

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

SERVICE EMPLOYES INTERNATIONAL :
UNION, LOCAL 668 :
 :
v. : Case No. PERA-C-10-63-E
 :
BUTLER COUNTY :

PROPOSED DECISION AND ORDER

On March 10, 2010, the Service Employees International Union, Local 668 (Complainant or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Butler County (Respondent or County) alleging that the County violated Section 1201(a)(1) of the Public Employee Relations Act (PERA).

On March 23, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and May 11, 2010 in Pittsburgh was scheduled as the time and place of hearing if necessary.

A hearing was necessary and was held as scheduled, at which times all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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 the parties stipulated and agreed that Service Employees International Union, Local 668 is an employe organization within the meaning of Section 301(3) of PERA 43 P.S. § 1101.301. (N.T. 14)
2. That the parties stipulated and agreed that Butler County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 14)
3. That the Union is the exclusive, certified representative of a unit of caseworkers at the County's Children and Youth Services. (N.T. 14-15)
4. That since 2008 the Union and the County have been engaged in at least 30 bargaining sessions to arrive at a successor collective bargaining agreement to the CBA that expired on December 31, 2008. (N.T. 15, 18, 62-63)
5. That the Union's negotiating team includes Laurie Kubli, who also serves as a steward and is actively involved in processing grievances. Ms. Kubli has served on the union's negotiating committee since 2004. She is also the chapter chair of the union, in which position she has responsibility over 7 counties in western Pennsylvania. (N.T. 18, 58-59)
6. That Ms. Kubli is employed as a Children and Youth caseworker, holding that position for the last 15 years. (N.T. 57)
7. That in January, 2008, the Union negotiating committee met and decided to attend the next public meeting of the County Commissioners on February 3, 2010 to express their frustration at not having a contract. (N.T. 63-68)
8. That all three Commissioners attended the February 3 meeting: James Kennedy, James Lokhaiser and chairman Dale Pinkerton. (N.T. 16)
9. That also in attendance were County department heads, other County employes, a citizen and representatives from newspapers, radio and the Armstrong Cable Television Company. (N.T. 31-33, 67)

10. That Laura Kowalski, western regional representative for SEIU and Roni Hamiel, secretary-treasurer of SEIU each addressed the Commissioners at the public comments portion of the meeting. (N.T. 39-40, 69, Union Exhibit 2)

11. That when the SEIU speakers had finished speaking, Chairman Pinkerton responded. He explained why the County was taking the the bargaining position it did. (N.T. 45)¹

12. That Ms. Kubli attended the meeting but did not sign in to speak in the public comment portion because she did not intend to speak. When she heard Mr. Pinkerton's response to the Union speakers, she decided she wanted to speak. (N.T. 49)

13. That when the commissioners finished speaking, Ms. Kubli then approached the microphone. The solicitor advised the Commissioners that the public comment portion of the meeting was now closed but that it was their prerogative to let her speak. The Commissioners decided to allow her to speak. (N.T. 49-50, 73-74)

14. That Ms. Kubli said the following:

MS. KUBLI:

Thank you. Good morning, Commissioners. I've seen a copy of the budget and in that you budgeted 13.3 percent raises for the Board. Now, I realize that you are ---given or got a six percent raise and that you're giving two percent of that back in order to match what the other people got. But it's hard me to believe that as a leader of the County that you wouldn't know what your---what you would be getting as a salary.

I do appreciate that you've moved to four percent, but I think it's a little disingenuous to say that everyone else has accepted less than we are--have attempted to negotiate with you about. The other people who took that two and a half percent this year they're getting four percent. I don't know why the other people who continued to negotiate should be punished because we are actually negotiating and not just being dictated to.

You know I think it's a little---it was after the bad publicity that you decided to give back the two percent. That's my feelings in the matter and I just---I don't think that you're negotiating fairly.

(N.T. 50-51)

15. That Commissioner Pinkerton responded:

MR. PINKERTON:

Thank you. Okay. In regard to that statement, okay, and I had already figured out what my increase was and when I realized that it was more than I thought, I did question it. And I did not know, and I admit I did not know the way it worked. And you believe that you want okay, but I would not ask one employe to do something that I didn't do myself. And I think if you do some research of me you'll find out that I have never lied to people. As far as you're concerned, okay, and since you spoke, okay, you had this year [] personal days, you took [] days vacation, you had [] sick days, you had 13 holidays, you got 208 hours of ---."

[Hearing Examiner redacted the days to protect Ms. Kubli's personal and private information.]

Ms. KUBLI: Is that a personal attack, sir?

COMMISSIONER PINKERTON: No, it's not.

¹ Armstrong Cable Television Company recorded and broadcast the February 3, 2010 meeting. The company saved the recording on a digital video disc (DVD), which the union introduced as Union Exhibit 2 on page 33 of the Notes of Testimony of this unfair practice hearing. The relevant portion of the DVD was then transcribed by the court reporter at pages 38 to 53 of the Notes of Testimony.

