

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

ALLENTOWN EDUCATION ASSOCIATION :
PSEA/NEA :
 :
 : Case No. PERA-C-14-216-E
v. :
 :
ALLENTOWN CITY SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On July 14, 2014, the Allentown Education Association PSEA/NEA (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Allentown City School District (District or Employer), alleging that the District violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA or Act). On July 18, 2014, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating January 5, 2015, in Harrisburg as the time and place of hearing, if necessary.

On August 28, 2014, the Association filed an amended charge of unfair practices against the District alleging a violation of Section 1201(a)(1) and (3) of the Act. On September 3, 2014, the Secretary of the Board issued an Amended Complaint and Notice of Hearing, assigning the charge to conciliation, and establishing a January 5, 2015 hearing date, if necessary.

The hearing was necessary and was held before the undersigned Hearing Examiner as scheduled on January 5, 2015, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association submitted a post-hearing brief in support of its position on March 3, 2015. The District submitted a post-hearing brief in support of its position on April 6, 2015.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 4)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 4-5)
3. Frank Nickischer was a seventh grade teacher at the District's Trexler Middle School during the 2013-2014 school year. He was vice president of the Association and served as president pro tempore at the time, positions he held for a number of years. (N.T. 15)
4. On February 27, 2014, Nickischer spoke at a School Board meeting and expressed his disappointment regarding the PATHS and Second Step programs implemented at the District, which were purchased from the Devereux Center for Child Resiliency, and which were designed to improve student behavior. (N.T. 18-19, 39-40; Association Exhibit 21)
5. On March 13, 2014, the programs were a topic of discussion at another School Board meeting, which involved seven members of the District's administration, including the District's Supervisor of Instruction at Trexler, Kim Birts. Nickischer was present for the March 13, 2014 School Board meeting. (N.T. 19-21, 25-26, 103)

6. On March 14, 2014, there was an in-service day at the District, for which students were not present. (N.T. 21-23)

7. In the hallway that morning, Nickischer met up with fellow Trexler Middle School teachers, Michael Hunsberger and Robert Zeky, who inquired about the School Board meeting from the previous night. (N.T. 22-23)

8. At the same time, Birts entered the hallway several steps behind the group and overheard Nickischer make a pejorative statement about her in response. (N.T. 100-101)

9. Later that day, Birts filed an Employee Complaint Form for Harassment with the District's human resources department, identifying Nickischer as the offender. (N.T. 105-106; District Exhibit 1)

10. Nickischer was placed on administrative paid leave the following Monday, March 17, 2014. (N.T. 181-182)

11. The District's policy in handling harassment allegations is to place the subject of the investigation on administrative paid leave while the matter is being investigated. The paid leave is not disciplinary in nature, but rather is done to protect the institution as well as the individuals involved. (N.T. 182, 199-200)

12. On March 24, 2014, the District's Executive Director of Human Resources, Christina Mazzella, advised Nickischer that the allegations were substantiated and that she was recommending a five day suspension without pay, as well as possible mediation and sensitivity training. (N.T. 194-197)

13. On March 26, 2014, Mazzella passed her recommendation on to her supervisor along with the District's solicitor. (N.T. 194-197)

14. By written memorandum dated April 30, 2014, the District imposed a five day suspension without pay and eight hours of sensitivity training on Nickischer as a result of the March 14, 2014 incident. (Exhibit D-9)

DISCUSSION

In its initial charge, the Association alleged that the District violated Section 1201(a)(1) and (3) of the Act¹ by suspending Nickischer for eight weeks in retaliation for his comments at a School Board hearing in early 2014. In the amended charge, the Association alleged that the District further retaliated against Nickischer by releasing confidential personnel information to a media outlet in connection with two recent articles from May and June 2014. The District, on the other hand, contends that the Association has not sustained its burden of proof and that it had a legitimate business reason for placing Nickischer on leave.

In a Section 1201(a)(3) discrimination claim, the Complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employee engaged in activity protected by PERA; (2) that the employer knew the employee engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employee's involvement in protected activity. **Audie Davis v. Mercer County Regional Council of Government**, 45 PPER 108 (Proposed Decision and Order, 2014) citing **St. Joseph's Hospital v. PLRB**, 373 A.2d 1069 (Pa. 1977). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). 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. Teamsters Local 776 v. Perry County, 23 PPER ¶ 23201 (Final Order, 1992). If the employer offers such evidence, the

¹ Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act... (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employee organization... 43 P.S. § 1101.1201.

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 (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. **Mercer County Regional COG, supra**, citing **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 (Final Order, 1992).

In addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. **City of Philadelphia**, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities—for example, whether leading organizers have been eliminated; the extent to which the adversely affected employees engaged in union activities; and whether the action complained of was “inherently destructive” of employee rights. **City of Philadelphia, supra, citing PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, **Teamsters Local 764 v. Montour County**, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employee engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. **Berks Heim County Home**, 13 PPER ¶ 13277 (Final Order, 1982).

In this case, the Association has sustained its burden of proof on the first two prongs of the Section 1201(a) (3) discrimination claim. The record clearly shows that Nickischer spoke out against the PATHS and Second Step programs in his capacity as vice president of the Association at a February 2014 School Board meeting. Likewise, the record shows that Mazella, the District’s Executive Director of Human Resources, was present for the February 2014 School Board meeting and observed Nickischer’s statement. (N.T. 202-203). However, the Association has not shown that the District engaged in conduct that was motivated by Nickischer’s involvement in protected activity. To the contrary, the record shows that the District placed Nickischer on administrative paid leave and the subsequent five-day suspension because of the pejorative statement he made about Birts in the hallway of Trexler Middle School on the morning of March 14, 2014. Therefore, the Association’s Section 1201(a) (3) claim will be dismissed.²

Finally, the Association argues that the District committed an independent violation of Section 1201(a) (1) of the Act. However, the Association did not allege an independent violation of Section 1201(a) (1) in either the original or amended charge of unfair practices. As a result, any allegation of an independent violation of Section 1201(a) (1) is untimely. Nor does the record support a finding that the District committed an independent violation of Section 1201(a) (1) of the Act.

The Board has held that an independent violation of Section 1201(a) (1) will be found if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employees have been shown in fact to have been coerced. **Bellefonte Area School District, supra, citing Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 1201(a) (1). **Northwestern School District, supra**. In light of the record here and Nickischer’s pejorative statement about Birts, this would not tend to coerce other employees. Therefore, the Association’s untimely allegation of an independent Section 1201(a) (1) violation must also be dismissed.

² In addition, the Association alleged in its amended charge of unfair practices that the District retaliated against Nickischer by releasing confidential personnel information to a media outlet in May and June 2014. At the hearing, the Association attempted to introduce two articles which allegedly appeared on lehighvalleylive.com regarding the March 14, 2014 incident. See Exhibits A-12 & A-13. However, the District’s hearsay objections to these articles and any testimony presented regarding the same were sustained. In any event, there is absolutely no competent evidence whatsoever that the District released any confidential information relative to Nickischer. As such, this portion of the charge is also dismissed.

CONCLUSIONS

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. The District is a public employer under Section 301(1) of PERA.
2. The Allentown Education Association is an employe organization under Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has not committed unfair practices in violation of Section 1201(a)(1) and (3) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA the Examiner

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint 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 first day of July, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner