COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

Connoquenessing Township (Township) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on December 3, 2009, challenging a Proposed Decision and Order (PDO) issued on November 18, 2009. In the PDO, the Board's Hearing Examiner concluded that the Township violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA) by discharging two members of the bargaining unit represented by the International Union of Operating Engineers, Local 66 (Union) in retaliation for engaging in protected activity and by refusing to proceed to arbitration on grievances filed over the discharges. The Union filed a response to the exceptions and a supporting brief, which were received by the Board on December 24, 2009.

The Hearing Examiner's findings of fact are summarized as follows. 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. During 2008, Road Superintendent William Chuba filed a grievance when the Township disciplined him for allegedly harassing a secretary. Daniel McGee, an equipment operator, also filed a grievance in 2008 when the Township terminated him for allegedly forging a signature on a vacation request. In November 2008, an arbitration hearing was held on the grievances filed on behalf of Mr. Chuba and Mr. McGee. The arbitrator sustained the grievances at the conclusion of the hearing.

In December 2008, the Township reinstated Mr. McGee and accused Mr. McGee and Mr. Chuba of improperly using their Township issued cell phones. The Township did not reissue a cell phone to Mr. McGee and turned off Mr. Chuba's cell phone. Thereafter, on April 2, 2009, Mr. Chuba and Mr. McGee received letters from Township Supervisors Evelyn Hockenberry and Jack Kaltenbaugh stating that they had been discharged for the "unauthorized/improper use of Township equipment" and "falsification of records."[1] Mr. McGee's letter also stated that he was being discharged for wrecking the Township truck, failing to report the accident and failing to take a drug test after the accident. The Hearing Examiner found as fact that Mr. McGee did not falsify any records, wreck the Township's truck or fail to take a drug test.

On April 10, 2009, Union Business Representative Ronald Cord sent a letter to Supervisor Hockenberry enclosing grievances regarding the discharges of Mr. Chuba and Mr. McGee. Supervisor Hockenberry did not respond to the letter. On April 28, 2009, Mr. Cord sent a second letter to Supervisor Hockenberry requesting that the matter proceed to arbitration. Supervisor Hockenberry responded on April 29, 2009, indicating that the Township would not proceed to arbitration on the grievances because the Union's request was untimely, as the decision to discharge Mr. Chuba and Mr. McGee allegedly occurred at a meeting of the Township Supervisors on February 12, 2009.

The Union filed its Charge of Unfair Practices on July 13, 2009. On August 3, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing, which was sent to the Township by certified mail, directing that a hearing be held before the Hearing Examiner on October 29, 2009. The Township filed an Answer to the Complaint and Notice of Hearing on August 20, 2009. A week before the hearing, the Board contacted the Township's attorney to

[1] Appendix A of the parties' collective bargaining agreement (CBA) 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 of the CBA provides for a five day suspension up to and including discharge for "[i]ntentionally falsifying or altering time production, or other records."

verify that the hearing could proceed as scheduled and was informed by the Township's attorney "that he would not be appearing at the hearing…." (N.T. 6). The hearing was held as scheduled. The Township did not attend the hearing or file a post-hearing brief.

In the PDO, the Hearing Examiner concluded that the Township had violated Section 1201(a)(1) and (5) of PERA by refusing to arbitrate the grievances of Mr. Chuba and Mr. McGee, citing PLRB v. Bald Eagle Area School District, 499 Pa. 62, 451 A.2d 671 (1982)(question of arbitrability of grievance is required to be decided by an arbitrator in the first instance) and Chester Upland School District v. McLaughlin, 655 A.2d 621 (Pa. Cmwlth. 1995), aff'd per curiam, 544 Pa. 199, 675 A.2d 1211 (1996)(same). The Hearing Examiner further concluded that the Township discharged Mr. Chuba and Mr. McGee in retaliation for their filing grievances and that the Township's explanation for their discharges was pretextual. Therefore, the Hearing Examiner determined that the Township had also violated Section 1201(a)(1) and (3) of PERA. By way of remedy, the Hearing Examiner ordered the Township to offer to arbitrate the grievances, to offer reinstatement to Mr. Chuba and Mr. McGee to their former positions, and to make them whole for any loss of pay and benefits.

In its exceptions, the Township initially argues that the Board has no authority to hear an appeal from a decision on the Union's grievances. However, the Board, in this unfair practice case, is not reviewing the merits of the Union's grievances. Rather, under Section 1301 of PERA, the Board has exclusive jurisdiction "to prevent any person from engaging in any unfair practice listed in [Section 1201] of [PERA]." 43 P.S. § 1101.1301. Because the Union filed a Charge of Unfair Practices alleging that the Township violated Section 1201(a)(1), (3), and (5) of PERA, the Board has jurisdiction to make a determination on the allegations set forth in the Union's Charge. Merely because an employer's action may give rise to both a grievance and an unfair practice charge does not oust the Board of jurisdiction. Millcreek Township School District v. PLRB, 631 A.2d 734 (Pa. Cmwlth. 1993), appeal denied, 537 Pa. 626, 641 A.2d 590 (1994).

The Township further argues that the Hearing Examiner's decision was biased in favor of the Union. However, although the Township had notice of, and opportunity to attend, the hearing conducted by the Board's Hearing Examiner, the Union was the only party to attend the hearing and present evidence. Therefore, the evidence presented by the Union was uncontroverted.

The Township next alleges that it did not violate Section 1201(a)(5) of PERA because, in the Township's view, the Union was not entitled to proceed to arbitration as it failed to timely file the grievances. The Township further alleges that the Hearing Examiner erred in concluding that it violated Section 1201(a)(3) because no evidence was presented to demonstrate that Mr. Chuba and Mr. McGee were engaged in protected activity. However, the Township waived these issues because it did not appear at the hearing before the Hearing Examiner or file a post-hearing brief. United Transportation Union v. SEPTA, 40 PPER 87 (Final Order, 2009)(issues not raised before the hearing examiner are waived).

However, even if these issues had not been waived, the Township's arguments are meritless. Pursuant to Section 903 of PERA, the arbitration of grievances arising out of interpretation of the provisions of a collective bargaining agreement is mandatory. 43 P.S. § 1101.903. Further, it is well-settled that issues concerning the arbitrability of a grievance, including the timeliness of the grievance, must first be presented to the arbitrator for determination. Bald Eagle, supra; Chester Upland, supra; Public Service Employees Union, Local 1300 v. Luzerne County, 19 PPER ¶ 19111 (Final Order, 1988)(timeliness of grievance is for arbitrator to determine). The evidence in the record shows that the Union filed grievances on behalf of Mr. Chuba and Mr. McGee, that the Union requested that the parties proceed to arbitration on these grievances, and that the Township refused the Union's request on the ground that the grievances were untimely. Whether the Union's grievances were timely filed is for an arbitrator to determine. Id. Thus, the Hearing Examiner properly concluded that the Township violated Section 1201(a)(1) and (5) of PERA.

Concerning the Union's Charge under Section 1201(a)(3) of PERA, the charging party must prove that the employes engaged in protected activity, that the employer was aware of the employes' protected activity, and that the employer took adverse action against the employes because of a discriminatory motive or anti-union animus. Cameron County

Educational Support Personnel Association PSEA/NEA v. Cameron County School District, 37 PPER ¶ 45 (Final Order, 2006)(citing St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977)). The charging party must demonstrate that all three elements are present in order to establish a prima facie case under Section 1201(a)(3). Colonial Food Service Educational Personnel Association v. Colonial School District, 36 PPER ¶ 88 (Final Order, 2005). The employer's motive creates the offense. Id. Further, an employer's pretextual reason for adverse action coupled with close timing of that adverse action to the exercise of protected activity will support a finding that the employer was discriminatorily motivated. Id.

In concluding that the Township's explanation for terminating Mr. Chuba and Mr. McGee was pretextual, the Hearing Examiner stated as follows:

> Notably, shortly after the grievances [Mr. Chuba and Mr. McGee] 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.

(PDO at 5). Thus, the Hearing Examiner found that the Township's adverse action closely followed the employes' protected activity of filing and arbitrating grievances,[2] and that the Township offered a pretextual reason for the adverse action against the employes. Because this is an adequate basis to infer a discriminatory motive on the part of the Township, the Hearing Examiner properly concluded that the Township violated Section 1201(a)(1) and (3) of PERA.

The Township also excepts to the remedy issued by the Hearing Examiner. It is within the Board's discretion to determine the appropriate remedy in an unfair practice case. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994). In order to effectuate the policies of PERA, the Board is authorized under Section 1303 to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action, including reinstatement of employes discharged in violation of [Section 1201] of [PERA], with … back pay…." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, not punitive. Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000). The Board finds the remedy in this case to be remedial and in furtherance of the purposes and policies of PERA to restore the status quo and to make Mr. Chuba and Mr. McGee whole for damages suffered due to the unlawful and discriminatory actions of the Township.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 Connoquenessing Township are hereby dismissed, and the November 18, 2009 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member and James M. Darby, Member, this twentieth day of April, 2010. 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.

[2] Filing grievances and processing them to arbitration is activity protected by PERA. Montrose Area Education Association v. Montrose Area School District, 38 PPER 127 (Final Order, 2007); Somerset Area Education Association v. Somerset Area School District, 37 PPER 1 (Final Order, 2005).

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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 in 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 back pay due with interest as directed, that it has posted a copy of the Proposed Decision and Order and Final 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