COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TEAMSTERS LOCAL UNION NO. 261	:	
	:	
v.	:	Case No. PERA-C-18-29-W
	:	
LAWRENCE COUNTY	:	
LAWRENCE COUNTY PRISON BOARD	:	

FINAL ORDER

Lawrence County and the Lawrence County Prison Board (collectively County) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on February 15, 2019, challenging a Proposed Decision and Order (PDO) issued on January 29, 2019. In the PDO, the Board's Hearing Examiner concluded that the County violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA) when it discharged Corrections Officer Kevin Boston in retaliation for his protected activity. Teamsters Local Union No. 261 (Union) filed a response and brief in opposition to the exceptions on March 6, 2019.

The facts of this case are summarized as follows. On April 24, 2017, the Union became the exclusive certified representative for all full-time and regular part-time prison guards employed by the County. There are approximately 43 corrections officers in the bargaining unit who work at the County prison. Warden Brian Covert, Deputy Warden Major Jason Hilton, the Captains and maintenance workers are not included in the bargaining unit.

The County corrections officers were previously represented by Laborers District Council of Western Pennsylvania, Local Union No. 964 (Laborers). The collective bargaining agreement (CBA) between the Laborers and the County expired on December 31, 2016. On January 19, 2017, the Laborers disclaimed interest in representing the members of the bargaining unit. After the Laborers disclaimed interest, bargaining unit members Kevin Boston, Matt Carney and Scott Rondeau contacted the Union to express their interest in the Union becoming the exclusive bargaining representative for the County corrections officers. On January 27, 2017, the Union filed a petition for representation with the Board, seeking to represent the County's corrections officers. On April 11, 2017, the Union was certified as the exclusive bargaining representative for the County's corrections officers.

Between the Laborers' disclaimer of interest and the Union's filing of its petition for representation, the County revoked the seniority and staffing provisions that had existed under the previous CBA. Two of the major issues the Union had with the County during the subsequent negotiations were seniority and staffing. In particular, the Union was concerned that new hires were receiving favorable shifts and assignments compared to employes with more seniority.

Mr. Boston was a corrections officer for the County for twenty-one years. He was a union steward as well as a member of the Union's bargaining

committee. Mr. Boston participated in collective bargaining, and expressed concern that management had eliminated seniority for staffing and shift assignments.

On April 13, 2017, the Union sent a letter to the County requesting to bargain over the terms and conditions of employment for the bargaining unit. Mr. Boston was present at the first bargaining session as a Union bargaining committee member. The parties held three bargaining sessions, but were unable to reach an agreement. On June 23, 2017, the Union requested interest arbitration and an arbitration proceeding was held in the summer of 2018.

On September 7, 2017, the Union filed a charge of unfair practices docketed at case number PERA-C-17-272-W, alleging that the County violated Section 1201(a)(1), (3) and (5) of PERA when it failed to pay wages to the employes who served on the Union's bargaining committee during negotiations. Mr. Boston was listed as a member of the Union's bargaining committee who was not paid for his time during negotiations for a new CBA.

On January 29, 2018, Deputy Warden Hilton contacted Mr. Boston over the radio and directed him to go to the County Courthouse along with Corrections Officer Robert Seinkner, who is a Union steward. As they were walking to the Commissioner's Room in the County Courthouse, Mr. Boston and Mr. Seinkner saw Dave Gettings, the Chair of the County Prison Board, and asked him what the meeting was about. Mr. Gettings responded, "You will see soon enough. Just wait in there." Mr. Boston and Mr. Seinkner went in the room and were eventually joined by Mr. Gettings, Warden Covert and County attorney David Mitchell. Attorney Mitchell started the meeting by asking Mr. Boston, "Have you ever called anyone in the jail a bitch?" Mr. Boston responded that he had used that language. Attorney Mitchell then asked, "Have you ever said Hilton's penis has been in anyone's mouth?" Mr. Boston did not answer the question and stated, "We are done with this meeting until I get an attorney." Mr. Gettings then said, "Go get a f***ing attorney, and we'll f***ing start this." The meeting soon ended after this exchange. During the meeting, the County did not tell Mr. Boston who made the charges against him or any other specific details.

Mr. Boston and Mr. Seinkner returned to the prison after the meeting and saw Billy Grannis, a maintenance worker who is not in the bargaining unit. Mr. Boston and Mr. Seinkner took Mr. Grannis into the men's bathroom and asked him, "Are you the one who filed the charge against [Mr. Boston]?" Mr. Grannis replied, "I was forced to by [Deputy Warden] Hilton and [Warden] Covert. I don't want to mess with your family, Boston." Mr. Boston and Mr. Seinkner did not threaten Mr. Grannis when they questioned him. While Mr. Boston was in the meeting at the Courthouse, Mr. Grannis approached Corrections Officer Glenn Jones and told Mr. Jones that Mr. Gettings and Deputy Warden Hilton forced him to write a report about Mr. Boston sexually harassing him.

On January 30, 2018, Mr. Boston was informed by Warden Covert that he was suspended with pay due to the allegations of harassment. On January 31, 2018, Mr. Boston received a letter from Warden Covert, which stated as follows:

> I am writing to follow up on our interview with you on Friday, January 26 [sic], 2018. At that interview you denied making comments to other employees about them or others engaging in sexual activity with Major

> Hilton; having Major Hilton's penis in their mouths; being under Major Hilton's desk; or being "Major Hilton's bitch." The County must take all allegations regarding comments of a sexual nature made in the workplace very seriously. You denied all of the above allegations with the exception of admitting to using the word bitch in relation to another employee in a conversation with that employee. Your denials are not credible and constitute additional grounds for potential disciplinary action.
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> At this time no decision has been made regarding any disciplinary action. If you have any further explanations or responses that you wish the County to consider or take into account before a decision is made, please provide it to me in writing, to be received in my office by 9 a.m. on Monday, February 5, 2018.

In February 2018, Mr. Boston received a letter from the Prison Board, which stated, in relevant part, as follows:

> It has also come to the County's attention after your interview on January 26 [sic], 2018, you returned to the jail and, accompanied by another employee, you summoned an employee who you believed made a statement or complaint about your actions into the men's locker room and proceeded to interrogate and intimidate that employee. Your actions are being considered as a potential violation of County policy, which prohibits intentional pressuring of or retaliation against others in connection with sexual harassment complaints.

On or about February 14, 2018, Mr. Boston approached Rhonda Heaney, the secretary for Deputy Warden Hilton, to obtain information about staffing at the prison. Mr. Boston was concerned about seniority for staffing and shift assignments. Mr. Boston was specifically concerned about Corrections Officer Mark Brader, a new employe, being scheduled for daylight shift and support while more senior employes were being scheduled on the units. Ms. Heaney showed Mr. Boston the schedule and answered his questions.

On February 21, 2018, Mr. Boston received a letter from the Prison Board, which stated, in relevant part, as follows:

> We are writing to inform you that the Lawrence County Prison Board has voted to terminate your employment as a Corrections Officer for Lawrence County. You will be paid through Friday, February 23, 2018.
>
> You were interviewed on Friday, January 26 [sic], 2018 regarding allegations that you made inappropriate comments of a sexual nature to other employees in the prison. Specifically, it was alleged that you repeatedly made comments to three other employees regarding those employees or others

> engaging in sexual activity with Major Hilton; having Major Hilton's penis in their mouths; being under Major Hilton's desk; or being "Major Hilton's bitch." When asked about these allegations, you denied them, stating only that you had used the word bitch in one conversation with Corrections Officer Brader. The County has interviewed the three reporting employees and has found their statements to be credible and your statements to not be credible. Your sexual comments, which occurred on multiple occasions over an extended period of time, were inappropriate and constituted sexual harassment. Your lack of credibility is an additional grounds for disciplinary action. In addition, you attempted to intimidate one of the employees who you believed made a statement or complaint about your actions, summoning him into the men's locker room by snapping your fingers at him and then interrogated him with another Corrections Officer about what he had reported and to whom. Whether taken together or considered separately, and whether considered in light of your employment history or apart from it, these incidents justify the termination of your employment with Lawrence County Corrections.

The County's progressive discipline policy in its employe handbook lists sexual harassment as a Group III offense with immediate discharge as a penalty for a first violation. The County's employe handbook also states that the penalties for engaging in sexual harassment "will result in appropriate sanctions, up to and including dismissal … depending upon the nature and severity of the misconduct." The County's employe handbook was not consulted when the County made the decision to terminate Mr. Boston.

The use of profane and lewd language in the County prison by bargaining unit members and other County employes, including Deputy Warden Hilton, is regular and routine. Prior to Mr. Boston's discharge, no bargaining unit member had ever been disciplined for using profane and lewd language.

The Union filed its Charge of Unfair Practices on February 8, 2018, as amended on March 27, 2018, alleging that the County violated Section 1201(a)(1), (3) and (5) of PERA when it suspended and subsequently discharged Mr. Boston in retaliation for engaging in protected activity. On May 17, 2018, the Secretary of the Board issued a Complaint and Notice of Hearing, directing that a hearing be held before the Hearing Examiner on July 27, 2018. Hearings were held on July 27 and September 11, 2018, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Both parties filed post-hearing briefs.

In the PDO, the Hearing Examiner concluded that the County violated Section 1201(a)(1) and (3) of PERA when it discharged Mr. Boston. Specifically, the Hearing Examiner held that the lack of an adequate explanation for the County's actions, the fact that the County had never disciplined other corrections officers for using similar profane and lewd language, which was commonplace at the prison, along with the County's failure to consult its progressive discipline policy when deciding to discharge Mr. Boston, evidenced a discriminatory motive on the part of the

County.[1] By way of remedy, the Hearing Examiner ordered the County to immediately reinstate Mr. Boston to his previous position with back pay, and to make him whole.

Initially, the County does not challenge any of the Hearing Examiner's Findings of Fact in its exceptions. Therefore, the Hearing Examiner's findings are conclusive. FOP Lodge #5 v. City of Philadelphia, 34 PPER 22 n.3 (Final Order, 2003).

In its exceptions, the County alleges that the Hearing Examiner erred in concluding that its discharge of Mr. Boston was motivated by anti-union animus, and that the County's purported reasons for its actions were pretextual. In order to sustain a charge of discrimination under Section 1201(a)(1) and (3) of PERA, the charging party must prove that (1) the employe engaged in protected activity; (2) the employer was aware of the employe's protected activity; and (3) the employer took adverse action against the employe because of a discriminatory motive or anti-union animus. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The charging party must demonstrate that all three elements are present in order to establish a prima facie case of discrimination. Colonial Food Service Educational Personnel Association v. Colonial School District, 36 PPER 88 (Final Order, 2005). The burden then shifts to the respondent to rebut the charging party's prima facie case. Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993).

Because an employer's motives are rarely overt, a finding that the employer harbored union animus or an unlawful motive may be based on inferences from the facts of record. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). In determining whether union animus was a factor in an employer's decision, the Hearing Examiner may look to the entire background of the case, including any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its actions against the adversely affected employes, the effect of the employer's adverse action on the employes' protected activities and whether the action complained of was "inherently destructive" of important employe rights. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Close timing between the employe's protected activity combined with pretextual reasons for the employer's actions can support the inference of anti-union animus. International Union of Operating Engineers, Local 66 v. Connoquenessing Township, 41 PPER 47 (Final Order, 2010). Pretext may be inferred where the Hearing Examiner finds, based on the credible evidence and testimony of record, that the employer would not have taken the same action in absence of the employe's protected activity. Lehighton Area School District v. PLRB, 682 A.2d 439 (Pa. Cmwlth. 1996).

It is undisputed that Mr. Boston engaged in protected activity through his participation as a union steward and bargaining committee member and that the County was aware of him engaging in such activity. Therefore, the issue

[1] The Hearing Examiner did not consider the Union's allegation that the County violated its duty to bargain under Section 1201(a)(5) of PERA. No exceptions were filed by the Union to the Hearing Examiner's decision with regard to its Section 1201(a)(5) claim. 34 Pa. Code § 95.98(a)(3)("[a]n exception not specifically raised shall be waived").

before the Board is whether the County was motivated by anti-union animus when it discharged Mr. Boston.

In concluding that the Union established that the County's actions were motivated by anti-union animus, the Hearing Examiner relied on the County's disparate treatment of Mr. Boston, lack of an adequate explanation for its actions and failure to consult its progressive discipline policy concerning sexual harassment when making its decision to terminate Mr. Boston. In finding disparate treatment, the Hearing Examiner stated, in relevant part, as follows:

> The [County's] disparate treatment of [Mr.] Boston leaps from the record. Witness after witness credibly testified that no other bargaining-unit member or other employe of the [County] at the County jail had ever been disciplined for profane or lewd comments. No one could remember anyone ever even receiving a verbal warning.
>
> I find that the use of profane and lewd language by employes had been rife in the County jail and suffused the employes' daily experience. In so finding, I make extensive credibility determinations as to witnesses' testimony on the issue of the use of profane and lewd language in the County jail. I find the testimony of Scott Rondeau on the issue of lewd and profane language to be credible. … Jay Fish testified that profane and lewd language were being used throughout the County jail. I find that the credibility of his testimony is strongly supported by his demeanor on the stand. Jamie King credibly testified that [Deputy Warden] Hilton made sexually suggestive comments to her and also that profane and lewd language is used throughout the County jail, including by [Deputy Warden] Hilton. I found King's demeanor on the stand to be particularly credible. Robert Seinkner, Glenn Jones, and Brian Raybuck all credibly testified that profane and lewd language was used throughout the jail and that no employe had ever been disciplined for lewd or profane language before [Mr.] Boston. Seinkner's, Jones's and Raybuck's credibility is supported by their demeanor on the witness stand.
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> With the above credibility determinations in mind, and considering the record as a whole, I find that profane and lewd language was a common experience in the jail and that the [County's] termination of [Mr.] Boston on the basis of using lewd language to be grossly disparate and disproportionate and therefore evidence of anti-union animus.

(PDO at 8). The County's claim that Mr. Boston's conduct of sexual harassment was dissimilar to the profane and lewd language used by others was rejected by the Hearing Examiner. The Hearing Examiner credited the testimony of the Union's witnesses that the type of profane and lewd language that led to Mr. Boston's discharge was prevalent in the County prison,

including such language by Deputy Warden Hilton, and that no employe was ever disciplined for using such language.

It is the function of the hearing examiner, who is able to view the witnesses' testimony first-hand, to determine the credibility of witnesses and to weigh the probative value of the evidence presented at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner may accept or reject the testimony of any witness in whole or in part. Pennsylvania State Corrections Officers Association v. Commonwealth of Pennsylvania Department of Corrections Pittsburgh SCI, 34 PPER 134 (Final Order, 2003). The Board will not disturb the hearing examiner's credibility determinations absent the most compelling of circumstances. Id. Upon review of the record, the County has failed to present any compelling reasons to warrant reversal of the Hearing Examiner's credibility determinations.

The County asserts that the Hearing Examiner erred in determining that it did not present legitimate reasons for discharging Mr. Boston, i.e., the sexual harassment allegations and Mr. Boston's alleged intimidation of Mr. Grannis. However, the uncontested findings of fact show that the sexual harassment allegations were a subterfuge by the County in order to get rid of Mr. Boston, evidenced by Mr. Grannis stating to Mr. Jones, as well as Mr. Boston and Mr. Seinkner, that he was "forced" to write up a sexual harassment complaint against Mr. Boston about the alleged lewd statement concerning Deputy Warden Hilton. Indeed, the two corrections officers that were present at the time of the alleged statement by Mr. Boston, both stated during the County's investigation that they did not hear Mr. Boston make that statement. (N.T. 384-385, 391-392). Further, the Hearing Examiner did not credit the testimony of Mr. Beighley or Mr. Brader concerning their allegations against Mr. Boston or that Mr. Grannis was intimidated or threatened by Mr. Boston.[2] Moreover, the uncontested findings establish that the County failed to even consult their progressive discipline policy when making the decision to terminate Mr. Boston. See Lehighton Area School District, supra. The County has not presented any compelling reasons to overturn the Hearing Examiner's decision to not credit the testimony of the County's witnesses concerning its reasons for discharging Mr. Boston. See Lancaster County v. PLRB, 124 A.3d 1269 (Pa. 2015).

After a thorough review of the exceptions and all matters of record, the County's disparate treatment of Mr. Boston, lack of an adequate explanation for its actions and failure to consult its progressive discipline policy concerning sexual harassment taken together are an adequate basis to infer a discriminatory motive on the part of the County in discharging Mr. Boston. See Lancaster County, supra. Therefore, the Hearing Examiner properly concluded that the County was motivated by anti-union animus when it discharged Mr. Boston in violation of Section 1201(a)(1) and (3) of PERA.[3]

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[2] The County alleges that the Hearing Examiner erred in concluding that Mr. Boston's questioning of Mr. Grannis was protected activity. Regardless of whether Mr. Boston's questioning of Mr. Grannis is protected activity, the Hearing Examiner found no credible evidence to support a finding that Mr. Grannis was intimidated or threatened and the uncontested findings show that Mr. Boston did not threaten Mr. Grannis during that meeting. Therefore, this exception is dismissed.

[3] The County further excepts to the Hearing Examiner's finding of anti-union animus concerning its actions between the disclaimer of interest and the

Accordingly, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed by Lawrence County and the Lawrence County Prison Board are hereby dismissed, and the January 29, 2019 Proposed Decision and Order be and the same is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, James M. Darby, Chairman, Robert H. Shoop, Jr., Member, and Albert Mezzaroba, Member, this twentieth day of August, 2019. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within Order.

Union's filing of a petition for representation and the County's questioning of Mr. Boston. However, the Board finds that there is ample evidence of disparate treatment, lack of an adequate explanation for the County's actions and failure to follow its discipline policy to support the Hearing Examiner's conclusion that the County was motivated by anti-union animus in discharging Mr. Boston. Nevertheless, in addition thereto, the Board finds that the Hearing Examiner did not err in also considering these other factors in the totality of the circumstances when inferring the County's motive. Child Development, supra. Therefore, these exceptions are denied.

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AFFIDAVIT OF COMPLIANCE

The County and County Prison Board hereby certify that they have ceased and desisted from their violations of Sections 1201(a)(1) and (3) of the Public Employe Relations Act; that they have reinstated Kevin Boston to his previous position and made him whole for any and all losses together with statutory interest of six percent *per annum*; that they have posted a copy of the Proposed Decision and Order and Final Order as directed; and that they have served a copy of this affidavit on the Union at its principal place of business.

_____
Signature/Date

_____
Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

_____
Signature of Notary Public