

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MARK KENNO :
 :
 v. : Case No. PERA-C-09-412-E
 :
 COMMONWEALTH OF PENNSYLVANIA :
 DEPARTMENT OF GENERAL SERVICES :

PROPOSED DECISION AND ORDER

On October 14, 2009, Mark Kenno (Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Commonwealth of Pennsylvania, Department of General Services (Respondent or Commonwealth) alleging that the Commonwealth violated Sections 1201(a)(3), (4), (5), (7) and (9) of the Public Employee Relations Act (PERA).

On November 17, 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 January 11, 2010, in Harrisburg was scheduled as the time and place of hearing if necessary.

A hearing was necessary but was continued to February 16, 2010, on the motion of the Respondent without objection from the Complainant.

The hearing was held on the rescheduled date. Additional days of hearing were on May 6, 2010 and May 26, 2010.

At the hearings, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The Complainant submitted a post-hearing brief on June 16, 2010. The respondent submitted a brief on July 28, 2010. The complainant submitted a reply brief on August 19, 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. Mark Kenno is a refrigeration mechanic for the Commonwealth of Pennsylvania, Department of General Services (DGS). He began his employment in the Department in August, 1989 as a maintenance mechanic. In 1993, he became a refrigeration mechanic. He repairs, maintains and monitors the HVAC systems in the buildings in the capitol complex in Harrisburg. (N.T. 166)

2. Mr. Kenno is a union steward for Local 2162, of the American Federation of State County and Municipal Employes (AFSCME) Council 90. (N.T. 169, 185)

3. Mr. Kenno has filed at least 9 grievances in the period from September 1999 to June 2004. (N.T. 354, Complainant's Exhibit 15, Respondent's Exhibits 3,4,5,6,7,8,9,10 and 11)

4. On or about June 16, 2009, the DGS posted a vacancy notice for the position of Refrigeration Plant Supervisor 1. (N.T. 104, 265, Complainant's Exhibit 7)

5. After the DGS Bureau of Human Resources determined the individuals who met the minimum experience and training requirements, the names of those applicants were submitted to an interview panel of DGS supervisors. (N.T. 7)

6. The interviews are rigidly circumscribed by the DGS Bureau of Human Resources. The same 19 approved questions, in the same order, must be asked of each applicant. (N.T. 20)

7. A representative of the Bureau of Human Resources was present at all of the interviews for the position in question to ensure that the interviews were properly conducted. (N.T. 20)

8. Five applicants were deemed qualified by DGS Bureau of Human Resources to perform the position. One of the applicants withdrew, leaving four persons to be interviewed for the position: Mr. Kenno, Jason Hall; Thanh Nguyen and Matthew Rouzer. (N.T. 28, 78, 119, 260, 265, Complainant's Exhibits 1 and 8)

9. The interviewing panel was made up of three persons: Michael Penyak, a Refrigeration Plant Supervisor 2, currently in charge of the Environmental Control Center (ECC); Marc Waxman, HVAC Chief in the DGS Bureau of Facilities Management and John Klinger, Division Chief of the ECC. (N.T. 59, 199, 260, 278, Complainant's Exhibit 1)

10. That Mr. Klinger was Mr. Kenno's supervisor at the time of Mr. Kenno filed four of his grievances listed above. (N.T. 354, Respondent Exhibits 4,6,7 and 9)

11. The members of the interviewing panel made notes of the interviews and then scored each applicant's performance at the interview. The members did this without looking at the other panel members' notes. (N.T. 227-229, 260, Complainant's Exhibit 1)

12. These scores were entered on an Evaluation Criteria/Rating Sheet that set forth 17 criteria, reflecting the panelist's belief of the applicant's potential for success in the supervisory position. The members did this without seeing the other members' evaluations. (N.T. 227, 233-235, 260, Complainant's Exhibit 1)

13. These scores were compiled on a "scoring log" for comparison of the applicants. (N.T. 207-209, Complainant's Exhibit 8)

14. The applicants' total scores that were entered on the scoring log were:

Mark Kenno 165
Jason Hall 162
Thanh Nguyen 264
Matthew Rouzer 222

(N.T. 119, 265, Complainant's Exhibits 1 and 8)

15. If Mr. Klinger's scores were removed from the total, the results would have been:

Mark Kenno 120
Jason Hall 117
Thanh Nguyen 183
Matthew Rouzer 150

(N.T. 119, 265, Complainant's Exhibits 1 and 8)

16. If both Mr. Klinger's and Mr. Penyak's scores were removed from the total, leaving only Mr. Waxman's score, the results would have been:

Mark Kenno 54
Jason Hall 54
Thanh Nguyen 87
Matthew Rouzer 69

(N.T. 119, 233, 265, Complainant's Exhibits 1 and 8)

17. On July 2, 2009, on the basis of this scoring log from the three member panel, the panel recommended the hiring of Mr. Nguyen. Mr. Waxman sent the panel's recommendation to Connie Tennis, Director of DGS Bureau of Human Resources and Suzanne Chubb, DGS Director of the Bureau of Facilities Management for review. On or about July 16, 2009, DGS offered the supervisory position to Mr. Nguyen, who accepted it. (N.T. 223-225, 248-250, Complainant's Exhibits 8 and 13)

DISCUSSION

The Complainant alleges that the Department of General Services' decision to promote another employe instead of him to the position of Refrigeration Plant Supervisor 1 violated several subsections of Section 1201 of PERA.

The emphasis in the Complainant's case is that the Department violated Section 1201(a)(3) of PERA, 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. St. 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 of the St. Joseph's test. Mr. Kenno was an active grievance filer. The record shows that he filed at least nine grievances between 1999 and 2005. He was also the AFSCME local steward. Accordingly, there is proof that Mr. Kenno engaged in protected activity.

As for the second element, John Klinger, one of the supervisors who was the subject of four of Mr. Kenno's grievances, sat on the interview panel for his promotion. Accordingly, the Complainant proved employer knowledge of his protected activity.

The issue is over the third element: proving that the Commonwealth, particularly the members of the DGS interview panel, was motivated by anti-union discrimination in its decision to promote someone other than Mr. Kenno to the supervisory position. In a charge of discrimination it is the employer's motivation which creates the offense. Perry County v. PLRB, 364 A.2d 808 (Pa. Cmwlth. 1994).

However, since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. PLRB v. Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982); St. Joseph's Hospital, *supra*. But an inference of anti-union animus must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." Shive supra at 313.

In Child Development Council of Centre County (Small World Day Care Center), 9 PPER ¶ 9188 (Final Order, 1978), the Board stated:

There are a number of factors the Board considers in determining whether anti-union animus was a factor in the layoff of the Complainant: the entire background of the case, including any anti-union activities by the employer; statements by the discharging supervisor tending to show the supervisor's state of mind; the failure of the employer to adequately explain the discharge, or layoff, of the adversely affected employe, the effect of the discharge on unionization efforts—for example, whether leading organizers have been eliminated; the extent to which the discharged or laid-off employe engaged in union activities; and whether the action complained of was "inherently destructive" of important employe rights."

9 PPER 9188, at 380.

Later, the Board noted other factors that it would consider to infer anti-union animus, including the timing of the adverse action against the employes. PLRB v. Berks County (Berks Heim County Home), 13 PPER ¶ 13277 (Final Order, 1982).

In this case, Mr. Kenno argues that anti-union animus can be inferred from two factors: that Mr. Kenno was a union steward who had engaged in extensive grievance filing and the failure of the Department to adequately explain the reason for not promoting Mr. Kenno. As for this second factor, Mr. Kenno argues that the Commonwealth failed to explain

how an interview panel that included a member who was the subject of four of Mr. Kenno's earlier grievances could conduct a fair interview of Mr. Kenno. He argues that having Mr. Klinger on the panel created a biased process to pick anyone other than him and thus led to a predetermined outcome.

Commonwealth's defends the charge by arguing that Mr. Kenno's extensive grievance filing history had no impact on the panel, which conducted itself in a strictly controlled manner. The Commonwealth argues that the selection of Thanh Nguyen was the result of an objective, neutral and fair process that used the composite of all the scores of the three member panel and was not motivated by anti-union animus.

Having heard the witnesses and reviewed the record, I am convinced that the decision to promote someone other than Mr. Kenno was not motivated by Mr. Kenno's filing of grievances but rather by the results of the Department's interviews of all the applicants and the tally of the scores from those interviews. The successful applicant, Thanh Nguyen, came out far ahead in the tally of scores. Mr. Nguyen came out ahead even when Mr. Klinger's scores were omitted from the total. The same result occurred when both Mr. Klinger's and Mr. Penyak's scores were omitted, so that only Mr. Waxman's scores could be considered. Mr. Waxman was the one DGS official on the panel who did not previously have a close working relationship with Mr. Kenno.

Accordingly, the attempt to infer animus from the factors that the Complainant has argued will not succeed. Without the proof of anti-union motivation, the Complainant has not proven the third part of the test for proving a violation of Section 1201(a)(3) of PERA.

The Complainant has also charged that the Commonwealth has violated Sections 1201(a)(4), (5), (7) and (9) of PERA.

The charge under Section 1201(a)(4) of PERA requires the Complainant prove that the employer engaged in discrimination because the complainant signed or filed an affidavit, petition or complaint with the Board, or gave information or testimony before the Board. The Complainant did not prove that he did any of those things or that the Department engaged in discrimination because of any of those actions. Accordingly, this charge will be dismissed.

The charge under Section 1201(a)(5) of PERA requires that the Complainant show that the Commonwealth refused to bargain collectively with the exclusive representative of the employes in the unit, AFSCME. over mandatory subjects of bargaining. By its very wording, this section is violated when the employer fails in its duty to bargain with the union. The Commonwealth owes its duty to bargain to the union. An individual employe such as the Complainant lacks standing to bring a refusal to bargain charge. See Towamencin Township, 29 PPER ¶29059 (Final Order, 1998), citing Maggs v. PLRB, 413 A.2d 453 (1980).

The charge under Section 1201(a)(7) of PERA requires that the Complainant prove that the employer violated one of "the rules and regulations established by the Board regulating the conduct of representation elections." There was no proof that the Commonwealth violated this section.

The charge under Section 1201(a)(9) makes it an unfair practice for an employer to refuse to comply with the requirements of "meet and discuss." The Complainant did not prove that the Commonwealth violated this section.

CONCLUSIONS

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

1. That the Commonwealth of Pennsylvania, Department of General Services, is a public employer within the meaning of Section 301(1) of PERA.
2. That Mark Kenno is a public employe within the meaning of Section 301(2) of PERA.
3. That the Board has jurisdiction over the parties hereto.

4. That the Commonwealth of Pennsylvania, Department of General Services has not committed unfair practices in violation of Sections 1201(a) (3), (4), (5), (7) and (9) 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 charge of unfair practices is dismissed and the complaint rescinded.

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-ninth day of October, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner