COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ABINGTON HEIGHTS EDUCATION ASSOCIATION	:	
v.	:	CASE NO. PERA-C-11-407-E
ABINGTON HEIGHTS SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On November 23, 2011, the Abington Heights Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Abington Heights School District (District or Employer) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA or Act) when the Superintendent placed a letter in a school nurse's personnel file that allegedly reprimanded her for testimony that she gave at a grievance arbitration hearing. The Union alleged that the letter was retaliatory and has a chilling effect on employes who exercise their protected right to give testimony at grievance arbitrations.

On December 13, 2011, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on June 29, 2012, in Harrisburg. The matter was continued at the request of the Union, and the hearing was held on September 12, 2012. During the hearing on that date, both parties were afforded a full and fair opportunity to present evidence and cross-examine witnesses. On November 13, 2012, the Union filed its post-hearing brief. On December 12, 2012, the District filed its post-hearing brief.

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. 6)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 6)

3. Dr. Michael Mahon is the District Superintendent. (N.T. 78)

4. Ms. Deborah Shane is a registered nurse at the District. (N.T. 16-17)

5. On September 13, 2011, Ms. Shane provided testimony at a grievance arbitration hearing on behalf of the Union. The grievance was filed by the Union complaining that the District required non-nursing staff to administer medication (in the form of Triaminic strips and Epi-pen injections) to a student, under a food allergy plan called

a "504 Plan." The student, Joe Doe, suffered from food allergies that could result in anaphylaxis.[1] The Plan and the District required non-nursing staff, such as Joe's bus driver and teachers, to administer the medication because the school nurse is never on the bus and, at times, she is not in the school building where Joe takes classes. (N.T. 18-22, 88-89, 94-95; Joint Exhibit 2, Pgs. 2, 8-9)

6. In the Plan, Joe's physician prescribed using the Triaminic strips on his tongue, if a teacher or bus driver sees a hive, to prevent escalating anaphylaxis. There are no adverse effects from using the strips, if Joe is not actually experiencing an allergic reaction, other than becoming sleepy or tired. (N.T. 88-89, 110)

7. Prior to her testimony, at a monthly health services meeting, Ms. Shane expressed her concerns about the 504 Plan and her opinion that only a licensed school nurse may administer non-emergency medication, under Pennsylvania school law. Dr. Mahon agreed with that position. (N.T. 32-33, 36-37, 91-92, 96-97; Joint Exhibit 2 Pgs. 8-9, 15)

8. Grievance arbitrations are common at the District. Dr. Mahon has participated in approximately 40-50 grievance arbitrations in nine years. Approximately 30 employes have testified on behalf of the Union at these grievance arbitrations and none of them have charged Dr. Mahon with retaliation. (N.T. 80-81)

9. On September 13, 2011, Ms. Shane testified at the arbitration hearing and stated for the first time that teachers should not use the Epi-pen until Joe Doe stops breathing, which contradicted the mandated procedure written by Joe's physician. Ms. Shane repeatedly stated this at the arbitration hearing. On cross-examination, Ms. Shane testified that breathing would have to be labored, but then she returned to the standard that Joe Doe would have to stop breathing. Joe Doe's mother was sitting next to Dr. Mahon at the hearing and began to cry as Ms. Shane gave this testimony. (N.T. 81-82, 99, 102)

10. The emergency plan is designed to prevent Joe Doe from escalating in a cascade of reactions, resulting from anaphylaxis, through the use of Triaminic strips and the Epi-pen. The Plan is designed to prevent Joe Doe from a cessation of respiratory function. (N.T. 81-83)

11. Ms. Shane is in a position of authority regarding the administration of health services at the District. At the hearing, Ms. Shane testified in the presence of teachers, who were charged with implementing the Plan, and Joe Doe's mother when she stated that Joe Doe should stop breathing before anyone administers the Triaminic strips or the Epi-pen. (N.T. 82-83, 87, 99)

12. On September 28, 2011, Dr. Mahon issued a written directive to Ms. Shane, which was placed in her personnel file. Although it is unusual for Dr. Mahon to issue written directives to employes, he has done so in the past. (N.T. 38-40, 70, 97; Joint Exhibit 1)

13. In writing the memo, Dr. Mahon credibly testified that he was motivated by concerns of federal liability for failure to follow the 504 Plan and having to potentially talk to Joe Doe's mom in a

[1] I have changed the student's name to protect his privacy.

hospital setting because District staff let an allergic reaction progress too far. (N.T. 83)

14. The letter stated, in relevant part, as follows:

> During your testimony in the arbitration hearing on September 13, 2011, you made numerous statements that fundamentally call into question your ability and willingness to respond to an emergency involving [Joe Doe]. As a result, it is my obligation to take the extraordinary step of demanding in this memorandum that you follow his emergency plan. In particular, you must follow the physician's directives in the plan.
>
> . . . .
>
> The welfare of [Joe Doe] and, less significantly, your continued employment in Abington Heights are dependent upon your willingness and ability to provide the care required in his plan in a faithful and expeditious manner.
>
> It is further expected of you to train and assist non-medical members of the staff to do the same.
>
> Your testimony regarding the use of epi-pens in a crisis situation was no less than frightening. You stated that teachers did not have the requisite knowledge or judgment to identify any of the indicators in the plan, such as appearing blue, that call for administration of the epi-pen. You stated that the standard for the administration of the epi-pen is met when the "student stopped breathing". Upon cross examination of this reckless position, you modified your statement to mean something approaching extreme breathing difficulty. Later in your testimony, you reiterated that the standard for epi-pen administration was if the "student stops breathing".
>
> While your testimony and analysis were unclear at best, there must be absolute clarity regarding your obligations to [Joe Doe]. The criteria for him to receive the epi-pen are spelled out in his emergency plan. The emergency plan is, itself, the standard for epi-pen administration that must be used by both you and the staff. You must not add your own standards or conditions that undermine the plain meaning of the plan. You must always use good judgment in administration of Triaminic strips and especially the epi-pen. You are reminded of both the fragility of [Joe Doe's] health and of the severe implications of epi-pen administration.
>
> Failure to follow the emergency plan or failure to train others to follow the emergency plan will result in disciplinary action, up to and including termination. I am willing to discuss the matters referenced in this memo at any time. If you wish to do so, contact my secretary, Nettie Lowe, to arrange an appointment.
>
> Finally, you are directed to read the attached agreement that references your obligations to [Joe Doe]. If you

agree, you must sign and return a copy of the agreement to me. The agreement and this memo will be placed in your file. You must contact me immediately if you disagree or refuse to sign.

_____

Deborah Shane

(signature acknowledges receipt)

(Joint Exhibit 1)

15. The reason Dr. Mahon placed the memo in writing in Ms. Shane's personnel file rather than having an unrecorded side conversation with her about her opinions regarding Joe's 504 Plan, is that, in his opinion, Ms. Shane was wrong and her position affected the health and safety of a child. He wanted "absolute clarity regarding [Ms. Shane's] obligations to [Joe Doe]." Dr. Mahon believed that there could be no ambiguity about directing Ms. Shane to follow the 504 Plan. The memo protected the District's legal position if something were to happen to Joe Doe and the District were sued for damages because staff did not properly follow the 504 Plan. The District acts in place of parents and Dr. Mahon wanted to document the District's legal and moral obligations to Joe Doe. (N.T. 90-91, 124)

16. The District has an obligation under the 504 Plan to properly train non-nursing staff with respect to how and when to administer medication to Joe Doe. Dr. Mahon credibly testified as follows: "what we don't want to live with is the outcome if we withhold that treatment early on in the case of an anaphylactic reaction." (N.T. 95-96, 110)

17. Joe Doe's condition is so serious that any reaction must be considered an emergency. In the 504 Plan, Joe's physician explained that the slightest hint of a hive on Joe Doe is an emergency. The 504 Plan was written because there is not always a nurse in the building and never on the bus. Non-nursing staff members (teachers and bus drivers) must be able to give Joe Doe the proper medication to prevent respiratory failure. (N.T. 94-95)

DISCUSSION

The Union argues that Dr. Mahon's written directive of September 28, 2011 was a reprimand in retaliation for her testimony at the grievance arbitration hearing of September 13, 2011, in violation of Section 1201(a)(3) of PERA. 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). 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 this case, the Association has not established a prima facie case of discrimination. Although it is undisputed that the District was aware of Ms. Shane's protected activity of testifying at a grievance arbitration hearing, the record evidence, and any favorable inferences to be drawn therefrom, does not establish that Dr. Mahon issued discipline to Ms. Shane in retaliation for that testimony. I conclude that the written memo was a written directive and not discipline or a reprimand, although it warns of discipline if the directive is not followed. I also conclude that, although Dr. Mahon was motivated by Ms. Shane's testimony in issuing the memo, that motivation was not unlawful or retaliatory.

Dr. Mahon was motivated by his uncompromising belief that Nurse Shane's position, which she espoused during her grievance arbitration testimony, placed Joe Doe in jeopardy. His physical safety and his life depended on non-nursing staff being properly trained by Ms. Shane to treat Joe Doe according to the 504 Plan. Her testimony, in front of the very staff who would have to provide emergency treatment to Joe Doe, authoritatively contravened the physician's directives in the 504 Plan. Dr. Mahon heard Joe Doe's mother begin to cry when she heard Ms. Shane testify that staff members should wait until Joe stopped breathing before treating him. He realized that Ms. Shane's position posed a significant risk to Joe's life and compromised the District's moral and legal positions. Dr. Mahon issued the written directive to ensure that Nurse Shane followed the proper procedure in the 504 Plan, and not her own, and that there was a record of such direction to protect the District from liability and to protect Joe Doe from severe harm.

After witnesses to Ms. Shane's testimony saw that Dr. Mahon heard her position, he was forced to go on record to correct that position and ensure the proper emergency care for Joe Doe. Moreover, during the course of nine years as Superintendent, 40-50 arbitration hearings and approximately 30 employes who testified against the District at those hearings, Dr. Mahon has never been alleged to have retaliated against ANYONE for their testimony. Accordingly, Dr. Mahon did not discriminate or retaliate against Ms. Shane. Rather he was motivated by his desire and obligation to protect the District and the safety of

Joe Doe and lawfully issued the written directive to Nurse Shane to ensure that she followed Doctor's orders in the emergency treatment of Joe Doe.

The Union also claims that the District independently violated Section 1201(a)(1) of PERA, when Dr. Mahon issued the September 28, 2011 letter to Ms. Shane. 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).

On this record, I conclude that the Union met its burden of establishing a prima facie case that a reasonable employe would be intimidated and coerced (in reference to providing testimony at grievance arbitration hearings) by the fact that Dr. Mahon issued the written directive to Ms. Shane, which was also placed in her personnel file. However, I also conclude that, on balance, the District met its burden of establishing legitimate reasons for issuing the written directive which justifiably outweigh concerns over the interference with employe rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER 26155 (Final Order, 1995). Those legitimate and justifiable business reasons are set forth infra with respect to the discrimination claim. Therefore, the District did not independently violate Section 1201(a)(1).

The Union also claimed a cause of action under Section 1201(a)(5) of PERA. The record does not support a violation under this Section, and this claim is, therefore, dismissed. Accordingly, the District did not engage in unfair practices under Section 1201(a)(1) or (3) or (5) of PERA. The charges are therefore dismissed and the complaint is hereby rescinded.

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 Association is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District has not committed unfair practices within the meaning of Section 1201(a)(1) or (3) or (5).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is 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-fourth (24th) day of December, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner