COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ELEASE M. ELLIOTT	:	
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	:	
v.	:	CASE NO. PERA-C-14-358-E
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	:	
LANCASTER COUNTY	:	

PROPOSED DECISION AND ORDER

On November 6, 2014, Elease M. Elliott (Elliott or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Lancaster County (County or Employer), alleging that the County violated Section 1201(a)(1), (3), and (4) of the Public Employe Relations Act (PERA or Act) by refusing to move Complainant to a requested shift in retaliation for her protected activity. On December 1, 2014, Complainant amended the charge to indicate that the alleged refusal occurred on July 14, 2014.

On December 5, 2014, the Secretary of the Board issued a complaint and notice of hearing, designating June 17, 2015, in Harrisburg, as the time and place of hearing, if necessary. The hearing was continued to June 30, 2015 at Complainant's request and without objection from the County.

The hearing was necessary and was held before the undersigned Hearing Examiner of the Board on June 30, 2015, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses, and introduce documentary evidence. The parties each filed post-hearing briefs in support of their respective positions on August 24, 2015.

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. The County is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7-8)

2. Elease Elliott is a public employe within the meaning of Section 301(2) of PERA. (N.T. 8)

3. Elliott is a correctional officer for the County, who was hired on May 20, 2013 as a full-time probationary employe. (N.T. 12)

4. Elliot began working the 8:00 am to 4:00 pm shift at that time. (N.T. 12-13)

5. On August 5, 2013, Elliot volunteered to move to the 12:00 am to 8:00 am shift in place of another employe with medical issues. (N.T. 13)

6. After she transferred to the 12:00 am to 8:00 am shift, Elliott requested several times to move back to the 8:00 am to 4:00 pm shift. She put in a formal bid on May 29, 2014 to return to the 8:00 am to 4:00 pm shift. At that point, her one year probationary term had expired. (N.T. 14-15; Complainant's Exhibit 1)

7. Elliott received the transfer and worked the 8:00 am to 4:00 pm shift for several weeks beginning in June 2014. (N.T. 18)

8. Elliott eventually learned that she would be moving to the 4:00 pm to 12:00 am shift because a lieutenant on the 4:00 pm to 12:00 am shift had mistakenly advised his subordinates that the posting for the 8:00 am to 4:00 pm shift was

not open to female correctional officers. As a result, the County reposted for the position on the 8:00 am to 4:00 pm shift. (N.T. 18-20)

9. On June 29, 2014, Elliott put in another bid for the 8:00 am to 4:00 pm shift once the County had reposted it. However, she did not get the position because a more senior officer had also put in a bid. (N.T. 21-22; Complainant's Exhibit 3)

10. Elliott subsequently filed a grievance on July 23, 2014, protesting the award to a more senior officer. Specifically, the grievance stated that Article XVI, Section 5 of the Collective Bargaining Agreement (CBA) between the County and District Council 89, American Federation of State, County and Municipal Employees, AFL-CIO (AFSCME or Union) "provides for filling (sic) position by seniority if, after posting for 10 days, there is more than 1 applicant. Here, Grievant [Elliott] was the sole applicant and is entitled to the position." The grievance progressed to step 3, but was ultimately withdrawn by the Union. (N.T. 22-24; Complainant's Exhibits 4, 5)

DISCUSSION

In her charge, Complainant alleged that the County violated Section 1201(a)(1), (3), and (4) of the Act[1] by violating Article XVI, Section 5 of the CBA when the County allegedly refused to move her to the 8:00 am to 4:00 pm shift permanently in July 2014 in retaliation for her protected activity. Specifically, Complainant alleged that her protected activity consisted of her requests for assistance in restraining a patient/inmate while on hospital detail on June 25, 2014. The County asserts that Complainant has not sustained her burden of proving the charges alleged.

Preliminarily, the charge under Section 1201(a)(4) of the Act must be dismissed because Complainant did not prove or allege that she signed an affidavit, petition, or complaint with the Board, or gave any information or testimony before the Board, prior to the County's alleged refusal to move her to the 8:00 am to 4:00 pm shift in July 2014. Indeed, it is well settled that Section 1201(a)(4) only addresses discrimination against an employe for activity before the Board, and does not concern alleged discrimination against an employe for union activity that does not involve the Board's processes. **James A. Confer v. Bellefonte Area School District**, 36 PPER 135 (Proposed Decision and Order, 2005).

With regard to her Section 1201(a)(3) 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 the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. **Audie Davis v. Mercer County Regional Council of Government**, 45 PPER 108 (Proposed Decision and Order, 2014) citing St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). Once a prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity. **Teamsters Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order, 1992). If the employer offers such evidence, the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual. **Teamsters Local 429 v. Lebanon County**, 32 PPER ¶ 32006 (Final Order, 2000). The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct. **Mercer County Regional**

[1] Section 1201(a) of the Act provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(3) 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. (4) Discharge or otherwise discriminating against an employe because he has signed an affidavit, petition or complaint or given any information or testimony under this act. 43 P.S. § 1101.1201.

COG, *supra*, citing **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 (Final Order, 1992).

In this case, the Complainant has not sustained her burden of proving a prima facie case of discrimination. In fact, the Complainant has not even shown that she engaged in protected activity, which is the first element in the Section 1201(a)(3) test. Although Complainant alleged in her charge that she asked for assistance in restraining a patient/inmate while on hospital detail on June 25, 2014, she did not offer any evidence to support these allegations. Indeed, the record is devoid of any substantial competent evidence to show that Complainant engaged in any activity protected by the Act, much less that which she alleged in her specification of charges, prior to her transfer off the 8:00 am to 4:00 pm shift in June 2014 and the County's subsequent award to a more senior employe after the position was reposted in June 2014.[2] Accordingly, the charge under Section 1201(a)(3) of the Act must also be dismissed.

Finally, Complainant has alleged that the County violated Section 1201(a)(1) of the Act. The Board holds that a violation of Section 1201(a)(1) may be derivative or independent. **Neshannock Education Support Professionals, PSEA/NEA v. Neshannock Township School District**, 46 PPER 48 (Final Order, 2013). A derivative violation of Section 1201(a)(1) occurs when an employer commits any violation of Section 1201(a)(2) through (9), whereas an independent violation of Section 1201(a)(1) occurs when an employer engages in conduct that, in and of itself, tends to coerce reasonable employes in the exercise of their rights under the Act. *Id.* In this matter, the County has not committed any violation of Section 1201(a)(3) or (4) of the Act, as alleged by Complainant. Therefore, the County has not committed a derivative violation of Section 1201(a)(1). Further, the Complainant has not alleged an independent violation of Section 1201(a)(1) in either her original or amended charge of unfair practices. As a result, the charge under Section 1201(a)(1) will also be dismissed.

CONCLUSIONS

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

1. The County is a public employer within the meaning of Section 301(1) of PERA.

2. Elease M. Elliott is a public employe within the meaning of Section 301(2) of PERA.

3. The Board has jurisdiction over the parties hereto.

4. The County has not committed unfair practices in violation of Section 1201(a)(1), (3), or (4) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge of unfair practices is dismissed and the complaint is rescinded.

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[2] The record does contain evidence of a July 23, 2014 grievance which Complainant filed protesting her removal from the position on the 8:00 am to 4:00 pm shift in Complainant's Exhibit 4. However, this occurred well after the County's decision to repost the position in June 2014 and its subsequent award of the position to another more senior employe, which occurred on July 11, 2014. (*See* Employer Exhibits 4 & 5). Thus, the Complainant's grievance could not possibly be the source of the alleged retaliation. In any case, Complainant did not allege in her specification of charges, which was initially filed on November 6, 2014, that the County retaliated against her as a result of any grievance she may have filed. Therefore, the Complainant's argument that the grievance was the source of the retaliation is now untimely as a matter of law. *See* 43 P.S. § 1101.1505 (providing for a four-month statute of limitations period).

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 sixth day of October, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner