COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ROBERT L. DOSPOY	:	
	:	
v.	:	Case No. PERA-C-09-416-W
	:	
HARMONY AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On October 16, 2009, the Pennsylvania State Education Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) on behalf of Robert L. Dospoy alleging that the Harmony Area School District (District) independently violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA). In its charge, the Union specifically alleged that the District's school board eliminated Mr. Dospoy's position because he joined the Union and sought to have his position included in the professional bargaining unit.

On November 12, 2009, the Secretary of the Board issued a letter advising the parties that no complaint would be issued because the charge was untimely. On January 10, 2010, the Board issued an Order Directing Remand to Secretary for Further Proceedings. On January 22, 2010, the Secretary issued a complaint and notice of hearing directing that a hearing be held on March 12, 2010, in Pittsburgh. The hearing was continued because both attorneys were previously scheduled to appear before another Board hearing examiner on that day. The hearing was rescheduled for and held on May 12, 2010, in State College, Pennsylvania. At the hearing, the complainant was represented by the Union, and both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. I approved an extended briefing schedule and, on July 26, 2010, the Board received the Union's post-hearing brief on behalf of the complainant. On August 23, 2010, the Board received the District's post-hearing brief.

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5).

3. The District hired Robert L. Dospoy as a grant writer in January 2004. Mr. Dospoy has been a registered engineer with the Commonwealth since 1996, and he is a certified water treatment and waste water treatment operator. Mr. Dospoy was also a District board member for thirteen years from 1989 to 2002. (N.T. 14-16; Union Exhibit 3).

4. Mr. Dospoy's position as grant writer was a non-bargaining unit contract position. When Superintendent Gooden suddenly left the District in October 2008, Mr. Dospoy became interested in joining a union. (N.T. 20-21).

5. Mr. Dospoy spoke with Joy Mazanko, who works in the District business office, and Shawn Stevens, the District's technology coordinator, about joining a union. Initially, Mr. Dospoy contacted the United Mine Workers of America, but that union was not interested in representing a small number of employes. In January 2009, Mr. Dospoy contacted the Harmony Education Association (Association). (N.T. 21-24, 25-26, 46).

6. In February 2009, Mr. Dospoy contacted Michael Lehmier, UniServ representative for the Union. In March 2009, Mr. Dospoy joined the Union and began paying dues. At about this time, Mr. Dospoy and Mr. Lehmier discussed pursuing a unit clarification procedure to include Mr. Dospoy's position in the professional unit

represented by the Association. Mr. Lehmier planned to file a unit clarification petition with the Board. (N.T. 26-27, 58-60).

7. On April 27, 2009, the school board held a special meeting which was advertised in the local newspaper. At the meeting, Superintendent Gunther Moritz recommended the elimination of Mr. Dospoy's position due to economic concerns, which the board approved by a 6-0 vote. By letter dated May 1, 2009, Superintendent Moritz informed Mr. Dospoy that his position was eliminated and that he was furloughed effective at the end of the 2008-2009 school year. (N.T. 30, 34, 41-42, 95, 98, 108-109, 118, 120-121; Joint Exhibits 9, 10a & 10b).

8. There was no discussion during the executive session or the public meeting about union organizing or a unit clarification petition. School board member Melanie Roland was present at the meeting and voted in favor of eliminating Mr. Dospoy's position. Ms. Roland did not remember knowing of Mr. Dospoy's Union activity before the board meeting.[1] (N.T. 124, 131, 136-137).

9. Mr. Dospoy does not know how anyone at the District, including board members and the Superintendent, would have known of his union activity. Mr. Lehmier mentioned a unit clarification matter to the District's solicitor in March 2009. Mr. Lehmier does not know whether the solicitor informed any District administrators or officials about the Union's intent to file a unit clarification petition on behalf of Mr. Dospoy. (N.T. 50, 73-74).

10. At no time did the Union send any communication to the school board, administrators or the Superintendent regarding the Union's intention to file a unit clarification petition. (N.T. 71-72, 120).

11. Anthony Beltowski was a board member at the District from 1989 through 2009. In the spring of 2009, Mr. Beltowski was unaware that Mr. Dospoy and the Union intended to pursue a unit clarification petition. (N.T. 92-93).

12. In April 2009, the District realized a budget deficit for the 2009-2010 school year. The District eliminated Mr. Dospoy's position as well as a recently filled custodial position to diminish the budget deficit. Educational programs and services would suffer by eliminating principals, teachers or other custodians. There was no decrease in enrollment to justify eliminating teachers. There are currently five or six District employes successfully performing grant writing duties. The District is very small, and there are not many administrators, teachers, cafeteria workers or custodians. The District cannot afford to eliminate any of them without reducing services or eliminating programs or courses. (N.T. 102-106, 115, 123-125, 128).

DISCUSSION

In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew that the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). On this record, however, the Union did not establish the second necessary element of St. Joseph's Hospital (i.e., that the board members or the Superintendent knew that Mr. Dospoy was engaged in union or protected activity before they considered eliminating his position).

On April 27, 2009, there was no discussion during the executive session or the public meeting among or in the presence of any board members or the Superintendent about

[1] The testimony of Superintendent Moritz and school board member Melanie Roland conflicts with the testimony of former school board member Anthony Beltowski. (N.T. 90). Mr. Beltowski testified that Ms. Roland relayed to him via telephone after the April 27, 2009 meeting, that the issue of Mr. Dospoy joining the Union was raised at the meeting. I do not credit the testimony of Mr. Beltowski on this point of fact. The Superintendent expressly and credibly testified that at no time did anyone discuss either the Union's or Mr. Dospoy's protected activities. Ms. Roland credibly testified that she did not remember even knowing of Mr. Dospoy's activity prior to the meeting and that union activity was not a consideration in her decision.

union organizing or a unit clarification petition. There is no evidence on this record that yields the inference that any board member or administrator was aware that Mr. Dospoy was pursuing Union membership or a unit clarification petition. Mr. Dospoy also testified that he does not know how anyone at the District, including board members, administrators and the Superintendent, would have known of his Union activity because neither he nor the Union informed anyone. Although Mr. Lehmier mentioned a unit clarification matter to the District's solicitor in March 2009, Mr. Lehmier did not testify whether he told the solicitor which position was the subject of the intended unit clarification petition.

At the hearing, Mr. Lehmier responded to questioning from Union counsel that, when he referred to the unit clarification petition during his conversation with the solicitor, he was referring to Mr. Dospoy. But his testimony is unclear with respect to whether he communicated the connection between the unit clarification and Mr. Dospoy to the solicitor. Also, Mr. Lehmier testified that he did not know whether the solicitor informed any District officials or administrators about the Union's intent to file a unit clarification petition on behalf of Mr. Dospoy.

Additionally, at no time did the Union send any communication to the school board, District administrators or the Superintendent regarding the Union's intention to file a unit clarification petition. Indeed, school board member Anthony Beltowski (a close friend of Mr. Dospoy who testified on his behalf) testified that he was unaware that Mr. Dospoy and the Union intended to pursue a unit clarification petition in the spring of 2009. Accordingly, absent prior knowledge that Mr. Dospoy engaged in protected activity, the District, as a matter of law, could not have acted with unlawful motive, and did not discriminate against Mr. Dospoy when it eliminated his position. Teamsters Local 764 v. Montour County, 35 PPER 147 (Final Order, 2004).

The Union also alleged an independent violation of 1201(a)(1) in its specification of charges. An independent violation of Section 1201(a)(1) occurs, "where in light of the totality of the circumstances, the employer's actions has 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); Northwest Area Educ. Ass'n v. Northwest Area Sch. Dist., 38 PPER 147 (Final Order, 2007). 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).

I credit the District's expressed legitimate concerns over reducing the projected budget deficit and the undesirability of eliminating other positions. There was no decrease in enrollment to justify eliminating teachers, and therefore educational programs; and District services would suffer by eliminating principals, teachers, cafeteria workers or other custodians. The District is very small, and there are not many administrators, teachers, cafeteria workers or custodians. The District cannot afford to eliminate any of these positions without significantly reducing services or eliminating programs and courses.

Accordingly, the Union did not meet its burden of proving the necessary elements of its causes of action under Section 1201(a) (1) and (3), either derivatively or independently, and the charge of unfair practices is dismissed in its entirety.

In its post-hearing brief, the District abandoned its challenge to the timeliness of the charge and thereby waived the issue. Alternatively, however, I find that the charge was timely filed on October 16, 2009, which was within four months of Mr. Dospoy's termination at the close of the 2008-2009 school year on June 30, 2009. Filing a charge for discriminatory discharge any time between the April 27, 2009 board meeting and June 30, 2009 would have been premature because the school board could have changed its mind any time before Mr. Dospoy's position was in fact actually eliminated and Mr. Dospoy was actually furloughed. In Officer of the Upper Gwynedd Township Police Department v. Upper Gwynedd Township, 32 PPER ¶ 32101 (Final Order, 2001), the Board opined as follows:

> As a general matter, the nature of the unfair practice claim alleged frames the limitations period for that cause of action. For example, a charge of unfair practice for refusal to arbitrate need not be filed when a public employer earlier announces its intent to subsequently refuse to arbitrate, although such activity when it occurs might be regarded as a refusal to bargain in good faith. The timeliness of the specific refusal to arbitrate the disputed claim is measured from when the arbitration duty arose and the employer refused a demand to arbitrate. Mere statement of future intent to engage in activity (which arguably would constitute an unfair practice) does not constitute an unfair practice for engaging in that activity.
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> Accordingly, the Board normally looks to the date of implementation of a unilateral change in evaluating timeliness of a claim that a policy was unlawfully, unilaterally implemented. In FOP Lodge 9 v. City of Reading, 30 PPER 30013 (Proposed Decision and Order, 1998), the employer passed an ordinance unknown to the union, the effect of which was the subsequent removal of bargaining union work and transfer of employes but the union could not reasonably have been on notice until the employer actually "implemented" the policy and transferred the employes. See also County of Lebanon, 27 PPER 27122 (Proposed Decision and Order, 1996), 27 PPER 27260 (Final Order, 1996), where a no-smoking policy was adopted but not implemented until a later date, the Board held that the later implementation date triggers the statute of limitations because that is the date the unfair practice occurred and the union was on notice. Unlike these cases, there was no delay between the date the alleged change in personal day policy was adopted and the date it was "implemented" or put into effect. There is no evidence that the Township intended to "implement" or require the police officers to start abiding by the policy at some future date that has not yet occurred. Implementation accordingly is the date when the directive becomes operational and serves to guide the conduct of employes, even though no employes may have been disciplined or corrected for failure to abide by the directive.

Upper Gwynedd Township, 32 PPER at 264. Accordingly, when the school board voted to eliminate Mr. Dospoy's position on April 27, 2009 effective June 30, 2009, their decision to change the status of Mr. Dospoy and his position would not be implemented until June 30, 2009 and the statute of limitations did not begin to run until the later date.[2]

CONCLUSIONS

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

1. The District is a public employer under PERA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District has not committed unfair practices within the meaning of Section 1201(a)(1) of PERA.

5. The District has not committed unfair practices within the meaning of Section 1201(a)(3) of PERA.

ORDER

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

[2] The District also raises an issue regarding Mr. Dospoy's status as a management level employe, which I need not address given the disposition and dismissal of the charge.

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint is 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 order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this seventh day of October, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner