COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLIANCE OF CHARTER SCHOOL EMPLOYEES AFT, LOCAL NO. 6056	:	
v.	:	Case No. PERA-C-11-185-E PERA-C-11-192-E
NEW MEDIA TECHNOLOGY CHARTER SCHOOL	:	

PROPOSED DECISION AND ORDER

On May 4, 2011, the Alliance of Charter School Employees AFT, Local No. 6056 (Union) filed with the Pennsylvania Labor Relations Board (Board) a petition for representation pursuant to the Public Employe Relations Act (PERA) at Case No. PERA-R-11-130-E. The petition alleges that thirty percent or more of the unrepresented professional and non-professional employes of New Media Technology Charter School (New Media or "the School") wish to be exclusively represented by the Union for the purpose of collective bargaining. On May 9, 2011, the Secretary of the Board (Secretary) issued an order and notice of hearing directing that a hearing be held on May 20, 2011, in Harrisburg. I granted New Media's request for a continuance, without objection from the Union, and rescheduled the hearing for May 26, 2011. At the hearing on that day, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. The only issue presented for hearing was the jurisdiction of the Board. The parties stipulated and agreed to the composition of the bargaining unit in the event that the Board asserts jurisdiction and orders an election. Both parties timely filed post-hearing briefs.

On June 9, 2011, the Union filed a charge of unfair practices with the Board, at Case No. PERA-C-11-185-E, alleging that the School violated Section 1201(a)(1) and (3) of PERA. In its specification of charges, the Union alleged that New Media discriminated against Shanisse Conway as a result of her Union support when, on May 9, 2011, the Educational Director loudly confronted her, in the presence of students, for her lesson plan, which resulted in written discipline. The Union also alleged that extensive oversight and extraordinary demands, as well as a second disciplinary action against Ms. Conway, were the result of her Union activities.

On June 20, 2011, I issued a letter in Case No. R-11-130 confirming that, pursuant to the Board's blocking charge policy, I was holding the representation matter in abeyance until the resolution of the charge in Case No. C-11-185. On June 22, 2011, the Secretary issued a complaint and notice of hearing, designating a hearing date of July 14, 2011, in Harrisburg for the charge case. Also on June 22, 2011, the Union filed with the Board another unfair practice charge, at Case No. PERA-C-11-192-E, alleging violations of Section 1201(a)(1), (3) and (4) of PERA. In its specification of charges, the Union specifically alleged that New Media discriminated against five employes when it terminated their employment for supporting the Union. On June 30, 2011, the Secretary issued a complaint and notice of hearing designating a hearing date of July 14, 2011, thereby consolidating the two charges for hearing purposes. With the consent of the Union, I granted New Media's continuance request and rescheduled three days of hearing for August 3, 4 and 5, 2011. Two days of hearing were held on August 3, and 4, 2011. At those hearings, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. At the hearing on August 3, 2011, the parties stipulated and agreed to incorporate the record for Case No. R-11-130 into the record for the two unfair practice cases. (N.T.B. 9).[1] Also during that hearing, the

[1] I will refer to the Notes of Testimony from the hearing on May 26, 2011 as "N.T.A." The Notes of Testimony from the hearings held on August 3 and 4, 2011 are sequentially paginated and therefore may be treated as one volume even though they are printed in two volumes. I will refer to the Notes of Testimony from the August hearings as "N.T.B."

Union withdrew the allegation regarding the disruptive student in Case No. PERA-C-11-185-E. (N.T.B. 69).

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

FINDINGS OF FACT

1. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T.B. 9).

2. New Media is a non-profit corporation that was created in 2004. New Media is a charter school organized under the School Code with an educational mission. The School employs approximately twenty-seven teachers and approximately twenty non-professionals. (N.T.A. 8-10, 44).

3. The School Reform Commission (SRC) is a commission created by the Commonwealth of Pennsylvania to govern the School District of Philadelphia. The SRC replaced the school board for the Philadelphia School District. (N.T.A. 11, 24).

4. The founders of New Media were private individuals who applied to the Philadelphia School District for its operating charter. The charter application contained stipulated obligations that New Media agreed to fulfill. The application was approved and became the charter for New Media. (N.T.A. 11-14, 38).

5. Every five years, the Philadelphia School District conducts a total review of all aspects of New Media's operations to determine whether to renew the New Media charter. Administrators from the Philadelphia School District physically visit New Media to observe and audit operations and staff. They audit, for example, special education, student treatment and funding. (N.T.A. 38-39).

6. As part of the audit and charter renewal process, the Philadelphia School District may require that New Media institute changes in operations or establish conditions that more closely match the charter. (N.T.A. 38-39).

7. New Media is required to produce an annual report and submit it to the Philadelphia School District. The Philadelphia School District relies on these reports to ensure that New Media is complying with its charter. New Media is required to perform an independent audit, which it must share with the SRC and the Commonwealth. Every six or eight years, the Commonwealth audits New Media. (N.T.A. 24-25, 35).

8. Some years ago, the SRC required that New Media remove more than one member of its Board of Trustees. (N.T.A. 39).

9. Changes to programs at New Media must be submitted to and approved by both the SRC and the Commonwealth. (N.T.A. 41).

10. The teachers at New Media are enrolled in the public employe retirement system. (N.T.A. 42).

11. New Media is funded by public money. Tuition is received from the Commonwealth through the Philadelphia School District. Students and their families do not pay tuition. (N.T.A. 34, 56-57).

12. When PSSA tests are administered, the results for the students at New Media are distributed by the Commonwealth to the Philadelphia School District and the District then distributes the results to New Media. (N.T.A. 45).

13. Shanisse Conway was hired on April 24, 2010 as a Spanish instructor for students in grades nine through twelve with six weeks left in the 2009-2010 school year. David Silfee approached the Union and offered to contact colleagues regarding unionizing the School. The organizing drive began in October 2010. In November-December 2010, the Union organizing committee was formed. (N.T.B. 19, 139-141).

14. In December 2010, Ms. Conway was approached by fellow teachers about unionizing. Ms. Conway began attending Union meetings in December 2010. She spoke to colleagues to gain their support for the Union. (N.T.B. 20-21).

15. By January-February 2011, the Union organizing committee members were Ms. Conway, Megan Malachi, David Silfee, Kate Dalton, Jonathon Morris, Jasmine Hawkins, Carol Kirkland and Duran Perkins all of whom circulated the petition in support of the Union as exclusive collective bargaining representative. On April 14, 2011, the Board of Trustees of the School voted to retain the firm that is representing the School in the representation and unfair practice cases. (N.T.B. 22-24, 140-142, 156-157; Union Exhibit 10).

16. Ms. Conway, Ms. Malachi, Mr. Silfee and Mr. Perkins visited the CEO of the School, Donna Marie Parker, on May 2, 2011, during the visit, they presented Ms. Parker with the petition and asked Ms. Parker to recognize the Union. (N.T.B. 25-26; Union Exhibit 1).

17. After May 2, 2011, the members of the Union organizing committee continued to interact with colleagues about unionizing and approximately half the employes began wearing Union pins and buttons distributed by committee members. Ms. Conway distributed and wore Union buttons every day. On May 19, 2011, the Union presented a brochure to the Board of Trustees of the School at an open meeting. The Brochure contains the names and pictures of ten employes and quotations from each. Mr. Silfee, Mr. Perkins, Ms. Conway, Ms. Malachi and Ms. Hawkins were at the meeting and are included in the brochure. (N.T.B. 30-33, 142-145, 151-153, 223; Union Exhibits 7 & 8).

18. On May 9, 2011, Ms. Conway received a written warning for refusing to obey a direct order from her supervisor, the Director of Education, Robert Best, to print out her lesson plans. (N.T.B. 34; Union Exhibit 2).

19. On that day, Mr. Best heard loud noises emanating from Ms. Conway’s classroom which interrupted his evaluation of another teacher in a nearby room and other classes. Mr. Best was aggravated by the student commotion. He went to Ms. Conway’s room and saw two students running around the room while Ms. Conway was in a recliner with her back to the students. (N.T.B. 34-35, 56-57, 59, 216).

20. After class, Mr. Best entered the classroom in which Ms. Conway had been teaching and saw her talking with another teacher. Upon seeing Mr. Best, Ms. Conway left the room. Mr. Best called Ms. Conway’s name several times down the hall before a student told Ms. Conway that Mr. Best was calling to her. Mr. Best then told Ms. Conway to get her lesson plans right away. She said she could not because she did not wish to leave her next class unattended. Mr. Best demanded two-to-three times that she get the plans from the computer lab. Mr. Best became agitated at Ms. Conway’s attitude and raised his voice. Ms. Conway refused all three of Mr. Best’s requests. Students were present during this exchange. Ms. Conway handed in her lesson plans the next morning. Ten minutes after this exchange with Ms. Conway, Mr. Best was conducting a second teacher observation and heard an argument in Ms. Conway’s classroom. (N.T.B. 35-40, 61-62, 64, 67-68, 217-220).

21. In August 2010, Mr. Best instructed all teachers to have formal lesson plans submitted to him by 3:00 p.m. Thursday for the following week. In October 2010, after performing some teacher evaluations and observations, Mr. Best instructed the teachers to have their lesson plans out during class. (N.T.B. 45-46, 213).

22. Lesson plans maximize instructional time by guiding teachers through the lessons so the teachers do not miss important instructional material or waste time in proceeding through the material. Lesson plans support classroom management by utilizing the entire class time for instruction which reduces time for students to stray and misbehave. (N.T.B. 47).

23. Ms. Conway was previously reprimanded twice for not having her lesson plans timely prepared, submitted and available for her class. On February 8, 2011, Ms. Conway received a written warning from Mr. Best for not submitting "an excessive number of lesson plans." Lesson plans had not been submitted for the following weeks: 11/8/10; 11/15/10; 12/6/10; 12/13/10; 12/20/10; 1/3/11; 1/10/11; 1/17/11; and 1/31/11. The warning ordered Ms. Conway to submit all missing lesson plans and future lesson plans. (N.T.B. 48-51; Employer Exhibits 1 & 2).

24. On March 4, 2011, Ms. Conway received another written warning from Mr. Best for failing to submit the missing lesson plans noted in the February 8, 2011 warning and for additional missing lesson plans for the weeks of 2/14/11; 2/21/11 and 2/28/11. Mr. Best again ordered Ms. Conway to submit the missing lesson plans as well as all future lesson plans. (N.T.B. 52; Employer Exhibit 3).

25. On January 31, 2011, Mr. Best issued a classroom observation of Ms. Conway's class. On the observation, Mr. Best gave Ms. Conway the lowest evaluation score for the category: "[t]eacher works effectively from an instructional plan for lesson delivery," and noted that Ms. Conway has "no lesson plan available." (N.T.B. 54; Employer Exhibit 4).

26. Ms. Conway recognized that, by the end of January 2011, Mr. Best was already frustrated with her for not preparing and submitting lesson plans. (N.T.B. 55).

27. Jonathon Morris was hired on March 15, 2010 and renewed for the 2010-2011 school year. He began attending Union organizing meetings in January 2011. Mr. Morris signed the petition on April 19, 2011 and wore Union buttons and stickers after the presentation of the petition. Mr. Morris received a non-renewal letter dated June 3, 2011 stating that his employment contract would not be renewed for the 2011-2012 school year. (N.T.B. 77-79, 87; Union Exhibit 5).

28. On January 7, 2011, Mr. Morris had a last period class that was disruptive so he ordered the class out of the room to re-enter and behave. The students went out in the hall before Mr. Morris. Coach Mike Green, approached Mr. Morris in the hallway and informed him that students were not permitted to be in the hall unattended. Mr. Morris began "yelling at the top of his lungs" at Mr. Green.[2] (N.T.B. 91-94, 185-188; Employer Exhibit 5).

29. On January 10, 2011, Marva Carter, Director of Operations in charge of Human Resources and Student Services, and Mr. Best met with Mr. Morris regarding the yelling incident with Mr. Green. They informed Mr. Morris that his behavior in the hallway in front of students interrupted staff and was inappropriate. At this meeting, Mr. Morris admitted that Mr. Green did not raise his voice. (N.T.B. 185-187, 241).

30. On March 3, 2011, Mr. Morris met with Ms. Parker regarding two incidents; one that occurred on February 24, 2011 and another on March 1, 2011. The February incident occurred when Mr. Morris heard from students that someone had said that Mr. Morris was their enemy. Mr. Morris yelled at a student to reveal the source of the "enemy" comment. (N.T.B. 96-100, 127; Employer Exhibit 6).

31. The March 1st incident occurred during Mr. Morris's 12th grade class, which was held in the auditorium. Students were refusing to put their cell phones and i-pods away.

[2] I do not credit Mr. Morris's version of these events as presented at the hearing which is inconsistent with his version of events as presented at the meeting with Ms. Carter and Mr. Best on January 10, 2011.

Mr. Morris wrote up approximately seventeen students and those students stated that those write-ups did not matter. Mr. Morris raised his voice and threatened the students with telling Ms. Parker that they did not deserve to graduate because they were not participating in courses and they were not earning their diplomas. He told the students that he would lay his "bloody corpse" in front of Ms. Parker's door before he would see them graduate. Ms. Parker informed Mr. Morris that his behavior and his statements were inappropriate, and she told him to stop yelling. (N.T.B. 100-103, 124-125, 127, 266, 329-331; Employer Exhibits 6 & 31).

32. On April 1, 2011, Ms. Parker met with Mr. Best to discuss teacher retentions for the 2011-2012 school year. Ms. Parker would announce a name from the directory of teachers contained in the parent/student handbook and Mr. Best would give his approval or disapproval based on his observations throughout the year. (N.T.B. 179-183; Employer Exhibits 7 & 8).

33. At the April 1st meeting with Ms. Parker, Mr. Best recommended that Mr. Morris not be retained for the next school year because of unprofessional conduct regarding the January 7, 2011 incident with Mr. Green and the other incident in the auditorium with the twelfth graders. (N.T.B. 183-187).

34. On February 26, 2011, Mr. Best and Ms. Carter engaged in an e-mail exchange regarding two incidents in which Mr. Morris was yelling uncontrollably at students. Mr. Best responded on February 26, 2011 as follows: "I think that now would be the time to consider replacing Mr. Morris being that this is the 2nd or 3rd incident with him. This especially with his feeling threatened that "He is the enemy." We may need to watch him very closely as he is moving about in the building, especially amongst staff." (N.T.B. 188-189; Employer Exhibit 9).

35. During the April 1st meeting with Ms. Parker, Mr. Best also voted not to retain Mr. Silfee because of two incidents of corporal punishment that Mr. Silfee inflicted upon students and because Mr. Silfee did not submit his lesson plans. (N.T.B. 192-194, 197).

36. On October 22, 2010, Mr. Best observed Mr. Silfee's classroom. His observation notes classroom management problems, students off task and too many non-engaged students talking. (N.T.B. 271; Employer Exhibit 32).

37. Mr. Best witnessed Mr. Silfee place a student in a wristlock in a classroom and released the student once he saw Mr. Best standing in the doorway. The student rolled over from the wristlock. After assuring Mr. Best that he would not engage in corporal punishment again, Mr. Silfee did physically restrain a student by bending his arm up behind his back, even though the student was leaving his classroom and presented not threat to Mr. Silfee. On April 11, 2011, Ms. Parker issued a three-day suspension without pay for the two corporal punishment incidents. (N.T.B. 193-195, 271-276, 318-321; Employer Exhibit 35).

38. In February 2011, Mr. Best issued a memo and a written warning to Mr. Silfee noting that Mr. Silfee's lesson plans for the following weeks were missing: 12/6/10; 12/13/10; 12/20/10; 1/3/11; 1/10/11; 1/17/11; 1/24/11; 1/31/11; and 2/7/11. (N.T.B. 197-198; Employer Exhibits 12 & 13).

39. During the April 1st meeting, Mr. Best recommended to Ms. Parker not to retain Duran Perkins because Mr. Perkins was insubordinate and failed to follow directions throughout the year. Mr. Perkins continued to lock his classroom door throughout the school year after being told repeatedly not to do so. Locking the door is a safety hazard. Mr. Perkins received a written reprimand for that conduct. (N.T.B 199-200, 277-278, 337).

40. Mr. Best observed Mr. Perkin's teaching in January 2011. During that observation. Mr. Best observed that Mr. Perkins did not use a lesson plan, two students

were allowed to sleep during the class and other students were talking and not engaged in the lesson. (N.T.B. 201; Employer Exhibit 14).

41. On February 8, 2011, Mr. Best issued a written warning to Mr. Perkins for failing to prepare and submit lesson plans for the following weeks: 11/29/1; 12/6/10; 12/13/10; 1/13/11; 1/10/11; 1/17/11; 1/24/11; 1/31/11; 2/7/11. (N.T.B. 202-203). On March 4, 2011, Mr. Best issued a second written warning to Mr. Perkins for failing to submit lesson plans previously requested and additional lesson plans not submitted since the last warning notice for the weeks of 2/14/11; 2/21/11; and 2/28/11. (N.T.B. 203-204; Employer Exhibit 17).

42. On March 31, 2011, Mr. Best issued a verbal reprimand to Mr. Perkins for maintaining an unsecured axe and crowbar under his desk. On that date, a student took the axe and banged on a desk with it. (N.T.B. 337).

43. During the April 1st meeting with Ms. Parker, Mr. Best voted not to retain Julie Tsui. Ms. Tsui had no control over her classes. The noise emanating from her classroom could be heard down the hall. Mr. Best had to intervene often. (N.T.B. 206-207).

44. Mr. Best conducted an observation of Ms. Tsui in December 2010 noting that Ms. Tsui does not speak to students respectfully. She made comments that angered students. The observation notes that Ms. Tsui explains chemistry concepts at a level that is beyond the students' understanding. Students were talking while Ms. Tsui was teaching and she taught over the talking and argued with students. (N.T.B. 207-209; Employer Exhibit 19).

45. Carol Kirkland was Mr. Best's assistant. Mr. Best gave her an assignment to call the parents of eleventh graders to inform them of the PSSA workshop. Ms. Kirkland did not want to do the assignment, but Mr. Best explained that it needed to be done. She delegated the assignment to the eleventh grade advisors telling them that Mr. Best wanted them to make the calls. On February 11, 2011, Ms. Kirkland received an official reprimand for disobeying a directive under deadlines. (N.T.B. 210-212; Employer Exhibit 20).

46. Ms. Kirkland's response to her discipline was "whatever!" She also stated that she did not need the job because her husband makes enough money. (N.T.B. 210-212).

47. Teacher employment contracts at the School are for ten-month terms. At the beginning of the 2010-2011 school year, ten-twelve new teachers were hired to fill in for non-retained teachers from the prior year. It is typical to make renewal decisions at charter schools at the end of each year and typical for employment contracts not to be renewed. Approximately ten to twenty percent of teachers have not been renewed at the end of each year at the charter schools for which Ms. Parker has worked. (N.T.B. 242-243, 246, 297-301; Employer Exhibits 21-25).

48. In Early April 2011, Ms. Carter and Ms. Parker met to discuss teacher retentions for the 2011-2012 school year. (N.T.B. 247).

49. Ms. Carter recommended that Ms. Kirkland not be retained because she was unprofessional and insubordinate. On September 24, 2010, Ms. Kirkland was given a warning for insubordination for refusing to collect attendance sheets. (N.T.B. 249; Employer Exhibit 26).

50. On November 10, 2010, Ms. Parker issued an official letter of reprimand to Ms. Kirkland for insubordination for taking two unpaid leaves that were expressly denied to her in writing. She requested time off from August 16, 2010 through August 17, 2010 and August 27, 2010 through September 3, 2010, which are the busiest time for the School's administration in preparing the new school year. (N.T.B. 250, 317).

51. Throughout the school year, Ms. Carter received complaints from other staff, students and parents about Ms. Kirkland's negative attitude and poor demeanor. Ms. Kirkland is the first person to be seen upon entering the administrative offices. (N.T.B. 251).

52. On December 21, 2010, Ms. Carter issued a written warning to Ms. Kirkland for again failing to follow a directive regarding the collection of attendance at the School. (N.T.B. 252).

53. During her retention meeting with Ms. Parker, Ms. Carter recommended not retaining Mr. Morris. Ms. Carter's reasons included Mr. Morris's inappropriate statements to and conduct toward students, about which she received multiple complaints, and his reluctance to follow directions. Another reason was the incident on January 7, 2011, where Mr. Morris yelled at Mr. Green in the hallway in front of students. Ms. Carter received several written statements from staff and students regarding the January 7, 2011, incident. These statements all agree that Mr. Green did not at anytime raise his voice at Mr. Morris; he remained calm. (N.T.B. 253-254, 261, 267-268; employer Exhibit 29).

54. On February 24, 2011, Mr. Morris intimidated a student to reveal the name of the person who called him the "enemy." Mr. Morris yelled at the student and placed his hands on his face. This was the third time that Mr. Morris yelled at this student.

55. Ms. Carter also recommended to Ms. Parker that Mr. Silfee not be retained. Ms. Carter's reasons included Mr. Silfee's classroom management issues and his incidents of corporal punishment of students. The retention meeting occurred after two corporal punishment incidents involving Mr. Silfee. Ms. Carter had to go to Mr. Silfee's classroom several times throughout the school year to manage his class for him. The student services manager, who deals with student discipline, complained to Ms. Carter about that classroom. The facilities manager also complained that there was damage to Mr. Silfee's classroom due to the disorderliness of his classes. In October 2010, Ms. Carter met with Mr. Silfee to discuss his inappropriate tone with students. (N.T.B. 268-269, 271-276).

56. Ms. Carter recommended to Ms. Parker that the School not retain Mr. Perkins for the same reasons that Mr. Best relied upon for his recommendation. Mr. Perkins displayed a negative demeanor throughout school year. Ms. Carter had to visit Mr. Perkins's classroom two-to-three times per week due to poor classroom management. (N.T.B. 277-278, 280-281, 283).

57. Ms. Carter recommended that Julie Tsui not be retained. Ms. Carter observed that Ms. Tsui had "severe" classroom management issues and a lack of rigor with her instruction. Ms. Tsui needed constant support to control her classes. She had difficulty teaching and maintaining order. Students would sleep during instruction. (N.T.B. 283-285).

58. Ms. Parker's first year at New Media was the 2010-2011 school year. The renewal decisions for that school year were already made when she began her employment in July 2010. Ms. Parker was not involved in the hiring of Mr. Perkins who was a new hire for the 2010-2011 school year. Ms. Parker was not involved in the decision to renew Mr. Silfee for the 2010-2011 year. She was not involved in the renewal of Ms. Kirkland or Mr. Morris. Ms. Tsui was not renewed for the 2010-2011 year, but she was called back because a vacancy became available. (N.T.B. 242, 302-305).

59. Ms. Parker agreed with Mr. Best's April 1, 2011 recommendations not to renew Ms. Tsui, Ms. Kirkland, Mr. Silfee, Mr. Perkins and Mr. Morris. A few days later Ms. Carter met with Ms. Parker and Ms. Carter independently corroborated the same recommendations. (N.T.B. 310-313).

60. Ms. Carter, Mr. Best and the maintenance manager all complained to Ms. Parker throughout the year that Mr. Silfee was not managing his students, there was excessive noise emanating from his classroom, and that there was damage to the classroom. Ms. Parker and Mr. Best met regularly and often discussed Mr. Silfee. Ms. Parker warned Mr. Silfee that he was not managing or instructing his students. (N.T.B. 322-323).

61. Ms. Parker observed Mr. Silfee giving a test for which the students were unprepared. As Mr. Silfee tried to explain the test, students were talking and sleeping. When Mr. Silfee's contract was renewed for the 2010-2011 school year, it was a conditional renewal. The School had concerns about his classroom management and his failure to submit lesson plans during the previous year. (N.T.B. 326-329).

62. Ms. Parker decided not to retain Mr. Morris because he had a series of inappropriate outbursts. He shouted in a student's face to find out who called him an enemy. Mr. Morris did not control the twelfth grade class. He would scream at them and make inappropriate statements. (N.T.B 329-330).

63. In deciding not to renew Mr. Perkins, Ms. Parker relied on her own observations of students sleeping in Mr. Perkins's class and having side conversations as well as the incidents that Ms. Carter and Mr. Best relied on, i.e., the locking of his classroom door and the unsecured axe, which a student used to bang a desk. (N.T.B. 335-337).

64. Ms. Parker had to calm Ms. Tsui's classroom down several times. On one occasion, Ms. Parker personally removed a student from Ms. Tsui's classroom. Mr. Best and Ms. Carter reported weekly incidents throughout the year to Ms. Parker concerning the classroom management problems in Ms. Tsui's classes. (N.T.B. 339).

65. Ms. Tsui was inappropriate to students. She announced to one class that a student in that class had a child at home, which was unknown to the students at the time. She also humiliated a hearing impaired student. (N.T.B. 340).

66. None of the science teachers were renewed because the School is overhauling its science program. Union organizing committee members Kate Dalton and Jasmine Hawkins were renewed for the 2011-2012 school year. (N.T.B. 343; Joint Exhibit 1).

67. On June 3, 2011, Ms. Parker issued letters to Mr. Morris, Ms. Tsui, Ms. Kirkland, Mr. Silfee, and Mr. Perkins stating that their employment contracts would not be renewed for the 2011-2012 school year. (Union Exhibit 12).

DISCUSSION

1. Jurisdiction

In order to address the merits of the unfair practice cases consolidated for hearing and disposition, I must first determine whether the Board has jurisdiction over the School. New Media argues that the Board lacks jurisdiction over charter schools in the Commonwealth of Pennsylvania. New Media contends that charter schools fall within the jurisdiction of the National Labor Relations Board (NLRB or "National Board") because they are not political subdivisions within the meaning of the National Labor Management Relations Act ("National Act" or NLMRA) and the United States Supreme Court decision in NLRB v. Natural Gas Utility District of Hawkins County, 402 U.S. 600, 604-605 (1971). New Media also argues that administrative law judges and the NLRB's Acting General Counsel's Office have also concluded that charter schools are not exempt from the NLMRA and fall within the jurisdiction of the NLRB. Consequently, argues the School, although the issue of charter school jurisdiction is pending before the NLRB, jurisdiction arguably lies with the National Board based on past ALJ decisions and the position taken by the Office of General Counsel. New Media also maintains that the Supreme Court of Pennsylvania, in Lay v. International Brotherhood of Elec. Workers, Local No. 174, 427

Pa. 387, 235 A.2d 402 (1967), and the Commonwealth Court of Pennsylvania, in Western Pennsylvania School for the Deaf v. Commonwealth, 438 A.2d 1025 (Pa. Cmwlth. 1982), have held that, where jurisdiction arguably lay with the NLRB, the Board may not assert jurisdiction without an express denial of jurisdiction from the NLRB. Absent an express declination of jurisdiction, the School maintains that the Board must seek an advisory opinion from the NLRB under School for the Deaf, supra.

New Media's jurisdictional analysis was very clearly presented and well-researched. Indeed, such analysis may prevail in another jurisdiction. However, I disagree with the School's position that charter schools in Pennsylvania are not political subdivisions and that the question should be first presented to the National Board.

PERA expressly provides that non-profit organizations and educational institutions receiving appropriations from local, state or federal governments are public employers covered by PERA, and within the jurisdiction of the Board. 43 P.S. § 1101.301(1). The Commonwealth's legislated jurisdictional declarations, however, could be preempted by the National Board's exercise of jurisdiction. In this regard, the Board does not exercise jurisdiction only because PERA so provides. The Board exercises jurisdiction over employers covered by PERA where the National Act expressly exempts that class of employers or the National Board has expressly declined to exercise jurisdiction over the class where the status is uncertain. School for the Deaf, supra. Section 2(2) of the National Act provides that the term "employer" "shall not include the United States or any wholly owned Government corporation, or any Federal Reserve Bank, or any State or political subdivision thereof or any person subject to the Railway Labor Act." 29 U.S.C. § 152(2) (emphasis added). The National Act does not, however, define the term "political subdivision," as used in Section 2(2).

In Hawkins, the Supreme Court of the United States held that a public utility, organized under Tennessee's Utility District Law, was a political subdivision exempt from the National Act, by operation of Section 2(2), and was beyond the National Board's jurisdiction. The Supreme Court concluded that the National Board misapplied its own test, which the Supreme Court adopted, for determining whether an employer was exempt as a political subdivision. According to the Court in Hawkins, an entity is an exempt political subdivision when it is "(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate." Hawkins, 402 U.S. at 604-605, 91 S.Ct. 1749.

The Commonwealth Court, in School for the Deaf, determined that "[w]e must, therefore, determine first whether [the school] is an employer covered by the National Labor Relations Act (NLRA) and, if it is such an employer, whether the NLRB has expressly declined to exercise its jurisdiction with respect to employers like [the school]." 438 A.2d at 1027. The significance of this statement and the ensuing analysis is that the Commonwealth Court gave this Board and the Courts, in the first instance, the authority to determine whether an employer is covered by the National Act by applying federal law. The School for the Deaf Court applied Hawkins and concluded that the school lacked the indicia of a political subdivision. The School for the Deaf Court also looked to determine whether the school was a political subdivision under a previous doctrine known as the "intimate connection test."

However, the Court's research revealed that the National Board had abandoned that test, leaving uncertain whether a school with close ties to exempt entities like public school districts is a political subdivision. 438 A.2d at 1028. It was only because that determination was uncertain, that the Court held that the parties in that particular case should have obtained an advisory opinion from the NLRB regarding jurisdiction. In this context of uncertainty, the court opined that "[w]e note that the appellate courts of other jurisdictions, in cases not before cited in these proceedings involving the application in uncertain circumstances of the requirement that the states must yield to the primary jurisdiction of the NLRB, have directed the referral of the matter to that agency." School for the Deaf, 438 A.2d at 1028. The School for the Deaf Court

specifically approved the state determination of whether an employer is covered or exempt from the National Act and merely concluded that referral to the NLRB was appropriate when the employer's coverage status was indeterminable. Such is not the case here. Under the dictates of School for the Deaf, I am required in the first instance to analyze whether New Media is covered or exempt by Section 2(2) of the NLMRA by applying federal law. Only if this Board concludes that the employer is covered by the National Act or is otherwise uncertain, should this Board defer to the National Board for a determination.

I also find that the Lay decision, cited by New Media, is inapposite. In Lay, the Supreme Court of Pennsylvania held that a state court did not have jurisdiction to issue an injunction against a union of electrical contractors engaged in informational picketing at a construction project on a county home for the poor. The Lay Court opined that, in order to divest a state court of equity jurisdiction in a labor matter, the party claiming that jurisdiction lies exclusively with the NLRB must establish that the employer was engaged in interstate commerce and that the activities were expressly or arguably within the jurisdiction of the National Board. The holding in Lay, however, has no applicability here because it predates public sector collective bargaining in the Commonwealth and the status of the employer as a political subdivision was not at issue. Private sector construction workers, in Lay, contracted with a county (i.e., they were not employed by the county) to perform work on the county facility. They were not public employes. Accordingly, there was no question that the employment relationship was within the jurisdiction of the National Board and not this Board. The question was limited to determining whether a state court of equity had the authority to grant an injunction against peaceful picketers where the behavior, and not the class or status of the employer, was within the jurisdiction of the National Act and the NLRB.

Significantly however, the Lay decision is controlling to the extent it held, as the Commonwealth Court so held in School for the Deaf, that the state court or this Board, does indeed have jurisdiction to determine its own jurisdiction. In this regard the Lay Court analyzed federal law and stated that "[t]he real issue here is whether the regulated conduct touches interests so deeply rooted in local feeling and responsibility that the states should retain jurisdiction. Probably the chief such area is where there is violence involved." Lay, 427 Pa. at 393, 235 A.2d at 405. Accordingly, the appellate courts of this Commonwealth have consistently held that, where a party has questioned the jurisdiction of the forum where the case has been brought, that forum has the authority in the first instance to determine where jurisdiction is proper, absent an express enunciation by the National Board asserting jurisdiction. Since the National Board has not addressed the issue of whether Pennsylvania charter schools are within its jurisdiction, this Board has the authority to determine the proper jurisdiction over that class of employer.

A review of the research provided by New Media reveals that the Acting General Counsel's Office of the NLRB has reviewed the National Board's assertion of jurisdiction over charter schools in different states. The research demonstrated that the NLRB does not have a one-size-fits-all national policy with regard to charter schools. Rather the National Board determines jurisdiction on a state-by-state basis giving great weight to a state's charter school laws. The NLRB ALJs have asserted jurisdiction over charter schools in Arizona because the laws in that state have created a charter school system that allows charter schools to behave like private schools. The National Board, however, has declined to assert jurisdiction over California charter schools because that state's laws establish a public school charter school system. I conclude that Pennsylvania, like California, has created a public school charter school system that is not within the jurisdiction of the National Board and is without a doubt under this Board's jurisdiction, as is a public school district. Therefore, Western Pennsylvania School for the Deaf, supra, is distinguishable and inapposite.

The Hawkins Court opined that the conclusion that the utility district constituted a political subdivision was dictated by the face of its enabling statute. Writing for the Court, Justice Brennan stated that "[t]his case does not however require that we decide whether 'the actual operations and characteristics' of an entity must necessarily

feature one or the other of the Board's limitations to qualify an entity for the exemption, for we think that it is plain on the face of the Tennessee statute that the Board erred in its reading of it in light of the Board's own test." Id. at 606, 91 S.Ct. at 1750. The Court emphasized that the utility district, under Tennessee law, although founded by private citizens, is operated as a nonprofit and "is declared by the statute to be a 'municipality' or public corporation," without the power to levy taxes. Id.

In the Acting General Counsel's Answering Brief in appeal of Excalibur Charter School, Inc and Nathaniel Wicke, at Case No. 28-CA-23039, on appeal before the National Board, which was submitted here by New Media with its post-hearing brief in Case No. PERA-R-11-130-E, the Acting General Counsel's Office clearly took the position that the Board treats different states differently with respect to charter schools. In this regard, Counsel compared charter schools in Arizona with charter schools in California and argued as follows:

> To the extent that Respondent seeks to rely on other authority, including agency decisions and case law arising out of other jurisdictions, finding that charter schools are exempt from coverage of the Act, there are no such cases in Arizona. Moreover, cases in other jurisdictions are distinguishable in that they rely on unique factors not applicable to Arizona charter schools. For example, in the representation cases arising in Regions 31 and 32 decided in 2006, cited by Respondent, the Regional Directors concluded that charter schools in California are political subdivisions exempt from coverage of the Act. Those cases, however, as discussed in more detail below, are readily distinguishable from the instant case and rely on unique factors applicable to California charter schools—as a result of California's particular enabling statutes—that do not exist in Arizona.

(New Media's Post-hearing Brief, Case No. PERA-R-11-130-E, Appendix A at 6-7). Acting Counsel further stated that "charter schools exist by virtue of state-specific enabling statutes, which vary from state to state." Id. at 7.

The Acting General Counsel's Brief further surveyed two California charter school cases where the National Board's regional directors concluded that the schools were exempt from the NLMRA as political subdivisions and stated the following:

> In both of these cases, the Regional Directors applied the Hawkins County test and concluded that the California charter schools at issue met both prongs of the test for determining whether the schools were political subdivisions of the state. . . . The California Charter Schools Act (CSA) recognizes charter schools as "public schools," and the California Constitution makes clear that public schools are considered part of local and state government. As Regional Director for Region 31 pointed out, "[t]he California legislature unequivocally declared its intent that 'Charter schools are part of the Public School System, as defined in Article 9 of the California Constitution.'" The Regional Director for Region 31 also found it relevant that the CSA prohibits preexisting private schools from obtaining a charter. These particular provisions of the California statute are not present in the Arizona enabling statute.

(New Media's Post-hearing Brief, Case No. PERA-R-11-130-E, Appendix A at 8).

An examination of the Charter School Law of Pennsylvania and the corroborating evidence of record in this case reveal that charter schools in Pennsylvania are not "created directly by the state, so as to constitute departments or administrative arms of the government." Pennsylvania charter schools may be founded by private individuals, as New Media and, therefore, are not political subdivisions under the first alternative of the Hawkins test. Applying the National Board's state-by-state approach to determining

whether charter schools, under the Hawkins requirement of examining state enabling laws for entities under consideration, yields the conclusion that Pennsylvania charter schools are political subdivisions and exempt from the National Act, under the second prong of Hawkins, like California charter schools.

The Pennsylvania charter school law is located at Article 17-A of the Public School Code of 1949, as amended. Section 1703-A provides, in relevant part, that a "`[c]harter school' shall mean an independent public school established and operated under a charter from the local board of school directors and in which students are enrolled or attend. A charter school must be organized as a public, nonprofit corporation. Charters may not be granted to any for-profit entity." 24 P.S. § 17-1703-A (emphasis added); see also, 24 P.S. § 17-1717-A(a). The local school board of directors "shall mean the board of directors of a school district in which a proposed or an approved charter school is located." Id. "A charter application shall be deemed approved by the local board of school directors of a school district upon affirmative vote by a majority of all the directors. Formal action approving or denying the application shall be taken by the local board of school directors at a public meeting, with notice or consideration of the application given by the board, under the 'Sunshine Act.'" 24 P.S. § 17-1717-A.

Section 1724 of the charter school law provides that employes of the charter school "may organize under [PERA]," and "[t]he board of trustees of a charter school shall be considered an employer for the purposes of Article 11-A." Article 11-A provides that an "[e]mployer shall mean a public school entity, but shall not include employers covered or presently subject to coverage under the act of June 1, 1937 known as the 'Pennsylvania Labor Relations Act,' or the National Labor Relations Act." 24 P.S. § 11-1101-A (emphasis added). Clearly, the intent of the General Assembly of this Commonwealth is that charter schools be public schools under the jurisdiction of this Board and not private schools within the jurisdiction of the National Board. Two Regional Directors in California and the Office of Acting General Counsel for the Board have already agreed that such statutory pronouncements are dispositive factors favoring the classification of charter schools as political subdivisions exempt from the NLMRA.

The charter schools in Pennsylvania are accountable, responsible and answerable to the local school boards, which are political subdivisions comprised of public officials. The charter itself must be approved by a local school board at a public meeting which means that the charter school is directly accountable to the public and the local electorate. Section 1728 of the Charter School Law provides that the local school board is required to audit and monitor the charter school in its district annually to assess whether the charter school is meeting the goals of its charter. 24 P.S. § 17-1728-A. Moreover, the local school board has ongoing access to the charter school and its records to ensure that the charter school is in compliance with the charter and meeting the requirements of testing, civil rights and student health and safety. Id. Administrators from the Philadelphia School District physically visit New Media to observe and audit school operations and staff to ensure that the School is complying with its charter and treating students properly and protecting students' rights and interests. New Media produces an annual report which it provides to the SRC as part of the SRC's role in monitoring New Media.

Additionally, the public officials on the local school board are authorized to revoke a charter either during the term or at the end of the term of the charter for failing to meet any condition in the charter or the requirements for student performance. 24 P.S. § 17-1729-A(a). When a charter is revoked, the school is dissolved. 24 P.S. § 17-1729-A(i). The charter is valid for a maximum of five years and may only be renewed upon the reauthorization of the charter by the local school district. 24 P.S. §17-1720-A. Every five years, the Philadelphia School District conducts a total review of all aspects of New Media's operations to determine whether to renew its charter. Some years ago, the SRC required that New media remove some members of its board of trustees. The SRC and the Philadelphia School District are comprised of public officials. Also, every six-to-eight years, the Commonwealth audits New Media.

As part of the audit and charter renewal process, the Philadelphia School District may require that new Media institute changes in operations or establish conditions that more closely match the charter. The fact that those officials have the power to suspend or revoke New Media's charter and dissolve the School and can require that members of the board of trustees be removed and replaced means that School administrators are responsible and answerable to public officials and the electorate, within the meaning of Hawkins.

Section 1714-A enumerates the powers of Pennsylvania charter schools and provides that a charter school may "[s]ue and be sued, but only to the same extent and upon the same condition that political subdivisions and local agencies can be sued." 24 P.S. § 17-1714-A. Significantly, the Charter School Law also provides that "[f]or purposes of tort liability, employes of the charter school shall be considered public employes and the board of trustees shall be considered the public employer in the same manner as political subdivisions and local agencies." 24 P.S. § 17-1727-A (emphasis added). Moreover, the charter schools in Pennsylvania "shall be accountable to the parents, the public and the Commonwealth, with the delineation of that accountability reflected in the charter. 24 P.S. § 17-1715-A. The public, non-private nature of Pennsylvania charter schools is further demonstrated by the restriction against granting charters to sectarian schools. Charter schools are prohibited by law from providing any religious instruction or displaying any religious symbols or objects. 24 P.S. § 17-1715-A. Indeed, "no charter school shall be established or funded by and no charter shall be granted to any sectarian school, institution or other entity." 24 P.S. § 17-1717-A(a). Also, charter applications are reviewed considering certain statutory criteria, one of which requires the examination of the "extent to which the charter school may serve as a model for other public schools." 24 P.S. 17-1717-A(e)(2)(iv). The modifier "other" in the previous sentence would not be necessary if charter schools were not already public.

Moreover, "[a]ll employes of a charter school shall be enrolled in the Public School Employees Retirement System . . . unless at the time of the application for the charter school the sponsoring district or the board of trustees of the charter school has a retirement program which covers the employes or the employe is currently enrolled in another retirement program. The Commonwealth shall make contributions on behalf of the charter school employes and the charter school shall be considered a school district." Here again, the statute makes clear the legislative intent that charter schools are public schools with the same level of sovereign immunity as political subdivisions. The General Assembly further identifies charter schools as public employers and that employes working at charter schools are public employes eligible to participate in the Public School Employes Retirement System.

Another important factor supporting the conclusion that charter schools in Pennsylvania are public employers and political subdivision as public schools under the Charter School Law, is that charter schools like New Media are funded by public money. New Media receives tuition from the Commonwealth through the Philadelphia School District. Neither students nor their families pay tuition as would be the case if it were a private school. Although private citizens founded New Media, the United States Supreme Court, in Hawkins, held that entities founded by private citizens can qualify as political subdivisions when they are operated as a nonprofit and declared by statute to be a public corporation, even though the entity is without the power to levy taxes. Id. In this case, New Media is operating as a nonprofit and the Charter School Law of Pennsylvania clearly declares charter schools to be public employers, public schools, public corporation and accountable to the public and local government officials. Also, when PSSA tests are administered, the results are distributed by the Commonwealth to the Philadelphia School District. The Philadelphia School District then distributes those results to New Media. This process of monitoring the New Media students' performance on the PSSAs demonstrates New Medias accountability and responsibility to the public officials at the District.

The Charter School Law and the facts of record regarding New Media clearly and expressly establish the intent of the General Assembly to exempt charter schools in

Pennsylvania from the National Act and to have those schools be public schools and public employers for purposes of collective bargaining, retirement and accountability to the public and elected officials. Under the National Board's state-by-state approach of examining the individual state's enabling statutes, which was also required by Hawkins, Pennsylvania charter schools clearly satisfy the second alternative under Hawkins and are imbued with the same public status and accountability as the utility in Hawkins and the charter schools in California.

2. PERA-C-11-185-E

In this charge, the Union claims that the School discriminated against Ms. Conway, on May 9, 2011, when Mr. Best allegedly confronted her throughout the day. The Union maintains that Mr. Best interrupted her instructional time telling her that her students were too loud without assisting her and that he repeatedly asked for lesson plans in the hallway in a loud and disrespectful manner in front of students. Soon thereafter, Mr. Best allegedly interrupted her class without reason and observed her for ten minutes. The Union further alleges that the intense scrutiny, verbal intimidation and heightened supervision were in retaliation for her Union support and organizing activities.

In Central York Educ. Ass'n v. Central York Sch. Dist., 40 PPER 29 (Proposed Decision and Order, 2009), the examiner presented the following:

> In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew that the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the 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 Employes 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 employe's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994).
>
> The Board will give weight to several factors upon which an inference of unlawful motive may be drawn. In PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether anti-union animus was a factor in the [adverse action against] the Complainant." Id. at 380. These factors include 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 action against the adversely affected employe, the effect of the employer's adverse action on other employes and protected activities, and whether the action complained of was "inherently destructive" of important employe rights. Centre County, 9 PPER at 380.
>
> The close timing of an employer's adverse action alone is not enough to infer animus, but when combined with other factors can give rise to the inference of anti-union animus. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO,

Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984). Adverse employer action closely following an employer display of union animus, further combined with an employer's failure to adequately explain its adverse actions or its shifting reasons for an adverse action, can support an inference of anti-union animus and may be part of the union's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Mere suspicion or conjecture is insufficient to sustain a discrimination charge. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311, 314 (Pa. Cmwlth. 1974).

For Section 1201(a)(3) cases, the Board has adopted the analysis of Wright Line, Inc., 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (1980). Teamsters, Local 776 v. Perry County, 23 PPER ¶ 23201 (Final Order 1992); Washington Township Municipal Authority, 20 PPER ¶ 20128 (Final Order, 1989); Township of Springfield, 12 PPER ¶ 12354 (Final Order, 1981). In Perry County, the Board stated that, under Wright Line, "once a prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity." Perry County, 23 PPER at 514. Upon the employer's offering of such evidence, "the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual." Teamsters Local #429 v. Lebanon County, 32 PPER ¶ 32006 at 23 (Final Order, 2000). "The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct." Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 at 64 (Final Order, 1992). The parties, however, may elicit and offer evidence in support of their primary burdens of proof or their rebuttal case at any time during the proceeding.

More importantly, however, the burden only shifts to the employer if the Union establishes a prima facie case of discrimination. Id. In Teamsters, Local No. 764 v. Montour County, 35 PPER 147 (Final Order, 2004), the Board opined that "`Wright Line requires the complainants to establish a prima facie case that protected activity was the motivating factor in the employer's decision. Then and only then must the employer counter that prima facie case.'" Id. at 452 (emphasis added)(quoting Temple 23 PPER at 64). "The burden, therefore, is first on the complainant to affirmatively establish every element required in a discrimination claim regardless of whether the employer specifically challenges any or all element(s)." Montour County, 35 PPER at 452.

Central York Sch. Dist., 40 PPER at 134-135.

In this case, although Ms. Conway was engaged in protected activities and the School's administration was aware of those activities by May 9, 2011, the Union did not meet its burden of proving that Mr. Best's actions against Ms. Conway were motivated by her Union activities. There are no anti-union statements of any kind from any of the School administrators nor are there shifting or insubstantial explanations for Mr. Best's frustration with and discipline of Ms. Conway. There is close timing between the submission of the petition on May 2 and the wearing of Union pins and buttons immediately thereafter on the one hand and Mr. Best's May 9 exchange with Ms. Conway and his May 10 imposition of discipline on the other. However, the timing alone is insufficient to support an inference of animus. Montour County, supra. Accordingly, the burden did not shift to New Media to establish that the actions were taken for legitimate business reasons. However, I will evaluate New Media's case for purposes of Board review in the event the Board disagrees with my conclusion that the Union failed to establish a prima facie case of discrimination.

The School established, with credible, substantial evidence, that Mr. Best possessed legitimate non-shifting reasons for his conduct on May 9th and 10th. On May 9, 2011, Mr. Best, in his capacity as the Education Director, was conducting an observation of a teacher in a nearby classroom when he heard loud noises emanating from Ms. Conway's room. Understandably aggravated by the disruption, Mr. Best investigated only to find students running around Ms. Conway's classroom while Ms. Conway was ignoring the students with her back to the class. She was not teaching, and she was not managing the students. When Mr. Best returned to talk to Ms. Conway, she walked away from him and ignored him when he called to her three times. This level of disrespect for Mr. Best, her supervisor, was unwarranted and itself worthy of discipline.

Lesson plans are an essential part of instructional and classroom management at New Media. Mr. Best has established a system whereby lesson plans must be prepared and submitted on Thursday afternoons for the following week. Additionally, Mr. Best has required teachers to have their lesson plans on their desk while teaching to minimize gaps and breaks in instruction thereby increasing the efficiency of instruction time. The efficient use of instruction time keeps the children engaged in the class and reduces distractions and non-instructional time that leads to student misbehavior and disengagement. Teachers know that lesson plans are at the core of Mr. Best's strategy for classroom management and instruction.

With this understanding, Ms. Conway repeatedly refused to prepare and submit lesson plans to Mr. Best. On January 31, 2011, Mr. Best observed Ms. Conway's class. On the observation form, Mr. Best gave Ms. Conway the lowest evaluation score for the category: "[t]eacher works effectively from an instructional plan for lesson delivery," and noted that Ms. Conway has "no lesson plan available." During the hearing, Ms. Conway recognized that, by the end of January 2011, Mr. Best was already frustrated with her for not preparing and submitting lesson plans.

After being told on her observation of the need and importance of preparing lesson plans, Ms. Conway was subsequently reprimanded twice for not having her lessons plans prepared and submitted. On February 8, 2011, Ms. Conway received a written warning from Mr. Best for not submitting "an excessive number of lesson plans." Lesson plans had not been submitted since November 8, 2010, almost three months. The warning ordered Ms. Conway to submit all missing lesson plans and future lesson plans. Ms. Conway blatantly ignored Mr. Best's warning, however, and on March 4, 2011, Ms. Conway received another written warning from Mr. Best for failing to submit the missing lesson plans noted in the February 8, 2011 warning and for failing to submit additional lesson plans thereafter. Mr. Best again ordered Ms. Conway to submit the missing lesson plans as well as all future lesson plans.

It is in this context that Mr. Best approached Ms. Conway on May 9, 2011, because he knew that her lack of lesson planning resulted in student disengagement from the lesson which further resulted in student misbehavior that Ms. Conway was ignoring. Mr. Best, understandably frustrated raised his voice in the hallway within earshot of students because Ms. Conway was disrespectfully ignoring him. Any discipline at this point was not only well deserved but had absolutely nothing to do with her Union activities; rather it was poor attitude, insubordination, disrespect and poor work ethic that caused Ms. Conway's discipline. Accordingly, the unfair practice charge at Case No. PERA-C-11-185-E is dismissed.

3. PERA-C-11-192-E

In this charge, the Union alleged that the School did not renew the following five employes for discriminatory and retaliatory reasons: Jonathon Morris, Julie Tsui, Duran Perkins, David Silfee and Carol Kirkland. All five employes signed the petition submitted to Ms. Parker. Of the five, pictures and associated quotes of David Silfee and Duran Perkins were included in the brochure that was presented to the Board of Trustees

on May 19, 2011. Accordingly, the School knew that the five were engaged in protected activities as of June 3, 2011, when the School issued non-renewal letters to the employes.

The Union however did not establish a prima facie case of discrimination or retaliation. The record is devoid of evidence that any of the School administrators exhibited unlawful animus toward any of the five employes because of their Union support or activities. Although the burden never shifted to New Media, I will evaluate New Media's case for Board review in the event that the Board disagrees with my conclusion that the Union failed to establish a prima facie case. The School established with substantial, credible evidence that it possessed an abundance of legitimate reasons for not renewing these five employes. All the same reasons were corroborated by the top three administrators at the School: Ms. Parker, Ms. Carter and Mr. Best. The School's legitimate reasons are contained in the findings of fact, which need not be repeated in detail in the discussion here. I will, however, provide a general overview.

The record shows that Mr. Morris had a very short temper. He exploded on young students and got into their personal space anytime students challenged his authority or engaged in disrespectful behaviors. He even felt threatened by other teachers and yelled inappropriately at Mr. Green. Mr. Best and Ms. Carter discussed, via e-mail that they should watch him closely and consider terminating him back in February 2011, before any administrators knew who may have been involved in Union activity. Mr. Morris made some very disturbing statements to the students when he was angry, which was often. New Media properly and legitimately decided not to permit its students to continue to be exposed to Mr. Morris's abuses.

Mr. Silfee engaged in two incidents of corporal punishment. The first incident involved placing a student in a wristlock, rolling the student over. The second incident involved bending a student's arm up behind his back when the student was walking out of the classroom and presented no physical threat to Mr. Silfee. The second incident also occurred after Mr. Silfee promised not to engage in physical punishment again. He was issued a three-day suspension without pay for abusing students. New Media not only had a legitimate reason to sever its relationship with Mr. Silfee, but also had an obligation to do so before he severely injured a student and exposed the School to liability.

Additionally, Mr. Silfee, like Ms. Conway, refused to prepare and submit lesson plans. In February, Mr. Best issued a written warning to Mr. Silfee for failing to submit lesson plans as far back as December 6, 2010. As a result, Mr. Best observed that Mr. Silfee's students were often off task and not engaged in the lesson. The facilities manager of the School complained to Ms. Parker that there was damage to Mr. Silfee's classroom as a result of the student misbehavior and chaos that often ensued in his classes. In fact, the School had concerns about renewing Mr. Silfee the prior year due to his poor classroom management and his failure to submit lesson plans before there was any Union activity. He was given a second chance under a conditional renewal for the 2010-2011 school year to improve, but he chose not to make those improvements.

Mr. Perkins refused to follow directives that impacted the safety and welfare of students. He repeatedly locked his classroom door after being told not to do so. Mr. Best observed that Mr. Perkins did not use lesson plans to teach his classes. As a result, students were sleeping during class while other students were disengaged and continued to talk about unrelated matters, which distracted other students. Ms. Carter visited Mr. Perkins's classroom two-to-three times per week, due to the poor classroom management. He also displayed a poor attitude throughout the year. On February 8, 2011, Mr. Best issued a written warning to Mr. Perkins for failing to submit lesson plans as far back as November, 2010. Additionally, Mr. Best issued a reprimand to Mr. Perkins for keeping an axe and a crowbar unsecured from students under his desk. As a result, one student banged a desk with the axe, presumably swinging the axe in the presence of other students.

Ms. Tsui simply had no control over her class and her students were not engaged in her lessons. She was disrespectful to students and used terms beyond their understanding. Ms. Tsui embarrassed a young student by revealing to the rest of the class that she had a child at home, about which no one knew. She also humiliated a hearing impaired child, which made that child not want to attend class. Mr. Best constantly intervened to control her class and the noise emanating from her classroom, which could be heard down the hall disrupting other classes. Indeed, Ms. Tsui was not initially renewed for the 2010-2011 school year. She was brought back because the school needed to fill a vacancy in the science department.

Ms. Kirkland was repeatedly insubordinate and defiant. Instead of assisting Mr. Best and Ms. Carter, as was her job, she made their jobs more difficult. Rather than accepting responsibility for her mistakes when counseled, she responded that she did not need the job anyway because her husband makes enough money. In August and September 2010, Ms. Kirkland defiantly took vacation time that she was told not to take due to the fact that this is the busiest time for the School administration with students coming in to start the school year. Throughout the school year, Ms. Carter received multiple complaints from staff, students and parents regarding Ms. Kirkland's negative attitude, which was noticeable because she was the first person one sees upon entering the main office. This attitude is certainly worthy of her termination, which had nothing to do with any protected activity in which Ms. Kirkland may have engaged. It is a wonder why Ms. Kirkland is seeking reinstatement to a job she did not need and expressly disliked.

Accordingly, the School legitimately severed its relationships with these employes in the interest of the students and the School and not for unlawful, discriminatory reasons. The charge at Case No. PERA-C-11-192-E is dismissed.

CONCLUSIONS

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

1. The New Media Technology Charter School is a public employer under PERA and a political subdivision within the meaning of Section 2(2) of the NLMRA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The School has not committed unfair practices within the meaning of Section 1201(a)(1) or (3), as alleged in Case No. PERA-C-11-185-E.

5. The School has not committed unfair practices within the meaning of Section 1201(a)(1), (3) or (4), as alleged in Case No. PERA-C-11-192-E.

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charges at Case Nos. PERA-C-11-185-E and PERA-C-11-192-E are dismissed and the complaints issued thereon are rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-second day of December, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner