

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

KEYSTONE EDUCATION SUPPORT :
PERSONNEL ASSOCIATION PSEA/NEA :
 :
 : CASE NO. PERA-C-11-256-W
v. :
 :
KEYSTONE SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On August 8, 2011, the Keystone Education Support Personnel Association (Union), filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Keystone School District (District) violated Section 1201(a)(1), (3) and (4) of the Public Employe Relations Act (PERA). On August 11, 2011, the Union filed an amended charge. The Union specifically alleged that, on April 18, 2011, the District furloughed all twenty-one paraprofessionals, effective at the conclusion of the 2010-2011 school year in June, 2011, in retaliation for seeking to join the existing non-professional bargaining unit. The Union further claimed that the District unlawfully circumvented the existing collective bargaining agreement for the non-professional unit by requiring the accreted, furloughed aides to reapply for nine positions rather than recalling them based on seniority.¹

On August 31, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 29, 2012, in Pittsburgh. At the hearing on that date, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both the District and the Union submitted post-hearing briefs.

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

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 10; In the Matter of the Employes of Keystone School District, PERA-R-11-64-W (Order and Notice of Election, April 18, 2011)).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 10; In the Matter of the Employes of Keystone School District, PERA-R-11-64-W (Order and Notice of Election, April 18, 2011)).

3. Richard Bonnar became acting superintendent in January 2010. He became the Superintendent July 1, 2010. (N.T. 105).

¹ The Union did not allege a bargaining violation.

4. In November 2010, organizing among the paraprofessionals (Aides) began. Shannon Johns was the contact person for the Aides with the PSEA representative Kimberly Frum (now Kimberly Wagner). (N.T. 17-19, 33, 49; Association Exhibit 1).

5. Tom Corbett became the Governor of the Commonwealth of Pennsylvania on January 18, 2011. After his election in the fall of 2010, Superintendent Bonnar began outlining possible cuts in District spending in response to rumors that state funding to the District would decrease under the new administration. Superintendent Bonnar met with District Business Manager Vernon Lauffer and other District officials in the fall of 2010 and in January 2011 to outline strategies. The District typically prepares its budget in January, February and March for completion and public examination by the June 30 adoption. Some options under consideration at this time were salary freezes for teachers and early retirement, but those options proved unavailable, so Superintendent Bonnar investigated staff reductions. When the elementary school principal retired, the school board decided not to refill the position. (N.T. 106-109, 111-113, 118-119, 170-172, 185).

6. Steven Wilson is the PSEA UniServ representative who negotiates with the District on behalf of the secretaries, custodians, maintenance employees and now the Aides. He also performs contract enforcement and grievance advocacy duties at the District. During negotiations for the support staff, during the fall of 2010 and prior to January 2011, the District conveyed to Mr. Wilson that the District was facing budgetary restrictions. (N.T. 30-33, 42).

7. By letter dated March 4, 2011, Ms. Frum notified Superintendent Bonnar that the Union petitioned the Board for an election and invited the District to join in the petition. The Superintendent credibly testified that he was astonished that the Aides were not already in a bargaining unit and that he did not oppose their joining a bargaining unit. (N.T. 21, 118-119; Association Exhibit 3).

8. On March 8, 2011, Governor Corbett issued his state budget plan for the 2011-2012 fiscal year. In that plan, Governor Corbett stated, in relevant part, as follows:

The Basic Education Funding subsidy is reset to the 2008-2009 level, the last year before federal stimulus funds were available, which results in an average annual increase of 2.8 percent in this funding over the last ten years. In addition, the budget proposes initiatives to give school districts increased flexibility and tools to improve student performance.

(District Exhibit 2, p.5).

9. At a public meeting in March 2011, Superintendent Bonnar advised the school board that the District should maintain its instructional core without going into debt which may require personnel cuts. (N.T. 109, 114, 184).

10. Spending cuts were necessitated by \$900,000 less from the Commonwealth and \$300,000 in increases from wages, benefits and healthcare, totaling 1.2 million dollars. (N.T. 176, 186).

11. On March 10, 2011, the Board issued an acknowledgement and notice of filing of the petition for representation to the District and Superintendent Bonnar. The petition sought a Westmoreland I.U. election to include twenty-one Aides into an existing nonprofessional unit of secretaries, custodians and maintenance employes. On March 23, 2011, the Board issued an order and notice of hearing on the petition for representation to the District and Superintendent Bonnar. (N.T. 21-22, 31; Association Exhibits 5 & 6).

12. On April 11, 2011, the parties entered into a memorandum of agreement (MOA) obviating the need for a hearing. (N.T. 22-23; Association Exhibits 6 & 8).

13. On April 18, 2011, the Board issued an Order and Notice of Election scheduling an election for May 5, 2011. On April 19, 2011, the Union notified the Aides of the election. (N.T. 23-24, 50; Association Exhibit 10).

14. Also, on April 18, 2011, the school board voted to eliminate all Aides positions. During the same school board meeting, the school board voted to alter the Title I program "to include the reduction of one professional employee and to use the remaining funds to re-hire paraprofessional support staff, effective July 1, 2011." (N.T. 33, 50-51, 123, 106; Association Exhibit 17, p.7).

15. The Majority of Aides who cast ballots voted in favor of the Union as their exclusive collective bargaining representative. (N.T. 24-25; Association Exhibits 11 & 12).

16. On May 12, 2011, the Board issued a Nisi Order of Certification certifying the Union as the exclusive representative of the nonprofessional bargaining unit that included the Aides. (N.T. 25; Association Exhibit 12).

17. Greg Barrett is a member of the school board. Soon after Superintendent Bonnar informed Mr. Barrett of the Union vote, Mr. Barrett contacted Union representative Wilson to schedule negotiations. (N.T. 183, 187).

18. The recognition clause of the collective bargaining agreement for the nonprofessional unit, effective July 1, 2011 through June 30, 2014, (CBA) does not recognize the Aides as included in the unit for purposes of the CBA. The recognition clause of the collective bargaining agreement for the same unit, effective July 1, 2005 through June 30, 2011, also does not recognize Aides. (N.T. 41-42; Association Exhibits 13 & 14; Joint Exhibits 1 & 2).

19. In June 2011, after the Aides were accreted into the nonprofessional bargaining unit by the Board, Mr. Wilson submitted a proposal on behalf of the Aides which contained the same terms as the CBA

for the existing unit, including the layoff provision. (N.T. 34-36; Association Exhibit 13; Joint Exhibit 1).

20. The District has not agreed that the layoff provisions of the CBA would apply to the Aides. Negotiations on behalf of the Aides are ongoing and there is no agreement covering the Aides. (N.T. 36, 38-40).

21. The different employe classifications within the existing bargaining unit (i.e., secretaries, custodians and maintenance employes) receive different negotiated benefits. (N.T. 39-40).

22. Formerly, secretaries and custodians were in separate units until they were joined. The two classifications received different benefits. Typically, when employes are accreted into an existing unit, their benefits are separately negotiated; they do not receive benefits or terms applicable to employes already in the unit by default. (N.T. 40).

23. All twenty-one Aides were furloughed in June 2011. During the August 8, 2011 school board meeting, nine of the twenty-one Aides were rehired by the District. Some of the rehired Aides had less seniority than some who were not rehired. (N.T. 53, 56-57, 128-130; Association Exhibit 18; District Exhibit 3).

24. The District did not perform or maintain evaluations of the Aides from year to year. The school board decided that the Aides seeking re-employment would have to re-apply. Aides who interviewed were rated by the interview committee on a scale of 1 to 5 for each question asked. The school board directed Superintendent Bonnar to ask all the questions so that the questioning was presented identically to all the candidates. (N.T. 130; District Exhibit 4).

25. Shannon Johns was an Aide at the District from 2005 until June 2011. Her husband is a school board member. On June 8, 2011, Superintendent Bonnar issued a letter to Ms. Johns (and the other Aides) informing her that her position had been eliminated effective June 1, 2011, as a result of the board of directors' vote on April 18, 2011. In the letter, the Superintendent stated that "[t]his decision was forced upon the [b]oard due to the severe reduction in subsidy monies received from the Commonwealth." The letter further stated that the school board will reassess filling the Aides positions if the Commonwealth increased funding to the District and that the Board will determine the process for refilling available positions because there was no mechanism for recall rights for nonprofessional employes. (N.T. 47; Association Exhibit 20).

26. The finalized state budget in July 2011 contained \$350,000 of additional funds for the District causing the school board to re-examine the cuts previously made. The school board re-opened its budget and directed the administration to reinstate full-time kindergarten, hire an elementary school principal and rehire nine Aides. (N.T. 146-147, 160-161, 163-165, 175-176, 190-191).

27. On July 21, 2011, Superintendent Bonnar sent a letter to Ms. Johns that provided, in part, as follows:

At the July 18, 2011 [school board] meeting, a new budget was adopted—reflecting our new Basic Education Funding subsidy. During a Personnel Meeting, the [school board] agreed to re-establish paraprofessional positions at both the Elementary and Secondary Schools. However, the new budget does not support funding of the full 2010-11 number of paraprofessionals.

The Personnel Committee has determined all previously employed paraprofessionals should re-apply for the reduced number of positions. Following an interview, personnel will be re-hired for the re-established openings. If you are interested in applying for one of these new openings, please submit a letter of interest to me by July 29, 2011.

(Association Exhibit 21).

28. Seniority was not considered in the rehiring of the Aides. During a faculty meeting at the end of the 2010-11 school year, Superintendent Bonnar stated that the Aides did not possess seniority rights because there was no contract providing for it. (N.T. 58, 77).

29. Ms. Johns applied to be rehired as an Aide. She was given a fifteen-minute interview. The interview committee was comprised of three school board members on the Personnel Committee of the school board, Superintendent Bonnar, the high school principal, the elementary school principal and the special education director. She was not rehired and she was more senior than another Aide who was rehired. Ms. Johns did not receive an interview score that was as high as other former Aides who interviewed. (N.T. 57-59, 61, 69, 75, 136-137, 141; Association Exhibits 18 & 23).

30. Superintendent Bonnar's evaluation of the candidates was only to be used in case of a tie. He never had to use his tie-breaking authority. (N.T. 132).

31. Shelley Seth was an Aide who was also furloughed at the end of the 2010-11 school year. She sent a letter of interest to be rehired and was given a fifteen-minute interview with the same interview committee. (N.T. 73-75).

32. Ms. Seth had more seniority than at least eight of the nine rehired Aides. At the interview, Ms. Seth provided the committee with five teacher references, a nurse reference (regarding her diabetes specialty) as well as a reference from a student's parents; She also provided training documentation and her résumé. She attained highly qualified status and intermediate status, and she was special education credentialed. She was not rehired. (N.T. 75-77; Association Exhibit 18).

33. Lee Ann Haun was an Aide who was furloughed at the end of the 2010-11 school year after being employed by the District for 20 years. She was the most senior Aide. She was not rehired for the beginning of the 2011-2012 school year, but she was eventually rehired in November 2011, after another rehired Aide resigned. (N.T. 84-87, 142; Association 18).

34. Ms. Haun is currently part of the Union bargaining committee and is currently engaged in negotiations between the Union and the District on behalf of the Aides. (N.T. 90-91).

35. In addition to eliminating twelve Aides positions, the District furloughed four teachers without tenure; it cut the athletic budget; it reduced transportation costs and supply budgets; it increased class size and reduced full-time kindergarten to half-time kindergarten; and it has one less music teacher. After it received increased funding from the Commonwealth, the District refilled the elementary principal position and returned the kindergarten program to full time. (N.T. 111-113, 118-119, 140, 170).

36. The District raised the millage rate by the maximum allowed under Act I, which yielded approximately \$80,000 in increased revenue. The school board did not seek an exception to the Act I limitation because it did not believe it could win the required referendum. (N.T. 120-121, 145).

DISCUSSION

1. 1201(a)(3) and (4)

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 employe'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). The Union argues in its post-hearing brief that there is no dispute that the District was aware that the Aides were engaged in protected activity before they voted to discharge them at the April 18, 2011 school board meeting. The Union further contends that the only remaining "issue in this case, like most, is the District's motive." (Union's Post-hearing Brief at 5-6). Accordingly, the Union maintains that the facts and circumstances present in this case yield the inference of unlawful motive.

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.

In support of its case for unlawful motive, the Union specifically argues that the timing of the District's furloughing of Aides, with

respect to the filing of the petition and the pending election violates the laboratory conditions doctrine and, on its face, yields an inference of unlawful motive. (Union's Post-hearing Brief at 8-9). According to the Union, the timing of the pre-election furlough establishes a prima facie case of discrimination, and the burden shifted to the District to demonstrate that it was motivated by legitimate business reasons. (Union Post-hearing Brief at 9).

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).

In Teamsters, Local 776 v. Perry County, 23 PPER ¶ 23201 (Final Order 1992), 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 Union argues that an inference of unlawful motive should also be drawn because, in addition to the violation of the laboratory election conditions, the District's economic reasons for furloughing the Aides during the pre-election period are pretextual. (Union's Post-hearing Brief at 9-10). While not disputing that the Commonwealth's budget reduced funding to the District, the Union maintains that the funding cuts did not justify the furlough of all the Aides or the furlough of any Aides during the pre-election period. (Union's Post-hearing Brief at 10). The Union further contends that neither the District nor the State finalized their budgets for the 2011-2012 fiscal year until June 30, 2011. The District, argues the Union, is unable to explain why it furloughed the Aides before the May 5, 2011 election when the budgets were not finalized until June 30, 2011. Moreover, the Union argues that, although the District represented that it had no objection to the Aides joining the unit, if that were true, it could have simply agreed to the accretion of the Aides to facilitate a smooth transition into bargaining.

The Union contends that the school board's April 18, 2011 minutes also show that there was never any reason to furlough all of the Aides because immediately following the vote to furlough the Aides, the school board voted to eliminate a Title I position to obtain funds to rehire Aides. Obviously, claims the Union, the District always intended to employ at least some number of Title I Aides in the 2011-2012 school year so the furlough of all Aides was unnecessary. (Union's Post-hearing Brief at 11). Also, the Union maintains that the testimony of District witnesses is contradictory. According to the Union, the District claimed that changes in state funding compelled the furlough of all Aides in April, 2011 effective in June 2011. However, many Aides positions are federally funded under Title I. The business manager testified that the amount of federal funding received by the District is not confirmed until the fall and that the District staffs those programs without knowing the funding it will receive. (Union's Post-hearing Brief at 11-12).

The Union additionally argues that, at a minimum, the District should have waited until the beginning of the 2011-2012 school year to determine how many Aides it needed to furlough because it would not have interfered with the election, the District would have known its funding levels and the delay would have enabled the District to know how many title I Aides to employ without furloughing all of them and then having to rehire nine. (Union's Post-hearing Brief at 13). Moreover, contends the Union, by furloughing all the Aides in June 2011, instead of eleven Aides in August 2011, the District incurred the additional expense of having to pay unemployment compensation for twenty-one Aides who normally do not qualify for summer unemployment. Because the District is self-insured for unemployment compensation purposes, the District paid 100% of the Aides' unemployment compensation claims. (Union's Post-hearing Brief at 13). The Union contends that, for these reasons, the District's purported economic bases for furloughing all twenty-one Aides, during the pre-election period, instead of waiting until August 2011, when it was clear the District would have money to employ at least some of the Aides, are pretextual and thereby support an inference of unlawful motive.

The Union has satisfied its burden of establishing the first two prongs of St Joseph's. At the time the school board voted to furlough all twenty-one Aides on April 18, 2011, the Union had already notified Superintendent Bonnar, by letter dated March 4, 2011, that the Union petitioned the Board for an election and invited the District to join in the petition. On March 10, 2011, the Board issued an acknowledgement and notice of filing of the petition for representation to the District and Superintendent Bonnar. On March 23, 2011, the Board issued an order and notice of hearing on the petition for representation to the District and Superintendent Bonnar. On April 11, 2011, the parties entered into a memorandum of agreement (MOA) wherein the parties agreed to the composition of the unit and the date, time and location of the election, which was set for May 5, 2011, thereby obviating the need for a hearing. The District, therefore, had knowledge that the Aides had engaged in the protected activity of organizing and petitioning the Board for a Westmoreland I.U. election to join the bargaining unit of secretaries, custodians and maintenance personnel, exclusively represented by the Union.

The Union's hearing presentation was thorough, comprehensive and well-organized. Also, its arguments were persuasive and clearly articulated. However, I credit the District's economic reasons for the furlough of the Aides and, contrary to the Union's position, I conclude that those business reasons are not pretextual. Accordingly, furloughing all twenty-one Aides and requiring them to re-apply for nine available positions, rather than recalling them in order of seniority, were not unlawfully motivated activities.

In response to rumors about state funding cuts for public schools circulating in the fall of 2010, when Governor Corbett was elected, Superintendent Bonnar met with District administrators to outline strategies to reduce its expenditures. These meetings occurred in late fall 2010, and January 2011. Mr. Bonnar also discussed the District's looming financial problems with Union negotiator Wilson in late fall 2010.

On March 8, 2011, Governor Corbett issued his proposed budget which reset education funding levels to the 2008-2009 level. Superintendent Bonnar informed the school board that, in considering spending cuts, the District should attempt to maintain its instructional core without incurring debt, which may require non-mandatory personnel cuts. In the spring of 2011, the District faced approximately \$900,000 in decreased educational funding from the Commonwealth and \$300,000 in increased spending requirements from wage, benefits, and healthcare increases, totaling approximately \$1.2 Million.

It was in this context that the Aides organized and sought to be accreted into the bargaining unit of nonprofessionals at the District and represented by the Union. The District entered into an MOA agreeing to the composition of the unit and an election date. On April 18, 2011, the school board voted to eliminate all twenty-one Aides positions effective June 2011, but at the same meeting they also voted to rehire as many Aides as subsequent funding changes would allow. At this time, an election date of May 5, 2011 had been set. Although the timing of the furlough vote and the pending election vote is suspicious, timing alone is insufficient to establish motive, without other evidence of animus, and mere suspicion or conjecture is insufficient to sustain a discrimination charge. Bellefonte, supra. There are no anti-union statements, and no pretextual or shifting reasons to consider on this record.

Adding to the credibility of the District's economic reasons for furloughing the Aides is the fact that the District sought to compensate for its projected budget shortfall by making other personnel cuts and reducing expenditures in other parts of the District. In this regard, the District also furloughed four teachers who did not have tenure; it cut the athletic budget; it reduced transportation costs; and it reduced the administrative supply budgets. It also left vacant an elementary school principal position, increased class sizes (resulting from professional personnel reductions) and it cut the kindergarten program from full time to part time.

The District also provided credible testimony that it considered other cuts. The District at one point proposed to the teachers' union salary freezes for teachers and early retirement, but those options proved unavailable to the District. In further support of the District's

position, it refilled the elementary school principal position, returned kindergarten to a full-time program and rehired nine Aides, when it received more funding from the Commonwealth than originally projected (i.e., \$350,000). The District also increased the millage rate by the maximum allowed under Act I, which yielded an additional \$80,000 in revenue, to reduce the need for personnel and program cuts.

The Union argues that timing is everything in this case because laboratory conditions in the conduct of the election have not been met. Although furloughs prior to an election are certainly coercive in voting, the employees in this case voted in favor of representation and the Union has cited no cases holding that furloughs before a union vote, without more, establishes unlawful motive. The District has been negotiating contract terms for the Aides with the Union since their rehire. The District provided credible testimony that it typically prepares its budget between January and March every year for June 30th adoption. The budget must be prepared early because there must be time and availability for public inspection and comment before the school board adopts it.

Although the Union emphasizes that the District has not recalled furloughed Aides by seniority, as the District notes, neither the School Code nor a collective bargaining agreement required the District to recall the Aides by seniority. The terms and conditions of employment for newly accreted classifications of employees must be separately negotiated. The employee classifications in the existing bargaining unit do not receive all of the same negotiated benefits and were in separate units at one time. The Aides do not receive the benefits of seniority by default because they were accreted into the unit.

The Union argues that, by not recalling by seniority, the most qualified and loyal Aides, including the Union organizer, Shannon John, were not rehired. The Union contends that "[b]y refusing to rehire the most senior members of the aide classification and the leader of the organizational effort, Superintendent Bonn[a]r and the District Administration were clearly attempting to send a message to other Aides. Obviously, if the most senior experienced aide and an aide whose husband was on the [s]chool [b]oard could all see their jobs eliminated and not be rehired, the same could happen to anyone remaining on the job." (Union's Post Hearing Brief at 19).

However, this record does not contain substantial evidence to support that conclusion. The District credibly explained that the interview process was implemented in lieu of recall by seniority because the District had not maintained performance evaluations on the Aides and it wanted to evaluate their skills and performance to rehire the best nine Aides. The record shows that the interview process was objective although individual committee members could certainly have interjected their subjective, personal opinions into the scoring. The Superintendent did not vote or exercise his tie-breaking authority. Also, Ms. Haun, who was the most senior Aide, was not initially rehired, but was rehired in November 2011, when a rehired Aide resigned. She was ranked number ten and was next on the list. Significantly, Ms. Haun is a member of the Union bargaining committee. Accordingly, the record does not support the conclusion that the District was avoiding the rehire of the most senior Aides to send a message to employees based on seniority or Union activities. Also,

considering that Ms. Johns was twelfth on the seniority list, she would not have been hired even had the District recalled the Aides based on their seniority. In other words, Ms. Johns is in no worse position as a result of the District's rehiring process than she would have been if the District simply recalled Aides based on seniority, as the Union is proposing.

2. Independent 1201(a)(1)

The Union argues that the District's furloughing of an entire classification of employes who filed a representation petition during the pre-election period and the creation of new procedures for re-hiring the Aides independently violated Section 1201(a)(1) of PERA by intimidating and coercing employes. (Union's Post-hearing Brief at 17- 18). An independent violation of Section 1201(a)(1) occurs, "where in light of the totality of the circumstances, the employer's actions has a tendency to coerce a reasonable employe in the exercise of protected rights." Fink v. Clarion County, 32 PPER ¶ 32165 at 404 (Final Order, 2001); Northwest Area Educ. Ass'n v. Northwest Area Sch. Dist., 38 PPER 147 (Final Order, 2007). Under this standard, the complainant does not have a burden to show improper motive or that any employes have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order, 2004). However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER 26155 (Final Order, 1995).

The District had legitimate economic reasons for furloughing the Aides and the timing of the furlough with the filing of the petition alone is insufficient to establish unlawful motive. However, the manner in which the District furloughed the Aides interfered with the rights of reasonable Aides, even though no actual interference was shown on the record. The District's vote on April 18, 2011 to furlough all Aides eligible to vote in a Union election two-and-one-half weeks before the election had a tendency to coerce a reasonable Aide and chilled the Aides' support for the Union, even though the Aides may not have been actually coerced (evident by the fact that, on May 5, 2011, they voted overwhelmingly in favor of the Union). The District could have waited until after the May 5th vote to announce the furloughs in time for the June 30th budget approval, with allowance for public review. Accordingly, I conclude that the District's funding concerns do not justifiably outweigh the interference with the Aides' right to support the Union, which was caused by the pre-election, wholesale furlough of the Aides.

I also, however, find that the rehiring process is neutral regarding its coercive effect on the reasonable Aide. Although the pre-election furlough of all the eligible voters was unlawfully coercive (but not discriminatory), the District needed some process by which to re-fill those positions when adequate funding for nine rehires became available. The District was under no legal or contractual obligation to recall by seniority and conducting interviews gave the District the ability to select which nine of the twenty-one Aides it considered most qualified.

The District legitimately wanted to evaluate and rank the top nine candidates. There is no substantial evidence on record to demonstrate that the process was unlawfully motivated or coercive. The District possesses the managerial prerogative to determine the most qualified candidate for a position. The District's managerial interest in evaluating the Aides justifiably outweighs any coercive effect that the rehiring process may have had on employees. Therefore, I am without authority to redirect the District's rehiring of the Aides.

CONCLUSIONS

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

1. The District is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has committed unfair practices within the meaning of Section 1201(a)(1) of PERA.
5. The District has not committed unfair practices within the meaning of Section 1201(a)(3) or (4) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.
2. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:
 - (a) Post a copy of this decision and order within five (5) days from the effective date hereof in a conspicuous place readily accessible to its employes and have the same remain so posted for a period of ten (10) consecutive days; and
 - (b) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fourth day of July 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

KEYSTONE EDUCATION SUPPORT	:	
PERSONNEL ASSOCIATION PSEA/NEA	:	
	:	
	:	CASE NO. PERA-C-11-256-W
v.	:	
	:	
KEYSTONE SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The Keystone School District hereby certifies that it has ceased and desisted from its independent violation of Section 1201(a)(1) of the Public Employe Relations Act; that it has posted a copy of the decision and order as directed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

Signature/Date

Title

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

Signature of Notary Public