MS. KUBLI: Yes, it was.

COMMISSIONER PINKERTON: This is a public record.

MS. KUBLI: What about your salary?

COMMISSIONER PINKERTON: I can give you---

UNIDENTIFIED SPEAKER: We're not in a debate. This is not a debate.

COMMISSIONER PINKERTON:

You can put it up any way you want. As far as you're a [] person on health care, your health care is \$5,816, your retirement paid for by the County last year was \$9,265. Your social security is \$3,341. Your workmen's comp paid is \$218.43. A grand total of \$62,370.88 which comes out to \$29.87 an hour. I just don't believe that we as Commissioners, okay, are going to give your particular union more than we've given other people. It's not fair to the people who have help with their health care and so forth for the last year and a half or two years. So at that---

[Hearing Examiner redacted marital status to protect Ms. Kubli's personal and private information.]

ATTORNEY GRAHAM: Mr. Eckstein [A citizen who earlier addressed the Commissioners.] this is not----

COMMISSIONER PINKERTON: Motion for adjournment, please?

COMMISSIONER LOKHAISER: So moved.

TRANSCRIPTION FROM VIDEOTAPE ENDS.

(N.T. 50-53, Union Exhibit 2)

16. That Ms. Kubli was upset at Mr. Pinkerton's statement. She felt like she was being singled out for an attack after making a statement on behalf of her fellow union members who she believed were being treated unfairly. She testified, "I was very upset by the way I had been exposed." (N.T. 56-57)

17. That the Commissioners meeting is open to the public. It is covered by local and Pittsburgh newspapers, radios and the Armstrong Cable Television Company. (N.T. 67)

DISCUSSION

The Union's charge of unfair practices alleges that the County violated Section 1201 (a) (1) on February 3, 2010 when County Commissioner Dale Pinkerton disclosed the number of personal, vacation and sick days that Ms. Kubli had taken as leave, the type of medical insurance coverage and the County's pension, social security and workers compensation payments on her behalf. The Union argues that the Commissioner's disclosure interfered with, restrained and coerced employees in the exercise of their protected rights because of the reasonable fear that the Commissioners would again publicly disclose personal and private information if they exercised their protected activity.

Section 1201(a) (1) of PERA prohibits a public employer from "interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of PERA." 43 P.S. 1101.1201(a) (1).

This Board has adopted the "tendency to coerce" test of NLRB v. Brookwood Furniture Division of the United States Industries, 701 F.2d. 452 (5th Cir. 1983) to determine whether an independent violation of Section 1201(a) (1) has occurred. An independent violation of Section 1201(a) (1) will be found if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive regardless of whether employees have been shown to, in fact, have been coerced. Northwestern School District, 16 PPER 16092 at 242 (Final Order, 1985).

In Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order 2004), the Board reiterated the law with respect to section 1201(a)(1) as follows:

"An independent violation of Section 1201(a)(1) occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable employee, regardless of whether anyone was actually coerced. Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). The employer's motive for its actions is irrelevant. Northwestern Education Association v. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)."

35 PPER at 303.

If the employer's conduct was not coercive, then no violation of section 1201(a)(1) may be found. Id. Nor may a violation of section 1201(a)(1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. Temple University, 23 PPER ¶ 23118 (Proposed Decision and Order 1992), affirmed on another ground, 25 PPER ¶ 25121 (Final Order 1994); Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order 1989). But if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 1201(a)(1) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order 1995).

The Union offered the testimony of Ms. Kubli, who testified credibly that Mr. Pinkerton's statement made her feel singled out for speaking on behalf of her union members. She also said she was upset by how she was exposed. Ms. Kubli's explanation of her feeling is understandable. She went to the microphone to contest Commissioner Pinkerton's statements regarding the fairness of the proposed wage increase for the employees and was met by Commissioner Pinkerton's disclosure of her personal and private information including her leave usage and marital status. Mr. Pinkerton's disclosure of this information immediately after Ms. Kubli spoke would certainly act to restrain and discourage other reasonable employees from similarly speaking to the Commissioners and therefore must be seen as coercive.

The County raises several defenses to the complaint. The first defense is that Commissioner Pinkerton's accurate statements at a public meeting are protected under the First Amendment to the United States Constitution. The County cites Montgomery v. Philadelphia, 140 A.2d 100, 102 (1958), which held that a Philadelphia Deputy Commissioner of Public Property was absolutely privileged in making defamatory communications to the press about the faulty construction of a police station. The County argues that the privilege enunciated in Montgomery divests the Board of jurisdiction to hear this unfair practice charge.

Montgomery is inapplicable to the present case. That case found that a privilege existed for the tort of defamation and that the county official could not be held liable. The present case does not raise the question of the official's liability, but rather the question of employer responsibility for an unfair practice under PERA. Montgomery was decided prior to the passage of PERA, which prohibits "public employers" from committing a set of enumerated unfair practices. With the passage of PERA in 1970, the General Assembly imposed certain restrictions on "public employers," prohibiting them from committing a set of enumerated unfair practices. PERA defines a "public employer" as a political subdivision of the Commonwealth of Pennsylvania. 43 P.S. 1101.301. Butler County is a political subdivision of the Commonwealth. It is governed by three commissioners, performing legislative and executive functions. The County's argument that the commissioners have an absolute privilege to say anything they wanted in a collective bargaining setting would render PERA meaningless for employees in county government.

The County next contends that the statements were factually accurate recitations of public records as defined in the Right to Know Act, 65 P.S. §67.701 et seq. The County contends that Commissioner Pinkerton merely disclosed aspects of her salary and compensation: her leave usage; the kind of health insurance provided her and employer contribution to social security, pension and workers compensation. The County contends that this information is subject to the Right to Know Act, which states "[n]othing in this paragraph shall preclude the release of the name, position, salary, actual compensation or other payments or expenses, employment contract, employment-related contract or agreement and length of service of a public official or an agency employee." 65 P.S. § 67.708(b)(6)(ii).

The Union does not dispute the factual correctness of Commissioner Pinkerton's statement. Also, the Union admits that the information, in the aggregate or individually without identifying the individual associated with the information, is subject to disclosure under the Right to Know Act. But the Union contends that the time and manner of disclosure in this instance violates PERA because Commissioner Pinkerton disclosed in a public setting personal and private information of the employe who had just addressed the Commissioners to advance the Union's collective bargaining position.

Finally, the County argues that there was a legitimate basis to Commissioner Pinkerton's statement that outweighed any coercive nature to the statement. The County asserts that "Commissioner Pinkerton merely expressed his view that the County's negotiating position was reasonable, which he is entitled to do under the law." (County brief, page. 6). Also the County contends that "the comments made by the Commissioner were in direct response to comments the Union officials and Ms. Kubli made at the public meeting, including Ms. Kubli's direct attacks on Commissioner Pinkerton." (County brief at 6-7)

The county contends that Commissioner Pinkerton's statement was well within the boundaries of acceptable employer free speech as set forth in PLRB case law. In Southeast Delco Education Association v. Southeast Delco School District, 27 PPER ¶ 27258 (Final Order, 1996), the Association charged the District with violating Sections 1201(a)(1) and (5) of PERA for publicizing teachers' salaries via a television cable access channel during various times in April and May of 1996. The Secretary of the Board refused to issue a complaint and the Board dismissed the Association's exceptions.

The District analogizes this case to Brookville Area Education Ass'n v. Brookville Area School District, 38 PPER ¶ 44 (Proposed Decision and Order, 2007) which relied on Southeast Delco School District, supra. In Brookville Area School District, the Hearing Examiner found that the District did not coerce employes when it published in a local newspaper during contract negotiations an advertisement titled "Brookville Teachers—How Much is Enough?" The advertisement included the costs of the salary and fringe benefits for each member of the bargaining unit by name and designated which members of the bargaining unit were members of the Association's bargaining team. The Examiner reasoned that the advertisement was not coercive because it was an "in kind" response to an earlier Association advertisement publishing the names and addresses of the School Board members and because it did not threaten employes.

However, in the present case, Commissioner Pinkerton's statement went beyond the employer's broadcast and publication of salary and benefits in the cases cited above. He disclosed the individual employe's usage of personal leave, vacation leave, and sick leave, and the employe's marital status for the kind of health insurance the County provided her. This personal information is the kind of information that a reasonable employe would expect to be kept private and not be disclosed in a public meeting that was covered by newspapers and radio and broadcast by the local cable television company.

Furthermore, it was more than an "in kind" response as was done in Brookville Area School District, supra. Ms. Kubli had taken issue with that year's percentage increase in compensation for all three County Commissioners as a class. Commissioner Pinkerton then responded by disclosing her individual use of leave and her marital information, data that was private and personal to her and not that of the class of social workers who were opposite the commissioners in negotiations. Understandably, Ms. Kubli was upset by the being "exposed" by this disclosure.

In summary, it must be concluded that based on the totality of the circumstances in this case, the employer's conduct in bringing employes' leave usage records and marital status to a public meeting covered by newspapers, radio and cable television and then reading this information immediately after the employe addressed the commissioners about the unresolved collective bargaining agreement would have a tendency to coerce a reasonable employe in the exercise of her protected activities.

CONCLUSIONS

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

1. That Butler County is a public employer within the meaning of Section 301(1) of PERA.
2. That the Service Employees International Union, Local 668 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 County has committed unfair practices in violation of Section 1201(a) (1) 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 County shall:

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

2. Take the following affirmative action:

- (a) 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.

- (b) 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

- (c) 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 thirty-first day of August, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner