9-10, Management Exhibit 12)

16. Later in the day on March 31, 2009, Mr. Nuss asked Mr. Kuenzig, "Did you really say that you were going to start laying off people if we didn't change our union representation?" Mr. Kuenzig laughed and said, "You know what was discussed at the meeting" and that "I expect better representation from the Union than to have these kind of wild accusations from them" Mr. Kuenzig had not said that he was going to lay off employes if they did not change their union representation. (N.T. 167-172, 178-179, 188-189, 195-196, 326-328, 381-385)

17. In April 2009, Mr. Kuenzig assigned Mr. Depetris to fill out maintenance checklists required by the Department of Environmental Protection. Mr. Kuenzig thought that Mr. Depetris, having previously been a maintenance employe, was best suited for the job. (N.T. 38, 42, 96, 270, 343-344)

18. In late June 2009, Mr. Kuenzig assigned Mr. Depetris to drive a tanker truck for one day because no maintenance employe or laborer was available to drive the truck. (N.T. 36-38, 104, 108, 342-344)

19. On June 28, 2009, Mr. Kuenzig and Mr. Depetris discussed a scheduling matter. Mr. Kuenzig sarcastically said that he expected at least two grievances to be filed. (N.T. 40, 116)

20. During the summer of 2009, Mr. Kuenzig verbally reprimanded Mr. Depetris for not filling out maintenance checklists on six occasions over two months. Mr. Depetris met with Mr. Kuenzig to grieve the discipline. Mr. Ranella was present during the meeting. (N.T. 345-347, 421-422; Management Exhibit 14)

21. By memorandum dated July 8, 2009, Mr. Kuenzig wrote to Mr. Depetris as follows:

> "Management met with David Depetris and his witness Bill Stevens on 07/08/09 over Mr. Depetris' failure to complete an assigned Preventive Maintenance Checklist. On Friday 06/26/09 at the morning staff meeting, Mr. Depetris was instructed that he was to complete the maintenance checklists when assigned to the Darragh facility (on Mondays and Tuesdays) unless management assigned other personnel to complete the checklist on those days. On Monday 06/29/09, Mr. Depetris failed to complete the maintenance checklist for the Darragh facility and the meeting yielded no valid reason for it to have not been completed. Further note, Mr. Depetris did not inform management of any outstanding issues on 06/29/09 at the Darragh/Rolling Hills facilities that would've prevented him from completing the assigned tasks. The result of the meeting was a verbal warning to Mr. Depetris that failure to complete the Preventive Maintenance Checklist in the future will not be tolerated."

(N.T. 41, 97; Union Exhibit 11, Management Exhibit 17)

22. By grievance dated July 17, 2009, Mr. Depetris alleged "Retaliation against Union Employe for Union activity. I was given a verbal warning for performing assigned tasks." (N.T. 42, 348; Union Exhibit 12, Management Exhibit 15)

23. By memorandum dated July 23, 2009, Mr. Kuenzig wrote to the Union in pertinent part as follows:

> "On 07/17/09, the Union filed a written grievance involving a verbal warning issued to Mr. David Depetris on 07/08/09 after a meeting to discuss his failure to complete assigned work from 06/29/09. (Please note, this grievance was not received by management until 07/20/09 and the Union must obtain a dated management signature on all future grievance submissions) . . .
>
> The following is my written response to this grievance. First, the written grievance does not specify any provision of the Labor Agreement that was violated. For that reason the grievance is denied. Further, I have reviewed the merits of this grievance and have concluded this grievance has no merit."

(N.T. 43, 98, 234, 313, 349, 388; Union Exhibit 13, Management Exhibit 16)

24. By memorandum dated July 23, 2009, Mr. Ranella wrote to "Union Employees" as follows:

> "On 07/20/09, management received the Union's appeal to Mr. Kuenzig's written response dated 07/08/09. Please note, this appeal should've been submitted to my attention and not Mr. Kuenzig's attention. In the appeal the Union stated they did not agree with the written response, yet offered no facts. What don't you agree with in Mr. Kuenzig's response and why? The Union needs to cite specific references in the Labor Agreement that pertain to their grievance. The Union needs to cite the relief desired from the grievance, specifically how does the Labor Agreement provide the relief you are seeking.
>
> Based upon my knowledge of the situation and the facts presented, I concur with Mr. Kuenzig's assessment of the grievance, that management acted accordingly as per the provisions established in the Labor Agreement. If you wish to appeal my decision, in accordance with the Labor Agreement you may file a written appeal to the board at their regularly scheduled meeting on August 10, 2009."

(N.T. 43-44, 234, 236, 349; Union Exhibit 14, Management Exhibit 17)

25. In late July 2009, the parties met in a conference room to discuss a grievance. They conducted the meeting in a professional manner. During the meeting, Mr. Ranella was under the impression that Mr. Depetris was staring at him. After the meeting concluded and as they were approaching a door to exit the conference room, Mr. Ranella asked Mr. Depetris, "Were you eyeballing me, Dave?" A former general manager (Gerald Answine) routinely asked employes in a jocular fashion if they were "eyeballing" him. Mr. Ranella never laid hands on Mr. Depetris. (N.T. 44-45, 119-123, 202-208, 358-360, 407-413)

26. By memorandum dated August 4, 2009, Mr. Depetris wrote to Mr. Ranella as follows:

> "The Union is not satisfied with the response to the grievance filed on the verbal warning for failure to complete assigned tasks. We wish to pursue it to the next step of the grievance procedure. Tim Kuenzig has failed to add the maintenance list at Darragh to the list of required jobs on the Union bulletin board or on the wall by the time clock. There is a list of job requirements including cleaning and emptying trash and maintenance items for operators, maintenance and laborers posted on the wall that does not include any maintenance list at Darragh. Any regular or reoccurring job requirement is on this list. There has never been any problem with assignments in the past as there is no problem now.

The Union feels this unnecessary warning is retaliation from the current union activity is seeking removal of this warning from the permanent record."

(N.T. 355; Management Exhibit 21)

27. By memorandum dated August 4, 2009, Mr. Depetris wrote to Mr. Kuenzig as follows:

"The Union is requesting a copy of the maintenance list for the Darragh facility for 2008 through June of 2009. We feel the information is necessary for the investigation of a grievance involving the list's completion."

(N.T. 239, 253-255, 352; Union Exhibit 16, Management Exhibit 20)

28. By memorandum dated August 13, 2009, Mr. Ranella without meeting further with Mr. Depetris denied Mr. Depetris's appeal of the grievance involving the verbal warning he received from Mr. Kuenzig. (N.T. 44, 238, 250; Union Exhibit 15)

29. On August 26, 2009, Mr. Kuenzig responded to Mr. Depetris's request for the maintenance list for the Darragh facility for 2008 through June of 2009 as follows: "MUST FILL OUT FORM FOR FREEDOM OF INFORMATION ACT AND HIS REQUEST WILL BE CONSIDERED ACCCORDINGLY. 15:45 per Rege on 08/07/09[.]" (N.T. 256, 267-268, 353-354; Management Exhibit 20)

30. On September 17, 2009, Mr. Kuenzig told Mr. Mihalchik that he could not grant his request to take off September 30, 2009, until he found out how many employes would be testifying at the hearing scheduled for that day. Afterwards, Mr. Depetris asked Mr. Kuenzig if he had a conversation with another employe about who was testifying at the hearing. Mr. Kuenzig said, "Yes, I need to know for scheduling." Mr. Depetris told Mr. Kuenzig to "have all Union business come through me." (N.T. 188, 240-241, 363-364)

31. On September 18, 2009, Mr. Kuenzig asked Mr. Depetris and Mr. Nuss for a list of employes who would be testifying at the hearing scheduled for September 30, 2009, so he could make arrangements to operate the plant. Neither Mr. Depetris nor Mr. Nuss responded to his request. (N.T. 242-243, 263-264, 268-269, 365-366)

DISCUSSION

The Union has filed a charge, an amended charge and a second charge alleging that the Authority committed various unfair practices on thirteen separate occasions. The Authority has answered that the charges should be dismissed because it did not commit any of the unfair practices charged.

I

The first charge is that the Authority committed unfair practices by refusing to provide the Union with requested "information about and copies of" no-smoking, sick leave and vacation policies.

According to the Union, the Authority violated its statutory obligation to bargain when its plant manager (Mr. Kuenzig) announced a no-smoking policy changing a work rule without giving the Union prior notice of the change as required by article V, section 1, of the parties' collective bargaining agreement and when he did not provide the Union with requested sick leave and vacation policies.

According to the Authority, no unfair practices occurred because Mr. Kuenzig posted the no-smoking and sick leave policies and because its vacation policy is as set forth in the collective bargaining agreement.

An employer violates sections 1201(a)(1) and (5) if it repudiates a provision in a collective bargaining agreement. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993).

The record shows that article V, section 1, of the parties' collective bargaining agreement provides that "[t]he Authority shall give employees reasonable advance notice of the applicability of any and all rules by posting said rules for a period of no less than seven (7) days prior to the effective date of said rules" (finding of fact 2). The record also shows that after the Authority's board of directors adopted a no-smoking policy Mr. Kuenzig posted a flier referencing the Clean Indoor Air Act (finding of fact 8) and that after the Union asked the Authority to verify that employes were to call off sick to the Authority's answering service Mr. Kuenzig posted the procedure for calling off sick (findings of fact 12 and 14). The record does not show that the Authority changed its sick leave or vacation policies.

On that record, it is apparent that the Authority repudiated article V, section 1, of the collective bargaining agreement by not posting its no-smoking policy for no less than seven days prior to its effective date. Thus, to that extent, the Authority committed unfair practices under sections 1201(a)(1) and (5).

Inasmuch as the record does not show that the Authority changed its sick leave and vacation policies, there is no basis for finding that the Authority was required to post them under article V, section 1, of the collective bargaining agreement. Thus, the Authority has not otherwise repudiated article V, section 1, of the collective bargaining agreement, and the remaining parts of the first charge must be dismissed.

II

The second charge is that the Authority committed an unfair practice by threatening to retaliate against employes if the Union pursued its request for the no-smoking policy.

According to the Union, the Authority coerced employes in the exercise of their rights under the PERA when Mr. Kuenzig said at a morning staff meeting that he would remove a promised outside table for smokers and expand the Authority's no-smoking policy to cover the Authority's entire property if the Union pursued its request for the non-smoking policy.

According to the Authority, no unfair practice occurred because Mr. Kuenzig said no such thing.

In Susquenita School District, 40 PPER 68 (Final Order 2009), the Board explained the applicable law as follows:

> "An independent violation of Section 1201(a)(1) of PERA arises when, in light of the totality of circumstances, the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights. Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001)."

Id. at 267. The filing of a grievance is a protected right. Montrose School District, 38 PPER 127 (Final Order 2007).

The parties agree that Mr. Kuenzig met with employes to announce the no-smoking policy. They presented conflicting testimony, however, as to what Mr. Kuenzig said when he met with the employes. The Union presented testimony by four employes (Mr. Depetris, Mr. Ellis, Mr. Nuss and Mr. Mihalchik) that Mr. Kuenzig threatened to remove a promised picnic table and smoking area if they filed a grievance (N.T. 10, 146, 165, 188), while the Authority presented testimony by Mr. Kuenzig that he made no such threat (N.T. 293-294).

The parties also presented conflicting testimony as to when Mr. Kuenzig met with the employes. Mr. Kuenzig testified that he met with the employes in December 2008 (N.T. 295, 371), while Mr. Depetris, Mr. Ellis, Mr. Nuss and Mr. Mihalchik testified that Mr. Kuenzig met with them in January 2009 (N.T. 9, 69, 144, 157, 164, 188).

In order to resolve conflicting testimony, the hearing examiner must make credibility judgments. Suffice it to say that each party submits that its own witnesses were credible while the other party's witnesses were not.

As Hearing Examiner Timothy Tietze cogently explained in Douglass Township, 34 PPER 131 (Proposed Decision and Order 2003):

> "Credibility judgments are based upon a witness's appearance, general bearing, conduct on the stand, demeanor, manner of testifying (e.g. candor, frankness, clearness of statements), and certainty of the witness with respect to the facts. Ross Township, 23 PPER ¶ 23175 (Proposed Decision and Order, 1992)(citing In Re Gaston's Estate, 361 Pa. 105, 62 A.2d 904 (1949)). The demeanor of a witness is the touchstone of credibility. Robinson v. Robinson, 183 Pa. Super. 574, 133 A.2d 259 (1957). Additionally, the Board has stated that an examiner may simply choose to believe one witness over another without further explanation. Upper South Hampton Township, PLRB Case. No. PERA-C-90-60-E (Order Directing Remand to Hearing Examiner for Further Proceedings, 1991)(not reported in PPER)."

Id. at 402-403.

Notably, as to when Mr. Kuenzig met with the employes, Mr. Ranella testified without rebuttal that the Authority's board of directors directed him to enforce the Clean Indoor Act on December 8, 2008, while Mr. Kuenzig was on vacation (N.T. 403-405) and that he directed Mr. Kuenzig upon returning from vacation to enforce the no-smoking policy effectively immediately (N.T. 405). Mr. Kuenzig also testified without rebuttal that he returned from vacation on December 15, 2008 (N.T. 294). It stands to reason that Mr. Kuenzig, as Mr. Ranella's subordinate, followed Mr. Ranella's directive and met with employes over the next two days to announce the no-smoking policy. Thus, as to when Mr. Kuenzig met with the employes, the hearing examiner has credited Mr. Kuenzig's testimony over Mr. Depetris's, Mr. Ellis's, Mr. Nuss's and Mr. Mihalchik's (findings of fact 8-9).

Moreover, as explained below, Mr. Depetris's testimony that Mr. Kuenzig never assigned him to fill out maintenance checklists was not creditworthy, while Mr. Depetris's and Mr. Nuss's testimony that Mr. Kuenzig and Mr. Ranella threatened lay offs was not creditworthy. As also explained below, Mr. Depetris's testimony about what Mr. Kuenzig said in relation to employes testifying before the Board was not creditworthy.

The hearing examiner, therefore, has resolved in the Authority's favor the conflict in the testimony as to what Mr. Kuenzig said to the employes (finding of fact 9). Thus, there is no factual basis for the second charge. Accordingly, the second charge must be dismissed.

III

The third charge is that the Authority committed an unfair practice by suggesting a reduction in force if the Union pursued a grievance involving a vacation day.

According to the Union, the Authority coerced employes in the exercise of their rights under the PERA when Mr. Kuenzig in discussing a grievance involving his denial of a vacation request by Mr. Depetris said that fewer employes might be needed and some should be laid off.

According to the Authority, no unfair practice occurred because Mr. Kuenzig said no such thing.

An employer commits an unfair practice under section 1201(a)(1) if it engages in conduct that under the totality of circumstances has a tendency to coerce a reasonable employe in the exercise of protected rights. Susquenita School District, supra. The filing of a grievance is a protected right. Montrose School District, supra.

The parties agree that Mr. Depetris and Mr. Nuss met with Mr. Kuenzig and Mr. Ranella to discuss a grievance involving Mr. Kuenzig's denial of a vacation request by Mr. Depetris. They presenting conflicting testimony, however, as to what transpired at the meeting. Testifying for the Union, Mr. Depetris said that Mr. Ranella threatened layoffs (N.T. 34), while Mr. Nuss said that Mr. Kuenzig threatened layoffs (N.T. 167).

Testifying for the Authority, Mr. Kuenzig and Mr. Ranella both denied having threatened layoffs (N.T. 319-320, 413-414).

Mr. Depetris's and Mr. Nuss's credibility suffered because their testimony was inconsistent as to who threatened layoffs. The hearing examiner, therefore, has credited Mr. Kuenzig's and Mr. Ranella's denials, which were consistent, accordingly (finding of fact 15).

Given that the hearing examiner has resolved the conflict in the testimony in the Authority's favor, there is no factual basis for the third charge. Accordingly, the third charge must be dismissed.

IV

The fourth charge is that the Authority committed unfair practices by threatening layoffs if employes did not change their union representation.

According to the Union, the Authority coerced employes in the exercise of their rights under the PERA when Mr. Kuenzig said to Mr. Mihalchik that they should consider changing their union representation before there were layoffs and when Mr. Kuenzig laughed in response to Mr. Nuss asking him if he had said as much to Mr. Mihalchik.

According to the Authority, no unfair practices occurred because Mr. Kuenzig said no such thing to Mr. Mihalchik and because Mr. Kuenzig's laughing was in keeping with the outrageous nature of the question by Mr. Nuss.

An employer commits an unfair practice under section 1201(a)(1) if it engages in conduct that under the totality of circumstances has a tendency to coerce a reasonable employe in the exercise of protected rights. Susquenita School District, supra. Selecting union representation is a protected right. City of Philadelphia, 28 PPER ¶ 28243 (Proposed Decision and Order 1997).

The parties presenting conflicting testimony as to whether or not Mr. Kuenzig said to Mr. Mihalchik that the employes should consider changing their union representation before there were layoffs. The Union presented testimony by Mr. Mihalchik that Mr. Kuenzig did (N.T. 188-189), while the Authority presented testimony by Mr. Kuenzig that he did not (N.T. 326).

The hearing examiner, having previously resolved in the Authority's favor the conflict in the testimony of Mr. Kuenzig and Mr. Mihalchik as to what Mr. Kuenzig said at the meeting at which he announced the no-smoking policy, has credited Mr. Kuenzig's testimony over Mr. Mihalchik's (finding of fact 16). Thus, there is no factual basis for the first part of the fourth charge, and to that extent the fourth charge must be dismissed.

The record shows that Mr. Nuss asked Mr. Kuenzig, "Did you really say that you were going to start laying off people if we didn't change our union representation?" The record also shows that Mr. Kuenzig laughed and said, "You know what was discussed at the meeting" and "I expect better representation from the Union than to have these kind of wild accusations from them" (finding of fact 16). The record does not show that Mr. Kuenzig expressly denied having made the statement Mr. Nuss attributed to him.

Given the lack of an express denial by Mr. Kuenzig, a reasonable employe would construe Mr. Kuenzig's laughing in the face of an inquiry as serious as Mr. Nuss's as intimating that Mr. Kuenzig might start laying employes off if they did not change their union representation. It is apparent, then, that Mr. Kuenzig's laughing would have a tendency to coerce a reasonable employe in the exercise of their right to select their union representation. Thus, to that extent, the Authority committed an unfair practice under section 1201(a)(1).

V

The fifth charge is that the Authority committed unfair practices by denying a "comp time" request by Mr. Depetris.

According to the Union, the Authority discriminated against Mr. Depetris for being the Union's steward when it denied a request by him for leave to pick up his daughter from gymastics.

According to the Authority, no unfair practices occurred because it lawfully denied Mr. Depetris's request as inappropriate under article XIII, section 8, of the parties' collective bargaining agreement.

In Susquenita School District, supra, the Board explained the applicable law as follows:

> "To support a claim of discrimination under Section 1201(a)(3) of PERA, the charging party must establish that the employe engaged in an activity protected by 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). Because motive creates the offense under Section 1201(a)(3) of PERA, PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969), an employer may successfully defeat a claim of discrimination by establishing a credible, non-discriminatory, legitimate business reason for its action. Wattsburg Education Association v. Wattsburg Area School District, 35 PPER 54 (Final Order, 2004)."

40 PPER at 266. Being a steward is a protected activity. Commonwealth of Pennsylvania, Department of Corrections, 36 PPER 114 (Final Order 2006).

The record shows that article XIII, section 8, of the parties' collective bargaining agreement provides "[f]or temporary leave to attend to medical or family matters during a work day" (finding of fact 5). The record also shows that Mr. Depetris asked for temporary leave three weeks in a row (finding of facts of 10, 11 and 13) and that Mr. Kuenzig granted his first request (finding of fact 10). The record further shows that Mr. Kuenzig denied Mr. Depetris's third request because he thought that Mr. Depetris was asking for flex-time beyond the scope of article XIII, section 8, of the collective bargaining agreement (finding of fact 13).

On that record, it is apparent that Mr. Kuenzig denied Mr. Depetris's request for a credible, nondiscriminatory, legitimate business reason. Accordingly, the fifth charge must be dismissed.

The Union contends that support for the charge may be found in the timing of events and the Authority's disparate treatment of another employe. The Union points out that Mr. Kuenzig denied Mr. Depetris's request on the very day Mr. Depetris as the Union's steward asked him to verify the call off procedure for sick leave (findings of fact 12-13) yet granted another employe (Mr. Mihalchik) similar leave (N.T. 433; Management Exhibit 13). The Union also points out that Mr. Ranella previously said in late 2008 that he did not want to meet with the Union if Mr. Depetris was the steward (N.T. 139) and that things would be worse for the Union if he reduced a tardiness policy to writing as requested by the Union (N.T. 142, 151).

Close timing between an employe's protected activity coupled with an employer's disparate treatment of similarly situated employes will support a finding that the employer was discriminatorily motivated. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005); Westmoreland County, 39 PPER 167 (Final Order 2008). Neither will the employer's disparate treatment of employes who are not similarly situated. Erie City School District, 40 PPER 12 (Final Order 2009). Nor will the employer's lack of just cause as an arbitrator might define the term. Bucks County Community College, 36 PPER 84 (Final Order 2005).

The record shows, however, that Mr. Kuenzig granted Mr. Depetris's first request despite the comments Mr. Ranella made in 2008 (finding of fact 10). Thus, the timing of events militates against a finding that Mr. Kuenzig was discriminatorily motivated when

he subsequently denied Mr. Depetris's third request. Moreover, the record does not show that any other employe requested time off three weeks in a row as Mr. Depetris did. Thus, there is no basis for finding that Mr. Depetris and any other employe were similarly situated. Accordingly, there is no basis for finding that Mr. Kuenzig's denial of Mr. Depetris's request was discriminatorily motivated.

VI

The sixth charge is that the Authority committed unfair practices by "repeatedly assigned more onerous and less desirable work duties to Depetris."

According to the Union, the Authority assigned Mr. Depetris to drive a tanker truck and to fill out maintenance checklists because he was the Union's steward and because the Union filed the original charge.

According to the Authority, no unfair practices occurred because neither driving the tanker truck nor filling out the maintenance checklists was onerous and less desirable work and because it lawfully assigned Mr. Depetris to drive the tanker truck on but one occasion when no one else was available and to fill out the maintenance checklists because his past experience as a maintenance employe best suited him for the job.

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 PERA. Susquenita School District, supra. Being a steward is a protected activity. Commonwealth of Pennsylvania, Department of Corrections, supra. An employer commits unfair practices under sections 1201(a)(1) and (4) if it discriminates against an employe for having filed a charge with the Board. Eastern Lancaster County School District, 40 PPER 11 (Final Order 2009). An employer may successfully defeat a claim of discrimination by establishing a credible, non-discriminatory, legitimate business reason for its action. Susquenita School District, supra.

The record shows that Mr. Kuenzig assigned Mr. Depetris to drive a tanker truck for one day because no maintenance employe or laborer was available to drive the truck that day (finding of fact 18).[2] The record does not show that Mr. Depetris lost any pay or benefits when he drove the truck. The record also shows that Mr. Kuenzig assigned Mr. Depetris to fill out maintenance checklists because he thought that Mr. Depetris's prior experience as a maintenance employe made him best suited for the job (finding of fact 17).

In Municipal Authority of the Borough of West View, 28 PPER ¶ 28057 (Final Order 1997), aff'd, 29 PPER ¶ 29107 (Court of Common Pleas of Allegheny County 1998), the Board dismissed a charge alleging that an employer discriminated against an employe for filing a grievance. In that case, the alleged discrimination was reassigning the employe from marking utility lines with a can a spray paint to digging ditches with hand tools.

The duties Mr. Kuenzig assigned to Mr. Depetris were hardly as onerous as or less desirable than the duties the employer assigned to the employe in Municipal Authority of the Borough of West View. Moreover, Mr. Kuenzig provided a credible, non-discriminatory, legitimate explanation for the assignments to Mr. Depetris. Thus, the same result as in Authority of the Borough of West View obtains. Accordingly, the sixth charge must be dismissed.

VII

The seventh charge is that the Authority committed unfair practices by "issu[ing] a disciplinary warning to Depetris."

[2] The parties presented conflicting testimony as to whether or not other employes were available to drive the truck. The Union presented testimony by Mr. Depetris that other employes were available to drive the truck (N.T. 37), while the Authority presented testimony by Mr. Kuenzig that the other employes were unavailable to drive the truck because he had assigned them to other duties (N.T. 342). Mr. Kuenzig's testimony was conclusory in nature. Moreover, it stands to reason that Mr. Kuenzig as the plant manager would be in a better position than Mr. Depetris to know of the other employes' availability. The hearing examiner has resolved the conflict in the testimony in favor of the Authority accordingly.

According to the Union, the Authority issued a verbal warning to Mr. Depetris because he is the Union's steward and because the Union filed the original charge.

According to the Authority, no unfair practices occurred because it lawfully issued the verbal warning to Mr. Depetris for not completely filling out maintenance checklists as part of his assigned duties.

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 PERA. Susquenita School District, supra. Being a steward is a protected activity. Commonwealth of Pennsylvania, Department of Corrections, supra. An employer commits unfair practices under sections 1201(a)(1) and (4) if it discriminates against an employe for having filed a charge with the Board. Eastern Lancaster County School District, supra. An employer may successfully defeat a claim of discrimination by establishing a credible, non-discriminatory, legitimate business reason for its action. Susquenita School District, supra.

The record shows that Mr. Kuenzig issued a verbal warning to Mr. Depetris because he determined that Mr. Depetris did not completely fill out maintenance checklists he assigned to him (findings of fact 17 and 20).

On that record, it is apparent that Mr. Kuenzig had a credible, non-discriminatory, legitimate business reason for disciplining Mr. Depetris. Accordingly, the seventh charge must be dismissed.

In arguing for a contrary result, the Union points out that Mr. Depetris testified that Mr. Kuenzig never assigned him to fill out the maintenance checklists (N.T. 94-95). By Mr. Depetris's own admission, however, he filled them out, albeit not completely (N.T. 95). It stands to reason that Mr. Depetris would not have filled out the maintenance checklists in whole or in part if he had not been assigned by Mr. Kuenzig to fill them out. Moreover, Mr. Depetris allowed in his testimony that Mr. Kuenzig had assigned him to fill out the checklists (N.T. 38, 42). Accordingly, Mr. Depetris's testimony that Mr. Kuenzig never assigned him to fill out the maintenance checklists was not creditworthy.

VIII

The eighth charge is that the Authority committed an unfair practice by "mak[ing] derogatory comments to employees, including Depetris, relating to the filing of grievances by employees."

According to the Union, the Authority coerced employes in the exercise of their rights under the PERA when Mr. Kuenzig said that he expected two grievances to be filed in relation to a scheduling matter.

According to the Authority, no unfair practice occurred because Mr. Kuenzig said no such thing.

An employer commits an unfair practice under section 1201(a)(1) if it engages in conduct that under the totality of circumstances has a tendency to coerce a reasonable employe in the exercise of protected rights. Susquenita School District, supra. The filing of a grievance is a protected right. Montrose School District, supra.

The record shows that when Mr. Depetris and Mr. Kuenzig were discussing a scheduling matter Mr. Kuenzig sarcastically said that he expected two grievances to be filed (finding of fact 19). The record does not show that Mr. Kuenzig denied having made the comment. To the contrary, it shows that he could not remember if he made the comment (N.T. 357-358), which falls short of a denial.

Mr. Kuenzig's comment would have a tendency to coerce employes in the exercise of their right to file grievances in that a reasonable employe would construe it as intimating disgust with their right to file grievances and be less likely to exercise their right in that regard in the future under the circumstances. Thus, the Authority committed an unfair practice under section 1201(a)(1).

IX

The ninth charge is that the Authority committed unfair practices by "instigat[ing] a verbal and physical confrontation with Depetris."

According to the Union, as the parties were exiting a conference room at the end of a grievance meeting, Mr. Ranella aggressively approached Mr. Depetris physically and verbally, asking "Are you eyeballing me?", because Mr. Depetris is the Union's steward and because the Union filed the original charge.

According to the Authority, no unfair practices occurred because Mr. Ranella did not step toward or lay hands on Mr. Depetris and was joking when he asked, "Are you eyeballing me?"

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 PERA. Susquenita School District, supra. Being a steward is a protected activity. Commonwealth of Pennsylvania, Department of Corrections, supra. An employer commits unfair practices under sections 1201(a)(1) and (4) if it discriminates against an employe for having filed a charge with the Board. Eastern Lancaster County School District, supra. An employer may successfully defeat a claim of discrimination by establishing a credible, non-discriminatory, legitimate business reason for its action. Susquenita School District, supra.

The record shows that Mr. Ranella asked Mr. Depetris "Were you eyeballing me, Dave?" as the parties were exiting a conference room at the end of a grievance meeting (finding of fact 25). The record also shows that Mr. Ranella was under the impression that Mr. Depetris had been staring at him during the meeting and that the parties conducted the meeting in a professional manner. Id. The record further shows that a prior general manager (Mr. Answine) routinely asked the same question in a jocular fashion. Id.

On that record, there is no basis for finding that Mr. Ranella attempted to instigate a confrontation with Mr. Depetris, much less that he did so because Mr. Depetris is the Union's steward or because the Union filed the original charge. Accordingly, the ninth charge must be dismissed.

In arguing for a contrary result, the Union points out that Local 487's president (Kevin Thornton) testified that a fight would have broken out if Mr. Ranella had asked the same question in a bar (N.T. 203). The parties were not in a bar, however. Moreover, the record does not show that the grievance meeting was the least bit contentious. To the contrary, as noted above, the record shows that the parties conducted the meeting in a professional manner.

X

The tenth charge is that the Authority committed unfair practices by "attempting to impose mandates" on the processing of grievances "such as requirements to obtain management signatures on grievance submissions and to list contract sections alleged[ly] violated."[3]

According to the Union, the Authority violated its bargaining obligation enforceable under the PERA when Mr. Kuenzig and Mr. Ranella denied a grievance on the ground that the Union had not specified which provisions of the parties' collective bargaining agreement had been violated and when Mr. Kuenzig indicated that he would not process grievances in the future unless the Union first obtained a management signature indicating a filing date.

[3] As noted above, at the outset of the hearing, the hearing examiner denied a motion by the Union to amend the charge to allege that Mr. Kuenzig in addition to Mr. Ranella attempted to impose mandates on the processing of grievances. As noted below, however, the parties nonetheless litigated whether or not Mr. Kuenzig and Mr. Ranella both attempted to impose mandates on the processing of a grievance. Under the circumstances, the hearing examiner has construed the charge as originally filed as encompassing attempts by both Mr. Kuenzig and Mr. Ranella to impose mandates on the processing of grievances. See Youngwood Borough, 17 PPER ¶ 17035 (Order Directing Remand to Hearing Examiner for Further Proceedings 1986), where the Board explained that its notice pleading requirements are "limited," so the fact that a complainant "may be mistaken or simply does not know precisely [what happened] at the time of the filing of the Charge is not fatal to the cause of action." Id. at 102-103.

According to the Authority, no unfair practices occurred because Mr. Kuenzig and Mr. Ranella denied the grievance consistent with the grievance procedure set forth in the collective bargaining agreement and because Mr. Kuenzig never refused to process a grievance for lack of a management signature.

An employer violates sections 1201(a)(1) and (5) if it unilaterally changes a mandatory subject of bargaining. Williamsport Area School District v. PLRB, 486 Pa. 375, 406 A.2d 329 (1979). The procedure for filing grievances is a mandatory subject of bargaining under section 903 of the PERA. No violations of sections 1201(a)(1) and (5) occur, however, if the employer denies but does not refuse to process a grievance under a collective bargaining agreement. As the Board explained in Garnet Valley School District, 10 PPER ¶ 10129 (1979):

> "When presented with the grievance at the lower stages, levels I through III the Employer denied them as not being covered by the collective bargaining agreement. The Employer admitted in its Answer that it refused to process the grievance in 77-78-1 since it did not arise under the collective bargaining agreement. The Board believes that the Employer was not acting improperly when it denied or refused the grievances for the reasons stated. The Association was left with the option after each denial of pursuing the grievance to the next level and in fact did so up to and including level III. At that point the Association could have requested that the Employer proceed to arbitration of the two grievances, however, the Association failed to do so. Having answered the grievance at each level to which it was presented, the Employer has complied with its obligations to discuss grievances and bargain in good faith."

Id. at 96.

The record shows that the parties' collective bargaining agreement sets forth a multi-step procedure under which grievances are to be filed (finding of fact 4) and that the grievance procedure is silent as to whether or not a management signature indicating a filing date must be obtained in order to file a grievance. Id. The record also shows that Mr. Kuenzig and Mr. Ranella denied a grievance in part because the grievant had not specified which provision of the collective bargaining agreement had been violated (findings of fact 23-24). The record does not show that they refused to process the grievance. The record further shows that Mr. Kuenzig wrote that "the Union must obtain a dated management signature on all future grievance submissions" (finding of fact 23).

Given that the grievance procedure is silent as to whether or not a dated management signature must be obtained in order to file a grievance, it is apparent that the Authority changed a mandatory subject of bargaining when Mr. Kuenzig wrote that "the Union must obtain a dated management signature on all future grievance submissions." The fact that Mr. Kuenzig has yet to refuse to process a grievance on that basis is immaterial; the fact remains that he imposed a requirement on the future filing of grievances. Thus, to that extent, the Authority committed unfair practices under sections 1201(a)(1) and (5).

There is, however, no basis for finding that the Authority committed unfair practices when Mr. Kuenzig and Mr. Ranella denied the grievance in part because the Union had not specified which provisions of the collective bargaining agreement had been violated. Given that they did not refuse to process the grievance, the same result as in Garnet Valley School District obtains. Accordingly, to that extent, the tenth charge must be dismissed.

XI

The eleventh charge is that the Authority committed unfair practices by refusing to meet "in accordance with the grievance procedure."

According to the Union, the Authority violated its bargaining obligation enforceable under the PERA when Mr. Ranella did not schedule a second step hearing on a grievance Mr. Depetris filed over a verbal warning he received from Mr. Kuenzig.

According to the Authority, no unfair practices occurred because the Union never asked for a second step hearing.

An employer violates sections 1201(a)(1) and (5) if it repudiates a provision in a collective bargaining agreement. Millcreek Township School District, supra. No violation of sections 1201(a)(1) and (5) occurs, however, if the employer's action was contractually privileged. As the Board explained in Munhall Borough, 40 PPER 102 (Final Order 2009):

> "In Pennsylvania State Troopers Association v. PLRB, 761 A.2d 645 (Pa. Cmwlth. 2000), the Commonwealth Court approved the Board's dismissal of a charge of unfair practices alleging a unilateral change in working conditions, based on the employer's 'sound arguable basis defense' stating that:
>
> > [t]he [Board] has recognized 'contractual privilege' as an affirmative defense to a charge of unfair labor practices alleging a refusal to bargain in good faith. The defense calls for the dismissal of such charges where the employer establishes a 'sound arguable basis' in the language of the parties' collective bargaining agreement, or other bargained-for agreement, for the claim that the employer's action was permissible under the agreement. Id. at 651."

Id. at 354-355.

The record shows that article VIII of the parties' collective bargaining agreement sets forth a multi-step grievance procedure, step two of which provides that "[w]ithin five (5) working days after the General Manager receives the appeal, the General Manager shall meet with the employee and a representative of the national Union or his designee" (finding of fact 3). The record also shows that Mr. Ranella was present when Mr. Depetris met with Mr. Kuenzig to grieve a verbal warning he received from Mr. Kuenzig (finding of fact 20) and that Mr. Ranella without meeting further with Mr. Depetris denied the grievance at step two (finding of fact 28).

On that record, it is apparent that the Authority has a sound basis for construing the collective bargaining agreement to mean that no hearing was required at the second step of the grievance procedure. See Millcreek Township School District, 11 PPER ¶ 11213 (Proposed Decision and Order 1980)(whether or not a hearing was required under a grievance procedure set forth in a collective bargaining agreement was a matter of contractual interpretation for an arbitrator rather than the Board to decide); Upper St. Clair Education Association, AFT #4270 PaFT, 30 PPER ¶ 30011 (Proposed Decision and Order 1999)(same), dismissed as moot, 30 PPER ¶ 30089 (Final Order 1999). Thus, regardless of whether or not Mr. Depetris asked for a second step hearing, the eleventh charge must be dismissed.

XII

The twelfth charge is that the Authority committed unfair practices by refusing to provide and imposing "improper and unreasonable" conditions upon the provision of requested information relevant to the processing of a grievance.

According to the Union, the Authority violated its bargaining obligation enforceable under the PERA when Mr. Kuenzig informed Mr. Depetris that he had to file a Right-to-Know Law request for a maintenance list he requested in relation to the grievance he filed over the verbal warning Mr. Kuenzig gave him for not completely filling out the list.

According to the Authority, no unfair practices occurred because Mr. Depetris did not file his request pursuant to the Right-to-Know Law.

In Temple University, 38 PPER 156 (Final Order 2007), the Board explained the applicable law as follows:

> "Pursuant to Section 1201(a)(5) of PERA, a public employer is obligated to provide the employe representative with information that is relevant to its processing of a grievance. Commonwealth of Pennsylvania v. PLRB, 527 A.2d 1097 (Pa. Cmwlth. 1987). Relevancy is determined under a liberal, discovery-type standard whereby the Board need only find (1) that the employe representative is advancing a grievance which on its face is governed by the parties' agreement, and (2) that the information

> will be useful to the employe representative. Id. Moreover, the Board has held that an unreasonable or inexcusable delay in providing relevant information is a violation of an employer's statutory obligation to bargain in good faith. United Steelworkers of America v. Ford City Borough, 37 PPER ¶ 11 (Final Order, 2006)(citing North Hills Education Association, PSEA/NEA v. North Hills School District, 29 PPER ¶ 29063 (Final Order, 1998))."

Id. at 459.

In Commonwealth of Pennsylvania, Department of Agriculture, 18 PPER ¶ 18003 (Final Order 1986), the Board also explained as follows:

> "{S}ince the Right to Know Act addresses public (rather than union) access to government documents, we find the provisions of PERA to be distinguishable and controlling. The relevance of the Right to Know Act to the instant dispute is minimal at best."

Id. at 11.

The record shows that Mr. Depetris asked Mr. Kuenzig for a maintenance list in relation to the grievance he filed over the verbal warning he received from Mr. Kuenzig for not completely filling out the list (finding of fact 27). The record also shows that Mr. Kuenzig's response was ""MUST FILL OUT FORM FOR FREEDOM OF INFORMATION ACT AND HIS REQUEST WILL BE CONSIDERED ACCCORDINGLY" (finding of fact 29).

On that record, it is apparent that Mr. Depetris was requesting relevant information that the Authority was obligated to provide without condition under the PERA. Thus, the Authority committed unfair practices under sections 1201(a)(1) and (5).

XIII

The thirteenth charge is that the Authority committed unfair practices by "questioning [employes] and/or demanding information from them about the identities of employees who may be testifying on behalf of the" Union in Case No. PERA-C-09-134-W.

According to the Union, the Authority coerced employes in the exercise of their rights under the PERA when Mr. Kuenzig asked Mr. Mihalchik who was going to be testifying for the Union at the first day of hearing and when he asked Mr. Depetris the same thing.

According to the Authority, no unfair practices occurred because Mr. Kuenzig did not ask Mr. Mihalchik who would be testifying at the hearing and because Mr. Depetris ignored Mr. Kuenzig's request.

An employer commits an unfair practice under section 1201(a)(1) if it engages in conduct that under the totality of circumstances has a tendency to coerce a reasonable employe in the exercise of protected rights. Susquenita School District, supra. Testifying before the Board is a protected right. Eastern Lancaster County School District, supra.

The record shows that after Mr. Kuenzig told Mr. Mihalchik that he could not grant his request to take off September 30, 2009, until he found out how many employes would be testifying at the hearing scheduled for that day Mr. Depetris asked Mr. Kuenzig if he had a conversation with another employe about who was testifying at the hearing (finding of fact 30). The record also shows that Mr. Kuenzig said, "Yes, I need to know for scheduling," and that Mr. Depetris told Mr. Kuenzig to "have all Union business come through me." Id. The record further shows that Mr. Kuenzig followed up by asking Mr. Depetris and Mr. Nuss for a list of employes who would be testifying at the hearing scheduled for September 30, 2009, so he could make arrangements to operate the plant (finding of fact 31).[4] The record does not show that Mr. Kuenzig's request was accompanied by any threats.

[4] The parties presented conflicting testimony as to what Mr. Kuenzig said to Mr. Depetris. Mr. Depetris variously testified that Mr. Kuenzig "ordered" (N.T. 242), "requested" (N.T. 264) and "wanted" (N.T. 269) a list of who was going to be testifying for the Union, while Mr. Kuenzig testified that he "requested" the list (N.T. 366). The inconsistencies in Mr. Depetris's testimony undermined his credibility. The hearing examiner has credited Mr. Kuenzig's testimony accordingly.

Although Mr. Depetris testified that "a Union employee came to me, informed me that, Tim Kuenzig had asked him who's going to be testifying at this hearing, at this labor hearing" (N.T. 241), what the employe told Mr. Depetris is hearsay not admissible under any of the exceptions to the hearsay rule. Thus, there is no basis for finding that Mr. Kuenzig asked Mr. Mihalchik who was going to be testifying at the hearing. See Manor Borough, 27 PPER ¶ 27025 (Final Order, 1995), citing Walker v. UCBR, 367 A.2d 366 (Pa. Cmwlth. 1976)(a hearing examiner may not rely on hearsay, even if unobjected to, unless one of the exceptions to the hearsay rule applies). Accordingly, the first part of the thirteenth charge must be dismissed for lack of proof.

There also is no basis for finding that Mr. Depetris coerced employes in the exercise of their right to testify at the hearing when he asked Mr. Depetris and Mr. Nuss for a list of employes who would be testifying at the hearing so he could make arrangements to operate the plant. Given the credible, non-discriminatory, legitimate business reason Mr. Kuenzig gave in explanation for his request, a reasonable employe would not be less likely to exercise their right to testify at the hearing. Thus, the second part of the thirteenth charge must be dismissed for lack of proof as well.

CONCLUSIONS

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

1. The Authority is a public employer under section 301(1) of the PERA.

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

3. The Board has jurisdiction over the parties.

4. The Authority has committed unfair practices under sections 1201(a)(1) and (5) of the PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Authority shall:

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

2. 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.

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

   (a) Rescind the requirement that a management signature be obtained for the filing of a grievance;

   (b) Provide Mr. Depetris with the maintenance list he requested;

   (c) 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

(d) 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 thirteenth day of January 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

Donald A. Wallace, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

UTILITY WORKERS UNION OF AMERICA AFL-CIO	:	
	:	
v.	:	Case Nos. PERA-C-09-134-W
	:	PERA-C-09-399-W
HEMPFIELD TOWNSHIP MUNICIPAL AUTHORITY	:	

AFFIDAVIT OF COMPLIANCE

The Authority hereby certifies that it has ceased and desisted from its violations of sections 1201(a)(1) and (5) of the PERA, that it has rescinded the requirement that a management signature be obtained for the filing of a grievance, that it has provided Mr. Depetris with the maintenance list he requested, 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