

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCEL 47, :
LOCAL 2187 :
 :
v. : CASE NO. PERA-C-21-174-E
 :
CITY OF PHILADELPHIA :

PROPOSED DECISION AND ORDER

On July 29, 2021, AFSCME District Council 47, Local 2187 (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the City of Philadelphia (City) independently violated Section 1201(a) (1) and (3) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that management, in the City's Department of Licenses and Inspection (Department or L&I), discriminatorily reprimanded and disparately treated Union Steward and Executive Board Member Conlan Crosley, for engaging in protected activity.

On September 22, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing (CNH) designating a hearing date of December 20, 2021, in Harrisburg. After 2 granted continuance requests, the hearing was held on August 10, 2022, via Microsoft TEAMS. During the video hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On December 9, 2022, the Union and the City filed their post-hearing briefs.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1. The City is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7-8)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7-8)
3. Conlan Crosley was a City employe from October 2014 through September 2021. Mr. Crosley no longer works for the City. He became a Construction Plan Review Specialist (CPRS or Inspector) for the Department in 2017 or 2018. Mr. Crosley became a Union Steward in 2018. In 2020, Mr. Crosley became a Chief Union Steward and a member of the Union's Executive Board, as the Financial Secretary. As Chief Shop Steward, Mr. Crosley wrote and filed grievances, dealt with COVID pandemic issues and family matters related to COVID. (N.T. 23-26, 109-111)
4. John Lech is the Director of the Construction and Inspection Unit for the Department. He was promoted into that position in May 2021. Prior to May 2021, Mr. Lech was the manager of the construction inspection unit. (N.T. 137-138)

5. Raymond Gaines is a Department Construction Compliance Supervisor. He supervises 4-5 inspectors and 2 clerks in the West District. (N.T. 119-120)

6. John Doherty is a Construction Compliance Supervisor for the Central East District. He supervised Mr. Crosley at the Central East District from September 2019 until Mr. Crosley's transfer to the West District in October 2020. (N.T. 13-14; UX-10)

7. In 2017, the City began assigning smartphones to inspectors. By the end of 2018, all inspectors were assigned a smartphone. The City did not provide any formal training on smartphone use to the inspectors, and the City upgraded the phones 3 times since 2017. All phones were android smart phones. (N.T. 140-141, 161-162)

8. On July 3, 2019, Director Lech sent an email to all supervisors, which none of the inspectors received, requiring that each district maintain staffing of at least 60% at all times, including clerks and inspectors. Supervisor Doherty understood Director Lech's July 3, 2019 email to apply only to vacation leave, and not to leave for training. Supervisor Doherty has never denied leave for training because it is required for maintaining inspectors' certifications. Supervisor Doherty never denied Mr. Crosley any leave for any reason during the time that Mr. Crosley was assigned to his District. (N.T. 15-19, 22, 121-123, 129-130, 151; CX-3)

9. On March 16, 2020, the day of the COVID shutdown, the Department rolled out a new software platform called "Eclipse." In January or February 2020, before Eclipse became operational, the City provided a 1-day training session to Department employees on how to use Eclipse. Eclipse was designed to store notes and photographs of a construction site investigation. (N.T. 26-28, 80, 141-144, 161-162)

10. Also in 2020, around the COVID shutdown, the City issued new Samsung cell phones to Department inspectors. A special cord was required to upload the construction site photos from those phones to Eclipse on Department computers. Department employees were not given that cord with their new phones. (N.T. 28-29, 80, 112)

11. Management directed the inspectors to upload photos into their investigation files in Eclipse, download software onto their computers and cell phones. The inspectors had difficulty uploading the photos and using Eclipse. The City transitioned slowly. The City did not require all photos to be uploaded immediately, and it gave the inspectors time to work with the equipment and software. As the Union Steward, Mr. Crosley received many requests from Union members in the Department, via text, email and phone calls, for more training on using the phones to upload photos of construction sites. Union members also complained that they did not have the cords. Mr. Crosley relayed his Union members' requests for more training and complaints about the new phones to his Supervisor, Mr. Gaines. (N.T. 29-31, 34, 36, 144)

12. Between March 16, 2020, and July 2020, the Inspectors worked remotely, as a result of the COVID shutdown. No training was provided on Eclipse after the March 2020 rollout. Mr. Crosley transferred to the West District in October 2020, when Mr. Gaines became his supervisor. From that point in time, Mr. Crosley emailed Mr. Gaines repeatedly about more training. (N.T. 31-32, 34, 119-120)

13. On February 22, 2021, Mr. Crosley emailed Manager Brett Martin to contact him via telephone to discuss training. (N.T. 36; UX-1)

14. On the morning of April 8, 2021, over one year since the rollout of Eclipse, Mr. Crosley emailed Supervisor Gaines asking: "Can you find out when the [D]epartment plans on having additional training for ECLIPSE and the new [p]hones? Several folks are reaching out to me to inquire[.]. Please let me know." The same morning, Mr. Gaines emailed Mr. Crosley stating that he forwarded the request for training to "John [Lech] and Brett [Martin]." At no time did Mr. Gaines inform Mr. Crosley that Mr. Crosley should not be contacting him about training or about problems with the use of the phones and other technology. (N.T. 38-39; UX-2)

15. On April 8, 2021, Mr. Gaines emailed the inspectors in his District recognizing the problems they were having with the new phones, but also suggesting a solution. Mr. Gaines therein stated: ". . . the new phones are not allowing you to upload without the special cable. The way around that is to email yourselves the photos and then upload. Takes more time [L]et's do that instead of making a comment that the photos cannot be uploaded. . . . " (N.T. 40-42; UX-3)

16. Mr. Crosley and others did not have an email application on their latest City-issued cell phones. Inspectors were unable to download the email application because only the licensed user could download the email application. Only the City's OIT personnel had the licensed-user passwords to download the email software, and those personnel were unavailable to serve employees requesting support. This required Mr. Crosley to take photos with his personal Apple IOS phone, which did have email capabilities, and email the photos to his City email account on his office computer, which he explained to Supervisor Gaines. At some point, the City prohibited the use of personal equipment, and Mr. Crosley was unable to upload photos into Eclipse with his work cell phone without the transfer cable and without email capability on his work phone. Mr. Crosley had told Mr. Gaines that he did not have access to email on his City-issued cell phone. (N.T. 89-92, 112-114, 128)

17. The next morning, April 9, 2021, Mr. Crosley emailed Mr. Gaines again asking: "When will the [D]epartment be providing us with training to adequately use the phone. I currently have an IOS operating system and have no clue how to use the Android operating system." A few minutes later, Mr. Gaines responded: "I forwarded the email about the need for training that you sent to me yesterday to John Lech and Brett Martin." ((N.T. 40-42; UX-3)

18. Again, on April 13, 2021, Mr. Crosley emailed Mr. Gaines to follow up on his request for additional training on the new phones and Eclipse as well as more Department inspectors. On April 27, 2021, Mr. Crosley emailed Mr. Gaines asking for an update on providing training on Eclipse and providing more inspectors in the West District of the Department. (N.T. 47-48; UXs-4,5,7)

19. On May 11, 2021, Director Lech emailed his district supervisors stating, in relevant part, as follows:

There seems to be multiple reasons why inspectors are no[t] attaching photos of investigations to the Case file investigation in eCLIPSE.

To resolve this issue, we first need to make the staff that are not affectively [sic] doing this aware that there is a deficiency in their performance. Then you should inform them of the requirements and what the expectation is. **Photos are to be taken of each and every investigation and attached to the investigation on the case file.**

. . . .

As for those that have a 0% rating, we will require the supervisor to obtain a **written explanation from each inspector outlining why they have not attached photos [for April 2021]**. I am aware of a handful of problems some individuals are experiencing but not all. This is not optional, and the explanations shall be in the supervisor's possession by the end of the day Thursday May 13th.

(CX-4) (emphasis original)

20. Eight inspectors, including Mr. Crosley, had attached 0 photos to their investigations during the month of April 2021. At 8:10 a.m. on May 12, 2021, Mr. Gaines emailed Mr. Crosley stating: "John Lech is asking for a written explanation of why you have not attached photos to your investigations. Photos are to be taken of each and every investigation and attached to the investigation on the case file. Please send me a written explanation by the end of the day Thursday, May 13, 2021." (UX-7; CX-4)

21. At 8:11 a.m. on May 12, 2021, Mr. Crosley emailed Supervisor Gaines stating as follows: "I am sending you an email to see if you have heard any updates regarding the training we continue to ask for with the new phones and ECLIPSE system. Please keep me in the loop when we can expect to hear something from the [D]epartment. We have asked several times." At no time while Mr. Crosley was sending Mr. Gaines multiple emails on training did Mr. Gaines inform Mr. Crosley not to contact him. Mr. Crosley had been instructed to always follow the chain of command. (N.T. 44-46, 50-52; UX-6)

22. At 8:21 a.m. on May 12, 2021, Mr. Crosley emailed Mr. Gaines, Union President Gigetts, and Union Staff Representative David Wilson, as follows:

I have sent you an email as recent as this morning regarding training and have asked well over a dozen times for it. I feel that I am being targeted and singled out. The [D]epartment continues to FAIL to provide any training for the new phones that they issued and many of us are unfamiliar with the android system. Furthermore, the new phones we received did not include an adapter to upload them to our computers. A great deal of us are still not operating at a proficient level with ECLIPSE. GIVE US THE RESOURCES TO DO THE REQUIRED JOB and stop trying to punish those of us who are trying to do a good job without the necessary training. . . .

(N.T. 48-50, 59, 126-127; UX-7) (emphasis original)

23. At 9:44 a.m. on May 12, 2021, Mr. Gaines forwarded Mr. Crosley's email to Director Lech. By 12:31 p.m., Director Lech emailed Mr. Crosley as follows:

Your email to Mr. Gaines is completely out of line.

We need to know the specific reason why you and the seven other inspectors in our unit have not attached any photos to their case investigations in the month of April. Once we have this information, we will come up with a resolution. Please provide Mr. Gaines a written explanation with the specific reason why YOU have failed to attach photos to your case investigation by COB Thursday May 13, 2021.

Mr. Gaines is not the point of contact for 2187's broad concerns over training, or lack thereof. You are well aware of the process that is in place to bring your members' concerns to Management. Sending harassing emails to your supervisor making baseless accusations is unproductive and insubordinate.

Consider this email a verbal warning for disobedience and insubordination. Your antagonistic and accusatory language directed to your supervisor, and management in general, must cease immediately. In addition, reasonable instructions from your superiors shall be carried out within the given timeframe. Further instances of insubordinate or disobedient behavior will be addressed with progressive discipline. To avoid this progression, be respectful to your superiors and follow reasonable direction going forward.

(N.T. 147; UX-7)

24. Director Lech's email acknowledged that Mr. Crosley's email response to Mr. Gaines was as a Union official acting on behalf of his members who were having problems with uploading the photographs into investigation files in Eclipse. (N.T. 169; UX-7)

25. Steven Porreca is an inspector supervisor in the East District of the Department. In the afternoon of May 12, 2021, Inspector William Sullivan emailed his supervisor, Mr. Porreca, requesting additional Eclipse training. (N.T. 57; UX-8)

26. On May 13, 2021, Mr. Crosley emailed Mr. Gaines his response to the May 12, 2021 request that he provide a written explanation of the reasons why he had not attached photos in Eclipse to his investigation files. The email provided: "I have already addressed why I am unable to provide photos. I have now been disciplined and will not continue to discuss this matter any further without [U]nion representation present." (N.T. 58; UX-9)

27. Also on May 13, 2021, Inspector Van McNeal emailed Mr. Crosley explaining that he had been trying to get training on Eclipse for months and that he had asked Manager Brett Martin and his immediate Supervisor, Rich Presel, for the training. Both responded that there would be no training. The email further stated that Inspector McNeal was having problems uploading photos from the latest City issued cell phone and that he was turning to the Union because he was not sure which direction to go with his problems, after no response from management. (X-10)

28. On May 13, 2021, Inspector Crystale Conquest emailed her supervisor, John Doherty, and copied Mr. Crosley at his Union email, asking when the Department would be scheduling training for Eclipse and asking that the training issue be addressed soon. Supervisor Doherty responded to

Inspector Conquest that she should send her request to Director Lech and Manager Martin. (UX-10)

29. On May 14, 2021, Inspector Edward Devlin emailed his Supervisor, Mr. Porreca in the East District, and copied Mr. Crosley, stating that he and his associates were having difficulty and that having training would be advantageous. His email further provided: "It took me over a month of calling OIT to get my email account and new phone functional. Since then, the phone has stopped receiving email as of 5/3/21, another call to OIT is now necessary. I have also had to procure my own hardware to up load pictures from my [C]ity cell phone to the [E]clipse system. I have had to send many correspondences to different members of our supervisory staff to try and straighten out glitches in the Eclipse permit issuance and inspection system. . . ." (UX-11)

30. The same day, Inspector Mitchell McClain emailed Supervisor Porreca, and copied Mr. Crosley, as Union representative, on his Union email, requesting additional Eclipse training. Also on May 14, 2021, Inspector Joseph Silberstein emailed Supervisor Porreca, and copied Mr. Crosley on his Union email, requesting additional training on Eclipse. Also, Inspector Kenisha Dockery emailed Mr. Crosley, as Union Representative, and her Supervisor, Brian Wright, reporting an inability to send or receive emails on her City phone and an inability to obtain support from OIT. (UXs-10,11)

31. On May 17, 2021, Inspector Cory Cywinski emailed Supervisor Porreca requesting training on Eclipse and the latest City issued phones. He further reported that his cell phone had an unresolved OIT ticket for 3 weeks. In the email, Inspector Cywinski stated that he was unable to use the City email on his phone and that there was no transfer cable to use with the new phone. Supervisor Porreca responded that he was aware of the problems that all the inspectors had been having with Eclipse and recognized that the inspectors could use more training on the new phones and Eclipse. (X-12)

32. On May 18, 2021, Inspector James Wright requested training on the use and operation of the new City work phones. Also on May 18, 2021, Inspector McNeal emailed Director Lech stating that he had more questions than answers about operating with Eclipse and reporting that his daily inspection inputs are down as a result of the way the Department requires the uploading of photos from the new City issued cell phones. (UX-13)

33. After Mr. Crosley's discipline, Director Lech and Manager Martin began requesting Mr. Crosley's route sheets 4-5 times per week, which had not been done before; it was "unheard of." Also, after Mr. Crosley's reprimand, management required Mr. Crosley to justify his time and take photos of himself at his various locations. Additionally, Mr. Gaines denied Mr. Crosley's request for leave to attend training. Mr. Gaines cited the staffing policy and a lack of adequate coverage in his District. Mr. Crosley had never been denied permission to go to training since he started at the Department in 2014. Mr. Crosley was never informed about the staffing policy or that leave needed to be requested a certain amount of time in advance to ensure that staffing was covered. Mr. Crosley is unaware of anyone else who was denied leave because of inadequate staffing (N.T. 72-75, 123-124, 153)

34. Requesting inspectors to take photos of themselves at construction sites was a practice to document overtime expenditures to the contractors who were billed by the City for the inspectors' overtime. These photos are requested of any inspector on overtime. (N.T. 155-157, 175)

DISCUSSION

The Union argues that the City retaliated against Mr. Crosley when Director Lech reprimanded him for engaging in the protected activity of demanding training on behalf of his Union members, while he was acting as a Chief Union Steward, in violation of Section 1201(a)(1) independently and Section 1201(a)(3). (Union Brief at 8-16). The Union also contends that, following Mr. Crosley's advocacy on behalf of his Union members and resulting reprimand, the Department disparately applied a staffing policy to deny him leave for training. (Union Brief at 17-19). The Union additionally posits that, after the reprimand, management disproportionately monitored Mr. Crosley and required him to take photos of himself at various locations. Management additionally demanded his route sheets 4-5 times per week. (Union Brief at 19). The Union further maintains that the City's explanations for reprimanding Mr. Crosley, monitoring his locations, and denying his leave for training are inadequate and pretextual. (Union Brief at 12-16, 19-20).

In a discrimination claim, the complainant has the burden of establishing that the affected employee engaged in protected activity, that the employer knew of that activity and that the employer took adverse employment action that was motivated by the employee'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). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employees Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employee's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct. Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 at 64 (Final Order, 1992). The burden only shifts to the employer if the Union establishes a prima facie case of discrimination. Id.

Other factors that the Board considers in determining the intent of the employer may include the following: 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 explain its action against the adversely affected employee(s); shifting reasons and/or pretext, and the effect of the employer's adverse action on other employees and their protected activities. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing of an employer's adverse action alone is not enough to infer animus, when combined with other factors, close timing can give rise to the inference of unlawful motive. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004).

In its post-hearing brief, the City acknowledges that the Union established that Mr. Crosley engaged in protected activity when he demanded training and that the City was aware those protected activities. (City Brief at 13). The City, however, contends that Mr. Crosley's May 12, 2021 email to Mr. Gaines was not protected. Rather, Mr. Crosley's response to management's legitimate request to explain why Mr. Crosley was not uploading photos into investigation files was "an irate email to his supervisor accusing L&I of failing, demanding training, and accusing management of trying to 'punish'

him for trying to do his job." (City Brief at 13). The City contends that Director Lech was "taken aback" and "surprised" by the email and that Mr. Crosley's email was insubordinate because he did not provide a response to Mr. Gaines' inquiry. (City Brief at 13). Director Lech believed that "Crosley's use of all capital letters in his email was a provocation," and that it was "completely out of line." (City Brief at 13). Therefore, contends the City, "even though the warning [from Director Lech] was in direct response to [Mr.] Crosley's email about training, it was not in retaliation for protected activity." (City Brief at 14).

However, in contrast to the City's position here, Mr. Crosley was lawfully engaged in protected Union speech when he wrote his May 12, 2021 email response to Mr. Gaines. Mr. Crosley had been advocating on behalf of Union members to obtain more training on the use of the new cell phones and the Eclipse software platform since at least February 2021, after receiving many complaints from Union members via text, email and phone calls. Mr. Crosley's May 12, 2021 email to Mr. Gaines was the culmination of months of Union advocacy on behalf of members to obtain training on the Eclipse software and the latest cell phones and to obtain the proper transfer cord and email application for the new phones. Accordingly, by May 12, 2021, when Mr. Gaines, at the direction of Director Lech, requested that Mr. Crosley explain why he was not attaching the photos to his investigation files in Eclipse, Mr. Crosley was understandably and reasonably frustrated. In fact, Director Lech's email response, as well as his hearing testimony, demonstrated his understanding that Mr. Crosley's May 12, 2021 email constituted advocacy on behalf of Union members. Therefore, Department management knew that Mr. Crosley's May 12, 2021 email constituted Union activity and there is no dispute that Director Lech disciplined Mr. Crosley for that communication.

There is a wide range of Union speech that is protected. In Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 33 (Final Order, 2010), the Board stated that "an employe's criticism of the employer will lose the protection of the act only if it is 'offensive, defamatory, or opprobrious,' and not if it is merely 'intemperate, inflammatory or insulting.'" Pennsylvania State Troopers, 41 PPER 33 (*quoting* Washington County, 23 PPER ¶ 23040 (Proposed Decision and Order, 1992), 23 PPER ¶ 23073 (Final Order, 1992)). In AFSCME, District Council 85, Local 3530 v. Millcreek Township, 31 PPER ¶ 31056 (Final Order, 2000), the Board opined that an employe's conduct as a union representative will only lose the protection of the Act where it is so obnoxious or violent that it renders the employe unfit for service. The Millcreek Township Board stated that the Act permits "some leeway for impulsive behavior, which must be balanced against the employer's right to maintain order and respect." Id. (citation omitted). In Millcreek Township, the local union president and Township employe contacted the Township's elected public safety supervisor concerning another employe. During that conversation, the union representative began yelling and screaming at the supervisor and accused her of mistreating the other employe. The Board characterized the behavior as rude, but it concluded that the communication was protected because it was not obnoxious or violent.

Mr. Crosley's May 12, 2021 email to Mr. Gaines, and copied to Union President Gigetts and Staff Representative Wilson, stated the following:

I have sent you an email as recent as this morning regarding training and have asked well over a dozen times for it. I feel that

I am being targeted and singled out. The [D]epartment continues to FAIL to provide any training for the new phones that they issued and many of us are unfamiliar with the android system. Furthermore, the new phones we received did not include an adapter to upload them to our computers. A great deal of us are still not operating at a proficient level with ECLIPSE. GIVE US THE RESOURCES TO DO THE REQUIRED JOB and stop trying to punish those of us who are trying to do a good job without the necessary training. . . .

Nothing in Chief Steward Crosley's email was "so obnoxious or violent as to render [him] unfit for service." The email did not contain any language that could be construed as "offensive, defamatory, or opprobrious." Also, the Board expressly held, in State Troopers, that a union representative is allowed to make statements critical of management. The tone, implications and opinions contained in Mr. Crosley's Union email were the reflections of the members who sought mutual aid and protection from their Union leadership.

The record reflects the collective frustration of the Union members in the numerous emails from inspectors to their supervisors complaining of the problems associated with the new phones, specifically the lack of the transfer cord and the email application. The record also reflects the collective inability of the inspectors to produce electronic files in Eclipse in the manner directed by management, as a result, as well as the repeated pleas from inspectors for help. Inspector McNeal emailed Mr. Crosley stating that he was turning to the Union because he had nowhere else to turn after not hearing from management about training and equipment issues. Supervisor Porreca acknowledged that he was aware of the inspectors' problems with the equipment and the technology as well as the need for more training. Mr. Lech's discipline of Chief Union Steward Crosley performing his Union leadership function on behalf of members constitutes the unlawful censorship and muzzling of the Union's legitimate, protected speech, thereby impeding the representative rights and responsibilities of the Union.

Director Lech required his supervisors to direct 8 inspectors, including Mr. Crosley, to explain in writing why their investigation reports during April 2021, did not contain attached photos uploaded into their investigation files in Eclipse. Director Lech issued this order after months of Mr. Crosley's explanations about the lack of equipment and training. He recognized that he was aware of the problems in his May 11, 2021 email to supervisors stating that "[t]here seems to be multiple reasons why inspectors are no[t] attaching photos of investigations to the [c]ase file investigation in Eclipse." Director Lech further stated that supervisors must make the inspectors aware that "there is a deficiency in their performance." Although Mr. Gaines did not make that statement to Mr. Crosley in his May 12, 2021 email, he did inform Mr. Crosley that he was not doing what he was supposed to be doing, i.e., uploading photos to his investigation files. It was in response to this criticism and after multiple attempts to get equipment and training to be able to upload the photos that Union Steward Crosley expressed his frustration in explaining why he and other inspectors were not uploading photos. Director Lech's disciplining of Union representative Crosley had the effect of hamstringing the Union in its ability to perform one its most vital functions in representing members regarding conditions of employment.

Moreover, the City did not adequately rebut the Union's prima facie case with credible legitimate reasons for disciplining Mr. Crosley or that Director Lech would have disciplined Mr. Crosley sans the protected email. The City contends that Director Lech disciplined Mr. Crosley because the

Crosley email was provocative, insubordinate and disobedient. The email, contends the City, was unresponsive to the request for an explanation of why Mr. Crosley was not uploading photos, and it undermined management by falsely accusing management of targeting him.

However, Mr. Crosley did in fact respond to Mr. Gaines' inquiry, and he provided the requested written explanation why he and others were not able to upload the photos. He explained that the "Department continues to FAIL to provide any training for the new phones" and that the inspectors did not receive the transfer cable/adaptor to upload the photos from the phones. The email was not unresponsive or disobedient. Mr. Crosley was clearly expressing his frustration with management's refusal to provide training and equipment to the inspectors after months of requests. He conveyed his opinion that he was targeted by management for his advocacy. Mr. Crosley's insistence, frustration, blame, and tone did not rise to the level of insubordination because it was protected Union speech permissibly critical of management. The Union leadership cannot effectuate changes in conditions unless and until it insists that management recognize the errors in the status quo, which was the purpose of Mr. Crosley's email.

Director Lech acknowledged that Crosley was acting on behalf of members. His email was not so obnoxious or violent that it lost the protections of the Act. Mr. Crosley did not know at the time that other inspectors were also required to explain their lack of uploading photos. In this regard, it was a reasonable opinion for Crosley to feel targeted as a Union official to explain his difficulties with uploading photos. A Union official is not only permitted but required at times to criticize management to effectuate changes in employment conditions for the benefit of represented employees. Characterizing Crosley's email as insubordinate and disobedient does not justify management's disciplining of a Union official for sending an email criticizing management and advocating for training and equipment on behalf of employees. The discipline was inextricably intertwined with the protected activity. Management may not subjectively characterize critical Union advocacy as insubordinate to justify the discipline of a Union official for engaging in protected, albeit unwelcomed speech.

The Union also argues that Mr. Crosley was further treated unfairly by the City when management required him to provide photos of himself at various locations to prove his whereabouts throughout the day and for being denied leave to attend training, which had never been denied to him before. The record, as a whole, yields the inference that management was motivated by Mr. Crosley's repeated, assertive and perhaps at times annoying Union activity of advocating for more training and equipment when it singled him out for providing proof of his whereabouts during the work day and requiring his route sheets 4-5 times per week, which was theretofore "unheard of." The change in conditions of employment for Mr. Crosley immediately after his May 12, 2021 email, in combination with his unlawful discipline for that email, supports the inference that he was discriminatorily targeted for increased monitoring of his daily activities at work. The City contends that all inspectors are required to take photos at locations during overtime operations. Director Lech required Mr. Crosley to take photos of himself throughout the day during a crane lift or sign installation during a Saturday inspection to document the overtime for the contractor for billing. However, the City's explanation does not address why Mr. Crosley was required to provide his route sheets 4-5 times per week, after never having been asked to do so before his discipline.

Also, the record, as a whole, yields the inference that Mr. Gaines disparately treated Mr. Crosley when he denied Mr. Crosley leave for training. Mr. Gaines testified that he was following the 2019 staffing policy instituted by Director Lech requiring a minimum of 60% staffing in his District. However, a public employer in this Commonwealth may not use managerial prerogatives in a discriminatory manner or as an offensive weapon of retaliation. Teamsters, Local No. 205 v. Brentwood Borough, 35 PPER 112 (Final Order, 2004), and an employer's managerial prerogative does not insulate it from the statutory obligation to exercise that authority without discriminatory motive. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994).

The City failed to prove that Mr. Gaines, or any other supervisor, applied the policy to deny leave for training in the past. Mr. Crosley credibly testified that he had never before been denied leave for training by either Supervisor Gaines or Supervisor Doherty. Supervisor Doherty credibly testified that he never applied the leave policy to training requests and that he never denied leave for training because it is required. The record shows that the 60% staffing policy was not applied in situations where leave was requested for training purposes. Yet, Mr. Gaines denied leave for training to Mr. Crosley after his discipline for Union advocacy. Additionally, Mr. Gaines expressed his frustration with Crosley's complaints on behalf of the inspectors about the lack of training and phone equipment when, on April 8, 2021, he emailed the inspectors that he was aware that "the new phones are not allowing you to upload without the special cable. The way around that is to email yourselves the photos and then upload. Takes more time [L]et's do that instead of making a comment that the photos cannot be uploaded." (emphasis added).

The Association also alleged an independent cause of action under Section 1201(a)(1) of the Act. An independent violation of Section 1201(a)(1) occurs, "where in light of the totality of the circumstances, the employer's actions have 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).

Under the totality of the circumstances in this case, a reasonable person in the bargaining unit or the Union leadership would unquestionably be coerced in exercising protected rights under PERA. Mr. Crosley, as Union Steward and Executive Board Member was exercising a common, routine right of Union officers to communicate with supervisory staff and management on behalf of Union members in support of members' seeking mutual aid and protection for the problems with their equipment in the face of management criticisms of their alleged deficient job performance. Mr. Crosley's protected role under the Act, as representative and advocate for his members, is to communicate freely with management. Union Stewards and officers are permitted under the Act to complain about management and to foster discourse between the leadership and management. Throughout his tenure as Chief Steward and Executive Board member, none of Mr. Crosley's Managers (Martin and Lech) or

Supervisors (Doherty and Gaines) told him that they were not the point of contact to address Union or employe complaints. Contrarily, Mr. Crosley was informed that he should always follow the chain of command.

Director Lech's discipline of Chief Union Steward Crosley was an attempt to gag the Union and inhibit its ability to protect employes from poor evaluations as a result of inadequate equipment and training, as well as promoting the interests of members in the provision of properly functioning equipment. Discipline of this nature has the effect of crippling the Union. A reasonable person in Mr. Crosley's position would certainly be coerced and intimidated regarding communications with management concerning improvements in training and equipment in light of management's criticism of employes' performance as a result of the defective equipment. The City, therefore, independently violated Section 1201(a)(1) by disciplining Mr. Crosley for his May 12, 2021 email, and the City's reasons are inadequate to outweigh the coercive effect on protected rights.

Additionally, under the totality of the circumstances, a reasonable Union representative would be coerced and intimidated regarding the exercise of Article IV rights as a result of the post-disciplinary changes imposed on Mr. Crosley's conditions of employment. Management increased its monitoring of Mr. Crosley's daily activities by requiring proof of his location and his route sheets for 4-5 days a week. Also, Supervisor Gaines denied Mr. Crosley's leave for training, which had not been done before. In this regard, the City independently violated Section 1201(a)(1), and the City's explanations are inadequate to outweigh the coercive effect on protected rights.

CONCLUSIONS

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

1. The City is a public employer within the meaning of Section 301(1) of PERA.
2. The Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The City independently committed unfair practices in violation of Section 1201(a)(1).
5. The City independently committed unfair practices in violation of Section 1201(a)(3).

ORDER

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

HEREBY ORDERS AND DIRECTS

that the City shall:

1. Cease and desist from interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of the Act;

2. Cease and desist 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.

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Immediately remove the letter/email of discipline from Mr. Crosley's personnel files and anywhere else that it may be recorded, placed or filed either in hard copy or electronic format, including but not limited to the personal or workplace files of any City administrators, managers, supervisors, directors, or other employes.

(b) Immediately cease and desist from imposing discipline against any Union stewards or officers for their individual or collective communications with Union members or management/directors/administrators expressing critical/negative opinions about terms and conditions of employment or any employer operations, policies, and/or equipment.

(c) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and

(d) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

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 and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this thirty-first day of January 2023.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

AFSCME DISTRICT COUNCEL 47, :
LOCAL 2187 :
 :
v. : CASE NO. PERA-C-21-174-E
 :
CITY OF PHILADELPHIA :

AFFIDAVIT OF COMPLIANCE

The City hereby certifies that it has ceased and desisted from its independent violations of Section 1201(a)(1) and Section 1201(a)(3) of PERA; that it has immediately removed the letter/email of discipline from Mr. Crosley's personnel files and anywhere else that it may be recorded, placed or filed either in hard copy or electronic format, including but not limited to the personal or workplace files of any City administrators, managers, supervisors, directors, or other employees; that it has immediately ceased and desisted from disciplining any Union stewards or officers for their individual or collective communications with management, directors, administrators, or supervisors expressing critical opinions about terms and conditions of employment or any employer operations, policies, or equipment; that it has posted a copy of this decision and order as prescribed therein; and that it has 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