

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

GARY SULLIVAN :  
 :  
 v. : Case No. PERA-C-09-275-E  
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 COMMONWEALTH OF PENNSYLVANIA :  
 DEPARTMENT OF PUBLIC WELFARE :  
 Philadelphia CAO<sup>1</sup> :

**PROPOSED DECISION AND ORDER**

A charge of unfair practices was filed with the Pennsylvania Labor Relations Board (Board) Gary Sullivan on July 15, 2009 alleging that the Commonwealth of Pennsylvania, Department of Public Welfare, Philadelphia County Assistance Office (Commonwealth) violated Section 1201(a)(1), (3) and (4) of the Public Employe Relations Act (PERA). On August 5, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing wherein this case was scheduled for hearing on November 10, 2009, in Philadelphia, Pennsylvania. A series of continuance requests resulted in a hearing being held on February 25, 2010. On that date, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. At the close of Sullivan's case, the Commonwealth moved to dismiss the charge. Only the Commonwealth filed a post-hearing brief.<sup>2</sup>

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

FINDINGS OF FACT

1. Gary Sullivan is a public employe.
2. The Commonwealth is a public employer.

3. Gary Sullivan is an income maintenance caseworker supervisor at the Philadelphia office of the Commonwealth's Department of Public Welfare. He received an annual employee performance review for the period of June 2008 through June 2009. Because Sullivan had more than one supervisor during the rating period, his primary rater, Rhonda Robertson<sup>3</sup> sought input from those other administrators for whom Sullivan worked, Sandra Byrd and Lisa Wilkins. Sullivan's overall rating was "satisfactory," as it was in his last evaluation. Sullivan was rated "needs improvement" in two categories for which he was rated "satisfactory" before. Only the overall rating is considered for employe promotions and transfers. (N.T. 7, 8, 76, 92, 93, 113, 153, 157; Sullivan Exhibit 1).

4. During the period of time Sullivan's 2008-2009 performance review was prepared, Robertson was unaware of whether Sullivan was a union member, and had no knowledge of Sullivan's filing any unfair practice charges. (N.T. 109-110).

5. The "needs improvement" ratings in Sullivan's latest review were based upon Sullivan's reduced performance in those respective categories. Sullivan did not do as many "Rushmore" reviews as he was required. Sullivan also failed to attend a number of mandatory meetings, and bypassed his chain of command by e-mailing the timekeeper. Sullivan also repeatedly failed to provide Robertson with a schedule of meetings with those he supervised. (N.T. 77, 94-108, 139-140; Commonwealth Exhibit 1).

DISCUSSION

Sullivan alleges that the Commonwealth violated Section 1202(a)(1), (3) and (4) of PERA. The basis of this charge is that, compared to his last review, two out of seven

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<sup>1</sup> The caption appears as amended by the Secretary.

<sup>2</sup> Sullivan's attorney of record, by e-mail dated August 4, 2010, informed the Board that Sullivan had instructed her not to file a brief on his behalf.

<sup>3</sup> Sullivan refers to this woman as Rhonda Smith-Robinson, but she identified herself at the hearing simply as Rhonda Robinson, and I refer to her as such in this proposed order. (N.T. 85).

sections in his current annual, employe performance review were down-graded from "satisfactory" to "needs improvement," and one category was lowered from "commendable" to "satisfactory." These Lilliputian changes did not alter his overall rating of "satisfactory." That overall rating is the singular evaluative item his employer looks to in determining any advancement by employes like Sullivan. Sullivan also alleged that his evaluation was downgraded because he had previously filed an unfair practice charge with the Board (PERA-C-09-186-E).<sup>4</sup>

Because Sullivan proved nothing that would even vaguely support any violations of PERA, this charge is dismissed in its entirety pursuant to the Commonwealth's motion to dismiss for failure to prove a prima facie case.<sup>5</sup> Aside from Sullivan proving nothing to support this charge, the Commonwealth put on the record valid, non-discriminatory reasons why it took the actions it did. A look at the law and the record clearly shows why Sullivan's proofs fall woefully short of adequate.

To succeed at proving a violation of Section 1201(a)(3) of PERA, Sullivan must show that he engaged in protected activity, that his employer knew about his protected activity, and that but for his protected activity his employer would not have taken the adverse action it did. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Sullivan must do more than create a mere suspicion of the existence of supporting facts. Uniontown Area School District, 26 PPER ¶ 26098 (Proposed Decision and Order, 1995).

Sullivan's proofs fall short in two of the three necessary elements from St. Joseph's; he has not shown that those who evaluated him were aware of his protected activity, and he has not shown that the action taken was at all adverse to him in any way.<sup>6</sup> A review of Sullivan's charge is necessary since there were no legal or factual arguments made in his case.

Sullivan's charge of unfair practices alleged that one "Rhonda Smith-Robertson. . . fabricated an official, annual Employee Performance Review (EPR)" for Sullivan for "the rating period of 6/08 to 6/09." The charge further alleged that Robertson changed three categories in the EPR; two from "satisfactory" to "needs improvement," and one from "commendable" to "satisfactory." Evidently, Sullivan is referring to changes from his last performance review.<sup>7</sup>

The charge further alleged that Robinson made these changes from Sullivan's last review in retaliation for his protected activity. Sullivan lists that protected activity as his "refraining from joining PSSU union," and his having "filed and signed an affidavit, petition and complaint" in a prior unfair practice charge.<sup>8</sup>

There is no dispute that Sullivan engaged in protected activity, as he asserts in his charge. (Commonwealth's post-hearing brief at 5). Sullivan's sole proof that Robinson knew of his protected activity is his mere assertion that the Commonwealth was sent a copy of his previously filed unfair practice. Sullivan offered no evidence that Robinson had an inkling of whether he filed a prior charge with the Board, or whether he was a union member.

To show knowledge, Sullivan must prove that Robinson had specific knowledge of his protected activities. Mere general knowledge of protected activity alone is insufficient. Temple University 23 PPER ¶ 23033 (Final Order, 1992). This evidentiary deficiency alone is sufficient to grant the Commonwealth's motion to dismiss.

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<sup>4</sup> That charge was administratively dismissed by the Secretary because of various fatal, legal and factual deficiencies.

<sup>5</sup> Since Sullivan's attorney made no opening or closing statements, and did not file a post-hearing brief, I have no idea upon what legal arguments Sullivan's bases his case. Sullivan has, then, waived all issues not raised before me. City of Wilkes-Barre 25 PPER ¶ 25196 (Final Order, 1994); Philadelphia School District, 25 PPER ¶ 25090 (Final Order, 1994).

<sup>6</sup> These evidentiary shortcomings are also fatal to Sullivan's allegation under Section 1201(a)(4) of PERA. Lebanon County (Sheriff) 32 PPER ¶ 32006 (Final Order, 2000).

<sup>7</sup> I say, evidently, because I have absolutely no idea what Sullivan's argument is concerning these "changes".

<sup>8</sup> Unless Sullivan is alleging that he filed either a representation petition or a unit clarification petition, he could have only filed, at best, a charge and accompanying affidavit. The Secretary of the Board issues complaints. 34 Pa. Code § 93.14.

Sullivan's proofs, however, are fatally deficient in yet another way; he has not proved any adverse action was taken against him by the Commonwealth. Albeit, specific sections of his annual performance review were downgraded from his prior review. Yet, those changes did not affect his overall review ranking of "satisfactory." And, that overall review ranking is the singular item affecting employe promotion or transfer. How an action that has no unfavorable or negative consequences can be adverse, is a conundrum conveniently ignored by Sullivan.

Summing up Sullivan's case, he has proved that he engaged in protected activity, and nothing more.

On the other hand, the Commonwealth has proved legitimate business reasons on the part of Sullivan's evaluators for making the changes they made from his prior review. Those changes were made in direct response to Sullivan's job performance in the requisite evaluation categories.

Because Sullivan has done little more than make bare allegations and set forth unsupported conclusions, the meet result is dismissal of the charge in its entirety.

#### CONCLUSION

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

1. Gary Sullivan is a public employe within the meaning of Section 301(2) of PERA.
2. The Commonwealth is a public employer within the meaning of Section 301(1) of PERA.
3. The Board has jurisdiction over the parties.
4. The Commonwealth has not committed unfair practices within the meaning of Section 1201(a)(1), (3) and (4) of PERA.

#### ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint rescinded.

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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-third day of September, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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TIMOTHY TIETZE, HEARING EXAMINER