COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TWIN VALLEY EDUCATIONAL SUPPORT PROFESSIONALS ASSOCIATION, PSEA/NEA	:	
v.	:	Case No. PERA-C-17-157-E
TWIN VALLEY SCHOOL DISTRICT	:	

FINAL ORDER

The Twin Valley School District (District) filed timely exceptions with the Pennsylvania Labor Relations Board (Board) on April 16, 2018, challenging a Proposed Decision and Order (PDO) issued on March 27, 2018.[1] In the PDO, the Board's Hearing Examiner concluded that the District violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA) when it unilaterally rescinded its practice of permitting second shift custodians to work first shift during the summer and transferred Donald Refford, the local union president, to another building. Pursuant to an extension of time granted by the Secretary of the Board, the District filed a brief in support of the exceptions on May 16, 2018. The Twin Valley Educational Support Professionals Association, PSEA/NEA (Association) filed a response and brief in opposition to the exceptions on June 7, 2018.[2]

The facts of this case are summarized as follows. Rita Haddock is the District's Human Resources Director. Scott Haddock is the District's Director of Buildings and Grounds. Mr. Haddock manages the custodial and maintenance staff and controls the building assignments and schedules for the custodians. Mr. Haddock and Ms. Haddock have both worked for the District for over thirty years.

Edwin Kelley is the immediate supervisor for custodial and maintenance staff for the District. Mr. Kelley works from 9:00 or 10:00 a.m. to 9:00 or 10:00 p.m. and he supervises both first and second shift custodial and maintenance employes. Mr. Kelley's responsibilities cover the entire District. He responds to maintenance calls and floats to all the District's school buildings.

Donald Refford has worked for the District for ten years. He is currently the Head Custodian at the Twin Valley Middle School. Prior to this assignment, Mr. Refford was the Head Custodian at Honeybrook Elementary School. He works second shift throughout the regular school year. Mr. Refford has been the Association President for three years. He was re-elected on June 4, 2017 for another two-year term. His second term began on

[1] The District's request for oral argument is denied because the exceptions raise no novel issues of law or fact and all arguments are adequately addressed in the parties' briefs.

[2] On June 4, 2018, the District filed a Motion to Reopen the Record. The Association filed a response to the District's Motion on June 20, 2018.

September 1, 2017. Mr. Refford participated in collective bargaining negotiations on behalf of the Association for the current collective bargaining agreement (CBA). Ms. Haddock and Dr. Robert Pleis, the District Superintendent, negotiated with Mr. Refford on behalf of the District.

David Hoffman is the Association Vice President and he has worked for the District for over twenty-eight years. Ms. Haddock typically contacts Mr. Hoffman about labor matters because they both work the day shift.

Barry Dewitt is the UniServ representative for the Association. Mr. Dewitt contacted Ms. Haddock to set up a meeting regarding the request of David Patterson and Deb Kauffman, two custodians assigned to the High School, to switch shifts. Ms. Haddock explained to Mr. Dewitt that prior requests by Mr. Patterson and Ms. Kauffman to switch shifts had been denied due to performance issues with Mr. Patterson and the need for him to be supervised. Mr. Dewitt requested that Ms. Haddock meet with Mr. Patterson and Ms. Kauffman to provide them an opportunity to state their reasons for a shift switch. Ms. Haddock agreed to a meeting, but informed Mr. Dewitt that there would be no shift changes.

On March 8, 2017, the parties met to discuss the requested shift switch. Mr. Refford, Mr. Hoffman, Mr. Dewitt, Mr. Patterson, Ms. Kauffman, Ms. Haddock and Superintendent Pleis attended the meeting. At the meeting, Mr. Dewitt noted that neither employe had documented discipline in their file. Ms. Haddock stated, "If you want documentation, we'll give you some." Also during the meeting, the District presented pictures of Mr. Patterson's performance deficiencies regarding the cleaning of desks. Mr. Kelley verbally counseled Mr. Patterson about his performance problems and cell phone use. Mr. Kelley retained his own notes documenting the counseling, but did not inform Mr. Patterson about those notes. The meeting on March 8, 2017 "took a different turn" as compared to prior meetings where the parties could resolve issues.

On or about April 4, 2017, Mr. Patterson received a written letter of reprimand regarding his performance deficiencies. On the same day, Mr. Refford filed a grievance regarding the written reprimand issued to Mr. Patterson. The Association stated in the grievance as follows:

> The Twin Valley School District and the District Human Resources Director, Rita Haddock, violated the Collective Bargaining Agreement when a discipline letter which was purely retaliatory in nature was placed in the employee file of Mr. Patterson only after Mr. Patterson and another custodian requested a shift transfer.

Mr. Haddock signed the Patterson grievance on April 7, 2017, and discussed the grievance with Ms. Haddock. He believed that the Patterson grievance would be or had been withdrawn. Mr. Haddock learned later that the Patterson grievance would not be withdrawn.

Ms. Haddock contacted Mr. Hoffman several times about the grievance in an attempt to stop the grievance from moving forward. During one conversation, Ms. Haddock stated that "the [Association] shouldn't go down this road," or that "it's a road we don't need to go down."

On April 30, 2017, Mr. Hoffman, Mr. Refford and Ms. Haddock met to discuss a labor issue with a cafeteria worker. Ms. Haddock asked Mr. Refford and Mr. Hoffman to stay after the meeting to discuss the Patterson grievance. When Mr. Refford and Mr. Hoffman informed Ms. Haddock that the grievance would not be withdrawn, Ms. Haddock stated "Do you really want to go down this road?" or "Do you really want to do this?"

Jo Shepherd is a part-time second shift custodian who is assigned to the Honeybrook Elementary School. She is also an aide for the District working the first shift during the regular school year. On March 14, 2017, Ms. Shepherd called off sick on a snow day when custodians were required to work. On March 13, 2017, Ms. Shepherd had requested vacation leave for March 14, which was denied due to the impending snow storm. Ms. Sheperd has a history of calling off work for parent-teacher conference days, snow days and in-service days. On March 22, 2017, Ms. Haddock issued a letter of reprimand to Ms. Sheperd for her failure to submit a doctor's note when she called off sick on March 14, 2017.

On April 4, 2017, Mr. Refford filed a grievance on behalf of Ms. Shepard, which was signed by Mr. Haddock, and stated as follows:

> The Twin Valley School District and the District Human Resources Director, Rita Haddock, violated the Collective Bargaining Agreement when a discipline letter which was purely retaliatory in nature was placed in the employee file of Ms. Shepard because Ms. Shepard utilized one of her sick days. Ms. Shepard turned in a physician's note for the day in question, even though the contract specifically calls for a required physician's note for more than three (3) days of consecutive absence.

Once Ms. Shepard produced a doctor's note, the District removed the reprimand from her file. Ms. Shepard's grievance was resolved within a few weeks of the incident. No grievances had been filed by the Association prior to the Patterson and Shepard grievances filed on April 4, 2017.

On May 3, 2017, Mr. Refford emailed the Honeybrook Elementary School custodial work schedule for the summer of 2017 to Karen Johnson, Mr. Haddock's assistant. On May 4, 2017, Ms. Johnson forwarded the schedule to Mr. Haddock. Mr. Refford worked the first shift every summer prior to 2017. The proposed custodial summer schedule for Honeybrook Elementary School included Mr. Refford, Kathy Hoffman, Jim Norris and Jim Seldonbridge on first shift with Ms. Shepard remaining on second shift. On May 4, 2017, Mr. Haddock sent an email to Mr. Refford containing the summer hours for Honeybrook Elementary School custodians. Mr. Haddock did not permit any of the second shift custodians to work first shift for the summer of 2017.

For at least the past twenty-eight years, the District always approved the summer shift change permitting second shift custodians to work first shift during the summer. The summer of 2017 was the first year that second shift custodians were not permitted to work first shift. The District did not bargain with the Association over the change in the practice of permitting second shift custodians to work first shift during the summer.

The District hosts summer school, events, clubs, organizations and activities every summer. The District has historically hosted summer day

camps from 9:00 a.m. to noon for eight to ten weeks. The custodians work in non-occupied areas of the school buildings during these activities and events. There are sufficient first shift hours remaining to work in those areas of the buildings that were occupied in the morning. During past summers, all custodial work was completed during first shift. There was always a second shift custodian available, if needed, for individual events held at school buildings during second shift. The custodians rotated by seniority to cover the specific event. Some second shift custodians remained on second shift during the summer for various personal reasons.

The District had a five-year roofing project at Honeybrook Elementary. The custodians were able to complete all custodial work for the past five summers during first shift while roofing work and other capital projects were being completed, including refinishing the gym floors. The roofing project at the High School did not interfere with custodial work at the High School or any other school. Only one second shift custodian was required to check for leaks during the roofing project. Any leaks that occurred at night were left uncleaned until morning.

The District purchased new floor cleaning equipment that does not require the drying time that the old equipment required. With the older equipment, the first shift custodians would clean the majority of the floors, allow the floors to dry overnight and finish the floors the next day. The classroom floors are cleaned once during the summer. Building areas that are used regularly during the summer, such as the cafeteria and the hallways, are cleaned regularly.

Mike Kazmierczak was the Head Custodian at the Middle School. Around the end of May 2017, Mr. Kazmierczak informed the District that he no longer wished to be the Head Custodian at the Middle School. The District promoted Lynn Bingaman, a custodian at the High School, to Head Custodian at Honeybrook Elementary School, replacing Mr. Refford. Mr. Kazmierczak was then assigned to Mr. Bingaman's regular custodian position at the High School. Mr. Refford was transferred to the Head Custodian position at the Middle School vacated by Mr. Kazmierczak. Scott Ebling had previously been the Head Custodian at the Middle School. Mr. Ebling was transferred from that position to the Head Custodian position at Robeson Elementary School because he caused personnel problems at the Middle School. Therefore, the District did not want to move Mr. Ebling back to the Middle School to fill the Head Custodian position. Donald Holland, the Head Custodian at Twin Valley Elementary, has two years of experience as a Head Custodian. Mr. Refford has four or five years of experience. There is no full-time Head Custodian at the High School.

On approximately June 3 or 4, 2017, Mr. Refford won reelection as the Association President. At that time, Mr. Refford was working the 2:30 p.m. to 10:30 p.m. shift at Honeybrook Elementary School. On June 12, 2017, Mr. Kelley informed Mr. Refford that he was being transferred to the Middle School on the 3:00 p.m. to 11:00 p.m. shift, effective June 19, 2017. After two weeks at the Middle School, Mr. Refford's hours were changed to 1:00 p.m. to 9:00 p.m. for a period of six weeks. For the last two weeks of the summer, Mr. Refford's hours were again changed to the 12:00 p.m. to 8:00 p.m. shift. The Middle School is larger than Honeybrook Elementary School. Although there are more custodial positions at the Middle School, it is currently short-staffed and has vacant positions.

The Association filed its Charge of Unfair Practices on June 14, 2017, as amended on July 12, 2017, alleging that the District violated Section 1201(a)(1), (2), (3) and (5) of PERA when it unilaterally changed the practice of permitting second shift custodians to work first shift during the summer and transferred Mr. Refford to another building in retaliation for filing grievances.[3] On August 1, 2017, the Secretary of the Board issued a Complaint and Notice of Hearing, directing that a hearing be held before the Hearing Examiner on September 27, 2017. After a continuance, the hearing was held on November 1, 2017, 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 District violated Section 1201(a)(1) and (5) of PERA when it unilaterally changed the practice of permitting second shift custodians to work first shift during the summer, relying on Minersville Area Educational Support Personnel Association v. Minersville Area School District (Minersville II), 41 PPER 31 (Final Order, 2010). In finding that the District violated Section 1201(a)(1) and (3) of PERA when it terminated the practice of custodial summer shift changes and transferred Mr. Refford to the Head Custodian position at the Middle School, the Hearing Examiner concluded that the close timing of the District's actions with respect to the filing of grievances, combined with the statements made by Ms. Haddock and the lack of an adequate explanation for the District's actions, evidenced a discriminatory motive on the part of the District.[4] By way of remedy, the Hearing Examiner ordered the District to immediately return Mr. Refford to the Head Custodian position at Honeybrook Elementary School and to restore the *status quo ante* of permitting second shift custodians to work first shift during the summer.

Initially, the District 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 District alleges that the Hearing Examiner erred in concluding that a past practice existed with regard to custodial summer shift changes because it had required more custodians to remain on their assigned second shift for several summers prior to 2017. An employer commits an unfair practice when it makes a unilateral change in a mandatory subject of bargaining that has been established through a binding past practice. AFSCME District Council 88 Local No. 790 v. Reading School District, 35 PPER 111 (Final Order, 2004). Section 701 of PERA requires public employers to bargain in good faith with the employes' exclusive bargaining representative "with respect to wages, hours and other terms and conditions of employment…." 43 P.S. § 1101.701; Minersville II, supra (hours of work and schedule changes

[3] The Association withdrew its claim under Section 1201(a)(2) of PERA at the hearing in this matter. Therefore, that allegation is no longer before the Board.

[4] The Hearing Examiner did not consider the Association's allegation that the District committed an independent violation of Section 1201(a)(1) of PERA because that claim was not raised within the four-month statute of limitations under Section 1505 of PERA. See Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001)(a violation of Section 1201(a)(1) may be independent or derivative).

are mandatory subjects of bargaining); Hazleton Area Educational Support Personnel Association ESPA/PSEA/NEA v. Hazleton Area School District, 29 PPER ¶ 29180 (Final Order, 1998)(same). The complainant has the burden of proving by substantial, credible evidence that the employer has unilaterally changed the practice. Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 43 PPER 53 (Final Order, 2011). In County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977), the Pennsylvania Supreme Court defined a past practice as follows:

> A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented.

476 Pa. at 34 n.12, 381 A.2d at 852 n.12 (emphasis in original).

The District asserts that under SEPTA v. PLRB, 654 A.2d 159 (Pa. Cmwlth. 1995), no past practice exists where an employer does not recognize a purported unwritten tradition for years at a time. However, in that case, the Commonwealth Court held that no past practice was established because SEPTA expressly stated from the inception of its tuition reimbursement program that the program was discretionary and contingent upon budgetary limitations, and had previously suspended the program. Those facts are not present here and, therefore, the Court's decision in SEPTA is inapplicable.

Indeed, the uncontested facts establish that for at least the past twenty-eight years, the District through Mr. Haddock, its Director of Buildings and Grounds, always permitted the second shift custodians who wished to work first shift during the summer to do so and that the summer of 2017 was the first time that all of the second shift custodians were required to remain on second shift. Further, the District's assertion that it had required more custodians to remain on second shift in the summers preceding 2017 is refuted by its summer schedule for the 2015-2016 school year, which shows a decrease in custodians working on the second shift as compared to the previous two years. See District Exhibit 4. Accordingly, the Hearing Examiner properly determined that a past practice existed concerning the second shift custodians' summer schedules.

The District further alleges that the Board's decision in Minersville Area School Services Personnel v. Minersville Area School District (Minersville I), 18 PPER ¶ 18025 (Final Order, 1986) controls, and that the Hearing Examiner erred in relying on Minersville II to conclude that the District violated its duty to bargain under Section 1201(a)(1) and (5) of PERA. However, the District's reliance on the Board's decision in Minersville I is misplaced. In that case, the district changed the schedules of several custodial employes from working the day shift in the summer to

working the night shift so that the buildings could be cleaned after the district's summer recreation programs finished for the day. The Board held that the change in schedules did not impact the employes' hours because they worked the same number of hours and were receiving the negotiated shift differential pay for working the night shift. Notably, the Board held that no evidence was presented to support the finding of a past practice with respect to the election of the custodial employes to be scheduled on first shift during the summer.

Here, the Hearing Examiner did not credit the District's proffered reasons for requiring all of the second shift custodians to remain on that shift during the summer of 2017. Further, the record establishes that a past practice existed for the past twenty-eight years, in which the District permitted the second shift custodians to work first shift during the summer. In Minersville II, which involved identical facts to those here, the Board held that hours of work and schedule changes are mandatory subjects of bargaining and that the employer's elimination of such a practice, i.e., permitting second shift employes to work first shift during vacation periods, violates the employer's duty to bargain under Section 1201(a)(5) of PERA. The District did not bargain with the Association prior to changing its second shift custodial summer scheduling practice. Therefore, the Hearing Examiner properly concluded that the District violated its duty to bargain under Section 1201(a)(1) and (5) of PERA and the District's exception to that conclusion is dismissed.

The District next alleges that the Hearing Examiner erred in concluding that the change in the second shift custodians' summer schedules and the transfer of Mr. Refford to the Head Custodian position at the Middle School were motivated by anti-union animus, and that the District'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 employes engaged in protected activity; (2) the employer was aware of the employes' protected activity; and (3) the employer took adverse action against the employes 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). The filing of grievances is activity protected by PERA. Montrose Area Education Association v. Montrose Area School District, 38 PPER 127 (Final Order, 2007).

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 employe protected activity and an employer's

adverse action alone is not enough to infer animus, but when combined with other factors can support the inference of anti-union animus. Colonial School District, supra.

In concluding that the Association established that the District's actions were motivated by anti-union animus, the Hearing Examiner stated, in relevant part, as follows:

> There is very close timing between Mr. Refford's filing of grievances, grievance meetings with the UniServ Representative [Barry Dewitt] and the Union's refusal to withdraw the Patterson grievance, on the one hand, and Mr. Refford's building reassignment and the denial of summer shift changes, on the other hand. This close timing in combination with other factors yields the inference of animus. Such factors include: Ms. Haddock's threatening, anti-union statements and her manifest frustration from contentious meetings with the Union and its UniServ Representative instead of meeting with the employes to resolve matters unchallenged, as was customary. … [T]he Union's sudden challenge to the District's authority regarding the Patterson and Shepard grievances, as well as Mr. Refford's accusation that Ms. Haddock retaliated changed the landscape and raised the ire of Mr. and Ms. Haddock. Although the District proffered business reasons at the hearing, for reassigning Mr. Refford and changing the summer shift practices, I do not credit the District's proffered reasons. I find those reasons to be pretextual, further supporting the inference of unlawful animus in this case.

(PDO at 10). Thus, the Hearing Examiner credited the testimony of Mr. Refford and Mr. Hoffman that the District's elimination of the custodians' summer schedule practice and transfer of Mr. Refford was in retaliation for the Association's filing of grievances, engaging in contentious grievance meetings and refusal to withdrawal the Patterson grievance. 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 District has failed to present any compelling reasons to warrant reversal of the Hearing Examiner's credibility determinations.

The District asserts that it presented legitimate reasons for requiring the custodians to remain on second shift for the summer of 2017, e.g., ongoing capital projects such as the replacement of the High School roof, increased use of the buildings and introduction of new floor cleaning equipment, and that the Hearing Examiner failed to credit the testimony of Ms. Haddock concerning the District's reasons. The District further asserts

that the Hearing Examiner erred in drawing a negative inference regarding the facilities request schedule submitted by the District and the District's failure to present the testimony of Mr. Haddock at the hearing.

The Hearing Examiner determined that the testimony of Ms. Haddock was not competent to establish Mr. Haddock's motive and reasons for the change to the practice that permitted the second shift custodians to work first shift during the summer. The Hearing Examiner did not err in concluding that Ms. Haddock's testimony would not be substantial evidence to establish the reasons for Mr. Haddock's change in custodial summer schedules.

Nevertheless, the Hearing Examiner considered the testimony of Ms. Haddock, but found that the District's alleged reasons for requiring the second shift custodians to remain on that shift were not credible and did not support the need for the change. Specifically, the Hearing Examiner concluded that the replacement of the High School roof did not affect the ability of the second shift custodians at the High School or the District's other schools to work first shift during the summer and that the record demonstrated that only one second shift custodian was necessary to check for leaks after the roofing work was concluded for the day. (N.T. 314). With regard to the alleged increased use of the District's buildings, the Hearing Examiner noted that the District's facilities request schedule submitted at the hearing only shows the requests for the summer of 2017 and that, absent evidence of building usage for prior summers, the facilities request schedule is insufficient to demonstrate that an increase in usage of the buildings occurred necessitating the change to the summer schedule. The Hearing Examiner further relied on the credible testimony of Mr. Refford and Mr. Hoffman that the first shift custodians could perform all their duties during the day even with the summer activities and events occurring in the buildings. (N.T. 48-49, 50-51, 171-173). Finally, the Hearing Examiner found that the District failed to establish that the new floor cleaning equipment required all of the second shift custodians to remain on that shift in order to clean the floors. The Hearing Examiner's decision is supported by the record. Further, the District did not present any compelling reasons to warrant reversal of the Hearing Examiner's decision not to credit the testimony of Ms. Haddock concerning the District's reasons for the change to the summer schedule practice. Accordingly, the Hearing Examiner properly concluded that the District was motivated by anti-union animus when it changed the practice of permitting the second shift custodians to work first shift during the summer in violation of Section 1201(a)(1) and (3) of PERA.

The District further alleges that Mr. Refford's transfer to the Middle School did not affect his wages or job duties and, therefore, the Association failed to demonstrate that he suffered any adverse action. However, as found by the Hearing Examiner, the District's involuntary transfer of Mr. Refford adversely affected his working conditions because he was required to perform more work due to the size of the Middle School and the fact that there were numerous vacant custodial positions.

The District additionally alleges that the Hearing Examiner erred in finding that it engaged in disparate treatment of Mr. Refford when he was transferred to the Head Custodian position at the Middle School. To establish disparate treatment, the complainant must prove that the employer treated similarly situated employes differently from the complainant based upon their support or lack of support for the union. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989); International Brotherhood of Painters and Allied Trades Local Union 1968 v. Erie City School District, 40 PPER 12

(Final Order, 2009). Here, Mr. Kazmierczak requested that he be transferred from the Head Custodian position at the Middle School to a full-time custodian position. As found by the Hearing Examiner, the record supports the finding that the District engaged in disparate treatment by accommodating Mr. Kazmierczak's request and discussing the transfer with him, whereas the District failed to even consult with Mr. Refford prior to the transfer or attempt to accommodate his desires regarding placement. See Bristol Borough Education Association v. Bristol Borough School District, 27 PPER ¶ 27088 (Proposed Decision and Order, 1996)(employer engaged in disparate treatment by transferring union president without her consent while obtaining the consent of other employes who were transferred).

Moreover, in addition to the disparate treatment, there was adequate evidence of record to support an inference of unlawful union animus on the part of the District in transferring Mr. Refford. Specifically, the close timing of the transfer to Mr. Refford's filing of grievances and the Union's refusal to withdraw the Patterson grievance. Additionally, Ms. Haddock's anti-union statements and her manifest frustration from contentious meetings with the Union and its UniServ Representative support a finding that the District harbored anti-union animus at the time of Mr. Refford's transfer. Therefore, the Hearing Examiner did not err in concluding that the District violated Section 1201(a)(1) and (3) of PERA in transferring Mr. Refford to the Middle School. See Tri-Valley Education Association v. Tri-Valley School District, 30 PPER ¶ 30048 (Final Order, 1999)(employer engaged in anti-union animus when it transferred union president to teach the same grade in another building due to president's role during protracted contract negotiations).

The District has also filed a request to reopen the record in order to submit into evidence a letter dated April 21, 2018 from Lynn Bingaman, the Head Custodian at Honeybrook Elementary School. The District alleges that it was unaware prior to the hearing that the Association did not consult with Mr. Bingaman before filing the Charge in this matter, that Mr. Bingaman opposes being transferred from his Head Custodian position at Honeybrook Elementary, and that Mr. Bingaman's letter corroborates the District's reasons for transferring Mr. Refford. When a request to reopen the record for additional evidence is made, the party making such a request must establish that the evidence sought to be admitted (1) is new; (2) could not have been obtained at the time of the hearing through the exercise of due diligence; (3) is relevant and non-cumulative; (4) is not for the purpose of impeachment; and (5) is likely to compel a different result. Minersville Area School District v. Minersville Area School Service Personnel Association, 518 A.2d 874 (Pa. Cmwlth. 1986).

The District's request to reopen the record must be denied for several reasons. Initially, the District does not allege that Mr. Bingaman was unavailable to testify at the hearing, and it has not offered any valid reason why it did not call him as a witness. Further, the statements in Mr. Bingaman's letter concerning his opposition to being transferred from his position as Head Custodian at Honeybrook Elementary School, and his subjective beliefs regarding his qualifications and experience, are not relevant to the disposition of this matter. Finally, Mr. Bingaman's statements in his letter would not compel a different result because the Hearing Examiner did not credit the District's reasons for the transfer of Mr. Refford. Therefore, the District has failed to demonstrate that the five

criteria necessary to reopen the record have been satisfied, and its request to reopen the record is denied.[5]

The District additionally excepts to the remedy issued by the Hearing Examiner. Specifically, the District asserts that the Hearing Examiner's order requiring it to return to the *status quo ante* of permitting the second shift custodians to work first shift during the summer is punitive rather than remedial. In order to effectuate the policies of PERA, the Board is authorized under Section 1303 to issue an order requiring the respondent to "cease and desist from such unfair practice, and to take such reasonable affirmative action … as will effectuate the policies of [PERA]." 43 P.S. § 1101.1303. The Board's authority to remedy unfair practices is remedial in nature, and not punitive. Uniontown Area School District v. PLRB, 747 A.2d 1271 (Pa. Cmwlth. 2000). The Board finds that the restoration of the *status quo ante* concerning the second shift custodians' summer schedules to be remedial and in furtherance of the purposes and policies of PERA. Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978)(holding that Board has authority to order restoration of *status quo ante* to remedy unilateral action of employer). Thus, the District's exception to the remedy is dismissed.

After a thorough review of the exceptions and all matters of record, the Board shall dismiss the exceptions and make the Proposed Decision and Order final.

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 Twin Valley School District are hereby dismissed, and the March 27, 2018 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 November, 2018. 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.

[5] The District further asserts that the Hearing Examiner erred in finding a derivative Section 1201(a)(1) violation. However, a derivative violation of Section 1201(a)(1) occurs when an employer commits any violation of Sections 1201(a)(2) through (9). Fink, supra. Because the District has committed unfair practices under Section 1201(a)(3) and (5) of PERA, the Hearing Examiner properly held that the District committed a derivative violation of Section 1201(a)(1).

COMMONWEALTH OF PENNSYLVANIA
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v.	:	Case No. PERA-C-17-157-E
TWIN VALLEY SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of Sections 1201(a)(1), (3) and (5) of the Public Employe Relations Act; that it has returned Donald Refford to the position of Head Custodian at Honeybrook Elementary School; that it has restored the status quo of permitting second shift custodians to work first shift during the summer; that it has posted a copy of the Proposed Decision and Order and Final Order as directed; and that it has served a copy of this affidavit on the Association 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