

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL 764 :
 :
 v. : Case No. PERA-C-09-229-E
 :
 MILTON REGIONAL SEWER AUTHORITY :

PROPOSED DECISION AND ORDER

On June 19, 2009, the Teamsters Local 764 (Complainant or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Milton Regional Sewer Authority (Respondent or Authority) alleging that the Authority violated Sections 1201(a)(1), (3) and (5) of the Public Employee Relations Act (PERA).

On July 28, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing in which the case was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and October 13, 2009, in Harrisburg was scheduled as the time and place of hearing if necessary.

A hearing was necessary but was continued to November 4, 2009 on the Union's motion without objection from the Authority.

The hearing was held on the rescheduled date, at which times all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The Union submitted a post-hearing brief on December 14, 2009 and the Authority submitted a brief on January 11, 2010.

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

FINDINGS OF FACT

1. That Teamsters Local 764 is an employe organization within the meaning of Section 301(3) of PERA, 43 P.S. § 1101.301(3).
2. That Milton Regional Sewer Authority is a public employer within the meaning of Section 301(1) of PERA, 43 P.S. § 1101.301(1).
3. That the Union is the exclusive certified bargaining representative of the Authority's full-time and regular part-time employes, including but not limited to, secretarial/clerical employes, desk persons, mechanics, operators, shift foremen, drivers and laborers, but excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in the PERA. (N.T. 9, 49, Complainant's Exhibit E)
4. That the Union and the Authority are parties to a collective bargaining agreement covering wages, hours and terms and conditions of employment. (N.T. 9, 49, Complainant's Exhibit E)
5. That Thomas Fawess is an Operator II for the Authority. He has worked there since 1977. He now works the 6:45 am to 3:15 pm shift. (N.T. 18)
6. That the second shift begins at 2:45 pm. The overlap of shifts allows the workers on each shift to exchange information. (N.T. 24)
7. That Mr. Fawess is the shop steward for the Union. (N.T. 18)
8. That on May 12, 2009, Mr. Fawess filed a grievance over the issue of holiday pay for Good Friday, April 10, and Easter Monday, April 13. The grievance is proceeding to arbitration. (N.T. 19, 58-59, Complainant's Exhibit A)

9. That Ronda Bogle is the office manager for the Authority. She has been in that position for ten years. (N.T. 57)

10. That Ms. Bogle works in the new Administration Building. Prior to 2007, she worked in the old Administration Building, known as Building No. 2. (N.T. 63)

11. That on May 14, 2009, Ms. Bogle sent a memo to the Authority employees directing them not to shower while on work time and further, that if they wished to shower, they should do so after their shift. (N.T. 60, Complainant's Exhibit B)

12. That Ms. Bogle sent the memo because she discovered that Mr. Fawess was showering during work time. She discovered this while she was processing hours for payroll and saw that Mr. Fawess had submitted a request for overtime pay for one day. She questioned him because the Authority had not approved overtime for that day and she learned that he had used overtime to shower that day. (N.T. 64)

13. That this was the first time that Ms. Bogle had learned that any employee was showering before clocking out. (N.T. 77)

14. That the Authority employs 11 persons, in the plant and in the office. In the plant, operators work with raw sewage samples and caustic chemicals. (N.T. 20)

15. That the Authority has installed four showers in three different locations: Building No. 2 (the former administration building); Building No. 9 (an empty building used for training) and Building No. 5 (the operator's building). The shower in Building No. 2 is near the time clock, near where Ms. Bogle's office was located until 2007. (N.T. 61, 69)

16. That when Ms. Bogle worked in Building No. 2 she saw employees taking showers in that building. However, she never saw employees take showers before they had clocked out. (N.T. 63)

17. That Ms. Bogle never saw employees taking showers at any time in Building No. 5 or Building No. 9 because she did not work in those buildings. (N.T. 69-70)

18. That George Myers is the Authority superintendent. He has held that position since 1991. His office was also in Building No. 2 until 2007. (N.T. 73-74).

19. That Mr. Fawess' request for overtime was the first time that Superintendent Myers had heard of any employee taking a shower while on the clock. (N.T. 76-77)

20. That Mr. Myers testified that when he worked in Building No. 2 he never saw employees showering in Building No. 2 before they clocked out. (N.T. 74-75)

21. That the Authority kept the time clock in Building No. 2. after Ms. Bogle's office changed location. (N.T. 63)

22. That Mr. Fawess testified that being able to take a shower before going home allows him to come home without the smell of the sewage treatment plant. (N.T. 36)

23. That the Authority had never put anything in writing regarding a showering policy. (N.T. 85)

24. That since the May 14, 2009 memo, Mr. Fawess has stopped taking showers during the work time but he does use one of the Authority showers after his shift. (N.T. 25)

25. That Mr. Fawess contends that the Authority had an unwritten policy allowing employees to take showers during the work time, at the end of their shifts. (N.T. 21)

26. That Mr. Myers, the Superintendent, testified that he worked at the Authority since 1991 and never knew that employees were showering before their shifts were over. (N.T. 74-75, 92)

27. That on May 21, Mr. Myers sent a memorandum to employees stating that no employee would be allowed to bring their personal trash to the Authority's dumpster for disposal. (N.T. 25, Complainant's Exhibit C)

28. That neither Mr. Myers nor anyone in management contacted the Union prior to issuing the May 21 memo to discuss the issue of employe use of the dumpster for personal trash disposal. (N.T. 25-26)

29. That since at least 1977 the Authority allowed the employes to use the dumpster for their personal trash, "as long as it did not create extra costs," as Mr. Fawess characterized the policy. (N.T. 26)

30. That Mr. Myers testified that he was motivated to issue the May 21 memo because of his discovery of a large quantity of carpet in the dumpster. On investigation, he learned that an employe had brought the carpet from his home. (N.T. 65, 78)

31. That this was the first time the Authority told employes that they could not use the Authority dumpster for their personal trash. (N.T. 65)

32. That no employe has used the dumpster for his or her personal trash since Superintendent Myers issued the May 21 memorandum. (N.T. 26-27)

DISCUSSION

The Union's charge of unfair practices alleges that the Authority unilaterally eliminated two longstanding employe benefits: showering in the last fifteen minutes of each shift and disposing of personal trash at the Authority's dumpster.

The Union contends that the unilateral elimination of these benefits violates Section 1201(a)(5) of PERA. The Union alleges that the Authority's unilateral changes also violated Sections 1201(a)(1) and (3) of PERA because they were retaliatory and anti-union actions for Union Steward Tom Fawess' filing of a grievance seeking correct pay for all employees who worked Good Friday and Easter Monday in 2009.

The first charge to be addressed is the allegation that the Authority's elimination of the practice of showering on work time violated Section 1201(a)(5) of PERA. An employer commits an unfair practice in violation of Section 1201(a)(5) when it unilaterally stops providing a benefit. In Cumberland Valley School District, 394 A.2d at 951, the Pennsylvania Supreme Court explicitly held that

Fringe benefits such as health and life insurance and tuition reimbursements which the Employer unilaterally terminated are "wages" within the meaning of Section 301(14) of the PERA. Section 301(14) defines wages as "hourly rates of pay, salaries, or other forms of compensation for services rendered." ... 43 P.S. §1101.301(14).

In this case, the use of the employer's shower is a benefit, as is the use of work time to take a shower. They are benefits even if they are not written in the collective bargaining agreement, as long as the complainant can demonstrate that they are the result of past practice. In AFSCME, District Council 88, Local No. 790 v. Reading School District, (Final Order, 2004), the PLRB held that "an employer commits an unfair labor practice within the meaning of PERA when the employer changes a mandatory subject of bargaining, including one established by past practice." (citing In re Appeal of Cumberland Valley School District, 483 Pa. 1334, 394 A. 2d 946 (1978)).

In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the Court defined a past practice as follows:

A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type of situation. It must be shown to be the accepted course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be accepted in the sense of both parties having agreed to it, but rather that it must be accepted in the sense of being regarded by the men involved as the normal and proper response to the underlying circumstances presented.

476 Pa. at 34 n. 12, 381 A.2d at 852 n. 12

In this case, the Union has not sustained its burden of proving that employes taking showers on work time was an "accepted course of conduct" at the Milton Regional Sewer Authority. Allegheny County, supra. To be "accepted" requires proof that both the union and management had knowledge of the practice. On this point, the Union's case falls short.

Three witnesses testified about their first hand knowledge of the practice of employes showering at the work site. One witness, shop steward Fawess, testified for the Union. He contended that the authority had an unwritten policy allowing employes to take showers during work time, at the end of their shifts. Fawess testified that he and other employes took daily showers in the last fifteen minutes of their shift.

Two persons testified for the Authority: Ronda Bogle, office manager, and George Myers, the Superintendent. Both testified that they were aware that some employes were using the Authority facilities to shower. However, these witnesses testified that they were not aware that the employes were showering while on work time.

Ms. Bogle testified that until 2007, her office was in close proximity to the shower in the administration building (Building No. 2), locker room and time clock. She testified credibly to seeing employes showering after they clocked out. Mr. Myers testified similarly. Because Ms. Bogle and Mr. Myers worked in different buildings than Building No. 5, where Mr. Fawess worked and showered, it is entirely believable that they did not know when Fawess was taking his shower. The Authority witnesses were credible in their testimony of the lack of knowledge that the employes were showering while on work time.

Accordingly, based on this record, the testimony does not persuade me that the Authority management had knowledge of the actual showering practices of the operators in Building No. 5. Without proof of this knowledge, it is difficult to conclude that showering while on work time was an accepted course of conduct. Thus, there will be no finding that showering on work time was a binding past practice. The employer's May 14 memorandum on showering will not constitute a unilateral change that would lead to a finding of a violation of the duty to bargain.

The Union's second allegation is that the Authority violated its duty to bargain by unilaterally ending the benefit of employes bringing their personal trash to the Authority dumpster. The Union contends that the practice was a binding past practice that was a benefit to employes.

As to whether this was a binding past practice, this allegation is subject to the same analysis that was done for the first allegation. Allowing employes to dispose of their personal trash saved money that those employes would otherwise spend for a private or municipal trash hauler. Mr. Fawess testified credibly that since 1977, the Authority allowed the employes to use the dumpster for their personal trash, as long as it did not create extra costs to the Authority. He testified that employes did this in an open manner and that it was known to management.

The Authority witness on this issue was Superintendent Myers. He did not claim that the employer lacked knowledge that this practice was occurring. Instead, he testified that he was first prompted to send the memorandum on May 21 by the large carpet disposed of in the dumpster. After he wrote the memorandum, Mr. Myers also became concerned that the practice may have violated environmental laws that required the separation of household and commercial waste.

Having reviewed the evidence of record, I must conclude that the Union and the Authority had a binding past practice of allowing employes to bring personal trash to the Authority dumpster. It was an accepted course of conduct for employes to bring small amounts of personal trash to the Authority dumpster. The Authority did not testify that this practice was unknown to management prior to the discovery of carpeting in the dumpster.

Superintendent Myers' concern about the size of a carpet being disposed was understandable. His concern about the violation of environmental laws, however, was a post hoc rationale for his initial decision caused by concern over the size of the carpet waste. Regardless of his thought process, he should have approached the Union to discuss his concerns

rather than entirely banning the use of the dumpster for all personal trash. His unilateral suspension of the benefit of bringing personal trash to the Authority dumpster constitutes a breach of the duty to bargain changes in benefits, a violation of Section 1201(a)(5) of PERA.

The Union also claims that these two employer actions violated Section 1201(a)(3), which prohibits employers from "discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization." 43 P.S. § 1101.1201(a)(3).

In order to prove a violation of Section 1201(a)(3), the complainant must prove three elements: (1) that the complainant engaged in protected activity; (2) that the employer knew of the complainant's protected activity and (3) that the employer was motivated by anti-union animus in taking the adverse action. Saint Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). In proving the third element, it is necessary to show that the employer took action that was motivated by the employe's protected activity. "The motive creates the offense." PLRB v. Stairways, Inc., 425 A. 2d. 1172, 1175 (Pa. Cmwlth. 1981). The complainant has the burden of proving its charge by substantial and legally credible evidence. Saint Joseph's Hospital v. PLRB, supra.

In this case, the complainant proved the first two elements. The issue is over the third element, whether the Authority was motivated to take these actions by the Union's filing of a grievance over the Easter weekend pay. Having heard the witnesses and reviewed the record, I am convinced that both employer actions were motivated by considerations that were unrelated to the Union's filing of a grievance.

The Authority's witnesses testified credibly that they discovered the employes' actions and responded because of the employes' actions, not because the Union had filed a grievance in another matter. Ms. Bogle testified that when she was processing payroll she discovered Mr. Fawess had used overtime to shower. Mr. Myers testified that he discovered an employe was using the Authority dumpster to dispose of household carpet when he went out to the dumpster one day and saw the carpet in the dumpster. The motivation for the employer action in each instance was not based on a desire to retaliate against the Union for its filing a grievance or for any other protected activity.

The Union alleges that the Authority's sending these two memoranda also violated Section 1201(a)(1) of PERA, which prohibits public employers from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA." The Board will find an independent violation of Section 1201(a)(1) of PERA "where in light of the totality of the 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 at 404 (Final Order, 2001). Under this standard, the complainant does not have a burden to show improper motive or that any employes have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order, 2004). However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER ¶ 26155 (Final Order, 1995).

The Union alleges that the Authority's actions were acts of retaliation for the union's filing of the grievance over the issue of pay for Good Friday and Easter Monday.

The Authority admits to sending the memoranda, which were sent shortly after the grievance was filed. However, the Authority convinced me that its reasons for sending the memoranda were not related to the grievance filing. Accordingly, I must conclude that the Authority's two actions did not meet the "tendency to coerce" test stated above. Thus, there will be no finding of an independent Section 1201(a)(1) violation.

CONCLUSIONS

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

1. That the Milton Regional Sewer Authority is a public employer within the meaning of Section 301(1) of PERA.

2. That the Teamsters Local 764 is an employe organization within the meaning of Section 301(3) of PERA.

3. That the Board has jurisdiction over the parties hereto.

4. That the Authority has not committed unfair practices in violation of Section 1201(a)(1) and (3) of PERA.

5. That the Authority has committed unfair practices in violation of Section 1201(a)(5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the Authority shall:

1. Cease and desist from refusing to bargain with the employe representative which is the exclusive representative of the Authority employes.

2. Take the following affirmative action:

(a) Rescind the May 21, 2009 memorandum prohibiting the use of the Authority's dumpster for personal trash;

(b) Offer to bargain with the Union over the issue of the use of the Authority dumpster for employes' personal trash;

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

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this Decision and Order by completion and filing of the attached Affidavit of Compliance; and

(e) Serve a copy of the attached affidavit of compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this twenty-fifth day of May, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner