

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NESHAMINY FEDERATION OF TEACHERS, :
LOCAL UNION NO. 1417 :
 :
 : CASE NO. PERA-C-13-7-E
 v. :
 :
 :
 NESHAMINY SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On January 14, 2013, Neshaminy Federation of Teachers, Local Union No. 1417 (Federation) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Neshaminy School District (District) violated Section 1201(a) (1) and (3) of the Public Employe Relations Act (PERA).

On February 5, 2013, the Secretary of the Board issued a complaint and notice of hearing designating a hearing date of August 5, 2013, in Harrisburg before Hearing Examiner Thomas Leonard, Esq. On June 4, 2013, this matter was reassigned by the Board to Hearing Examiner Jack Marino, Esq. On that same day, Hearing Examiner Marino granted the District's request to continue the hearing and rescheduled the hearing for November 22, 2013. A hearing was held in this matter on November 22, 2013. All parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Prior to the hearing the Federation withdrew its cause of action under Section 1201(a) (3) and the matter proceeded as a charge that the district violated Section 1201(a) (1).

The Federation filed a post-hearing brief on February 23, 2014. The District filed a post-hearing brief on April 28, 2014. This matter was reassigned to the undersigned hearing examiner on July 15, 2015.

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

FINDINGS OF FACT

1. The Federation is an employe organization with the meaning of PERA. (N.T. 7).
2. The District is an employer within the meaning of PERA. (N.T. 7).
3. Louise Boyd (Boyd) is a teacher at Neshaminy High School (NHS), an employe of the District, and member and veteran president of the Federation. (N.T. 9-10).
4. Dr. Robert McGee (McGee) is principal of NHS. (N.T. 86).
5. Bargaining unit members at NHS commonly brought issues to Boyd's attention. (N.T. 15).
6. The Federation tells its members to copy the Federation on emails concerning health, safety and other contract issues. (N.T. 64, 65).
7. The Federation has a system to address safety concerns whereby members would work directly with building representatives if they discovered a safety issue, and then the building representative or the member would report the issue to administration on behalf of the other members of the building. (N.T. 26-27).
8. The Federation encouraged its members to share their concerns with Federation officers regarding issues relating to work. (N.T. 38).

9. In her capacity as Federation President, Boyd consulted with members regarding issues of school safety. (N.T. 17).

10. In December, 2012, the Sandy Hook school shooting occurred which caused significant concern regarding school safety issues. There were extensive discussions among unit members with regard to the Sandy Hook tragedy and the possibility of a similar event happening at NHS. (N.T. 16-17).

11. On December 16, 2012, unit member Eric Horchheimer (Horchheimer), a teacher at NHS, sent McGee an email alerting McGee to the fact that he had heard that a certain student was in possession of weapons and had made a threat to bring weapons to school. Horchheimer also asked McGee what measures were being taken to ensure the safety of staff and students. (District Exhibit 2).

12. Horchheimer used the actual name of the student in his email. (District Exhibit 2).

13. Horchheimer copied Boyd and building representative Jeff Dunkley (Dunkley) on his email to McGee. (District Exhibit 2.)

14. On December 16, 2012, unit member Lori Shennard (Shennard), a teacher at NHS, and co-teacher with Horchheimer, emailed a letter to McGee expressing her concerns that the same student was going to bring guns to school on December 21, 2012, and shoot people. Shennard also asked McGee in her email what measures were being taken to ensure the safety of staff and students. (District Exhibit 3).

15. Shennard used the actual name of the same student in her email. (District Exhibit 2).

16. Shennard copied Boyd on her email to McGee. (District Exhibit 2).

17. On December 17, 2012, Boyd received a phone call from Horchheimer in which Horchheimer reported to Boyd that there were concerns about guns in his class and that he was concerned about the safety of his students and Shennard, his co-teacher. Boyd resolved to send an email to McGee and the Superintendent to make them aware of the concerns that unit members had. (N.T. 20, 22).

18. On December 17, 2012, Boyd, based on the phone call from Horchheimer, sent an email to McGee to let McGee know that she was aware of a possible threat to the NHS. Boyd copied Robert Copeland, the Superintendent, and Jeff Dunkley, the building representative on the email. (N.T. 24, 86-87; Federation Exhibit 1).

19. The text of Boyd's December 17, 2012, email to McGee is as follows:

As you know, tensions and concerns are always high regarding school safety. This month's inconceivable event in a public elementary school exacerbates the level of concern. I am writing to you for two reasons; first to confirm that action has been taken in the specific possible threat by a NHS student and then meetings held with the teachers that reported it to the administration.

First what has taken place to investigate this possible threat to the safety of all students and staff at NHS related to this threat.

Secondly, teachers can and should notify the [Federation] elected leaders about anything that they believe threatens their work environment. I would like to make sure that in your effort to protect student confidentiality you have suggested that members / employees do not have this right. I would like to ensure you and the District that any information provided to the [Federation] that may identify a particular student is not shared with anyone

but the District administration. If it is to be forward [sic] to anyone else, names are didacted [sic] to ensure no violation of the students' individual rights.

thank [sic] you in advance for keeping the leadership of the [Federation] in the loop considering safety as this is and should continue to be a shared commitment, Louise.

(Federation Exhibit 1).

20. Boyd believed that sharing information about students based on safety concerns was appropriate under relevant law. (N.T. 63).

21. That same day, December 17, 2012, McGee sent an email to all staff of NHS in response to Boyd's email. (N.T. 105).

22. The text of McGee's December 17, 2012, email to NHS staff is as follows:

Hi All,

Just so that we all are clear on the procedures regarding rumors and student confidentiality.

I disagree with the below and apparently you may have been given inaccurate advise [sic] so let me be clear with the following directives.

First, I will not discuss individual student issues with the [Federation].

Second, the disclosure of a student's name to the [Federation] by NHS staff is a clear violation of FERPA. It will not be tolerated.

The NFT has no standing in individual student discipline and individual staff members have no right to discuss rumors and allegations with other staff members. Not only is it unprofessional it's unethical.

The staffs' [sic] obligation is to inform the Administration and then not to spread rumors that cause greater concerns and fear among a larger group. The Administration's roles [sic] is to investigate and intervene if necessary. Most rumors are just that . . . rumors. Please be assured there is no threat to NHS.

Please call my cell phone if a concern about a student or school safety arrives outside school hours. [redacted phone number].

24/7

Thank you for understanding the importance of this issue.

Rob.

(District Exhibit 1)

23. Boyd's previous email was visibly attached at the bottom of McGee's email and every recipient of McGee's email would have also seen Boyd's email. (N.T. 31).

24. McGee sent this email to NHS staff to correct what he thought was a misunderstanding of a rumor that was not true, and because he thought there was a violation of a particular student's right to privacy based on his interpretation of the Family Educational Rights and Privacy Act (FERPA), 20 U.S.C. § 1232g. (N.T. 106, 122).

25. McGee intended to warn unit members against spreading rumors. (N.T. 123).

26. McGee intended to communicate to unit members that there will be consequences if they do not follow federal rules and that they could be subject to discipline. (N.T. 145-146).

27. McGee's assertion that "the disclosure of a student's name to the NFT by NHS staff is a clear violation of FERPA" is a misstatement. (N.T. 145).

28. McGee believed that FERPA does not permit the disclosure of student records to the Federation. (N.T. 112).

29. Boyd had been informed of concerns that unit members were being led to believe that they should not share information with the Union. (N.T. 26, 50).

30. Following McGee's email, Boyd observed that unit members of staff were upset by McGee's email. (N.T. 33).

31. Subsequent to McGee's email, unit members stopped bringing information to Boyd. (N.T. 51, 54).

DISCUSSION

The Federation alleges that the District independently violated Section 1201 (a) (1) of PERA when McGee distributed an email (District Exhibit 1) to all Federation members where the contents of the email disagreed with an earlier email sent by Boyd and allegedly undermined Boyd in her role as Federation leader.

In its brief, the Federation cites Lehigh County, 11 PPER ¶ 11115 (Nisi Decision and Order, 1980), as authority for the proposition that the Board will find an employer to be in violation of Section 1201(a) (1) of PERA if it attempts to undermine the authority of the exclusive representative of the bargaining unit.

In Lehigh County the Board, citing Northern Bedford School District, 7 PPER 194, 105 (1976), stated the importance of the union's status as the exclusive representative:

To afford public employes the full benefit and protection of the collective bargaining rights guaranteed to them by the Act, it is necessary to insulate them from any efforts by the public employer, direct or indirect, to undercut the authority of the employes' duly selected representative, or fragment the unity of the bargaining unit. Any such action by the employer is considered to be an unfair practice.

Lehigh County, *supra*.

Importantly, Lehigh County deals with a charge based on Section 1201(a) (1) and (5), not an independent Section 1201(a) (1) charge as in the case in this matter. Lehigh County concerned a "total breakdown of collective bargaining between the parties. . . ." *Id.* During the on-going contract dispute and bargaining breakdown, the employer's representatives sent letters to all bargaining unit employes which made such statements as "I believe that the [union] has kept you in the dark."; and "It is your [union] representative's responsibility to keep you informed . . . he has not!"; and "I find it very difficult to impose suffering on a large group of people because a few Local and International officials were derelict in the performance of their responsibilities to you and the County." *Id.* These, and other, statements by the employer's representatives in the context of collective bargaining lead the Board to find a violation of Section 1201(a) (1) and (5). I find that it would not be proper to apply the reasoning in Lehigh County to this matter as this matter does not exist in the context of the a direct dealing charge nor has the Federation made a charge under Section 1201(a) (5).

The law of independent Section 1201(a) (1) violations was recently examined in *Municipal Employees Organization of Penn Hills v. Municipality of Penn Hills*, 45 PPER ¶ 88 (Proposed Decision and Order, 2014), and I apply it to this case. Section 1201(a) (1) of PERA prohibits an employer from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this Act." 43 P.S. §1101.1201(a) (1). An employer commits an independent violation of section 1201(a) (1) of PERA "where in light of the totality of the circumstances the employer's actions have 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). Under this standard, the complainant does not have to show improper motive or that any employees have in fact been coerced. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985); Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER ¶ 97 (Final Order, 2004).

This Board has adopted the "tendency to coerce" test of NLRB v. Brookwood Furniture Division of the United States Industries, 701 F.2d. 452 (5th Cir. 1983) to determine whether an independent violation of Section 1201(a)(1) has occurred. In Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER ¶ 97 (Final Order 2004), the Board reiterated the law with respect to Section 1201(a)(1) as follows:

"An independent violation of Section 1201(a)(1) occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable employe, regardless of whether anyone was actually coerced. Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). The employer's motive for its actions is irrelevant. Northwestern Education Association v. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)."

35 PPER at 303. If the employer's conduct was not coercive, then no violation of Section 1201(a)(1) may be found. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, supra.

Nor may a violation of section 1201(a)(1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. Temple University, 23 PPER ¶ 23118 (Proposed Decision and Order, 1992), affirmed on another ground, 25 PPER ¶ 25121 (Final Order 1994); Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989). But if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 1201(a)(1) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order, 1995).

One specific Section 401 protected right is the right to engage in lawful concerted activities for the purpose of mutual aid or protection. 43 P.S. §1101.401. The Board has previously addressed the scope of the "concerted activities" protected right contained in Section 401. In Washington Hospital, 3 PPER 363 (Nisi Decision and Order, 1973) the Board found that the formulation and presentation of complaints by an employe representing departmental employes is protected concerted activity. In Montefiore Hospital, 5 PPER 99 (Final Order, 1974), the Board held that the record in the case did not support an allegation that an employe engaged in "concerted activities" because there was no evidence of activities with other employes or on behalf of employes for their mutual aid and protection. The Board stated that for an activity to be considered "concerted" there must be some relationship to group action in the interests of employes. Id.

More recently, in AFSCE District Council 88 v. Lehigh County, 33 PPER ¶159 (Final Order, 2005), the Board, in facts similar to this matter, upheld the hearing examiner's decision that a counseling memorandum issued by an employer would tend to coerce employes in the protected right to express safety concerns, and therefore violated Section 1201(a)(1) of PERA. The Board found in this case that a corrections officer's concern about the safety of a fellow employe in his task of inspecting a certain notorious cell block was protected concerted activity under PERA. Id. Additionally the Board found that an employe has statutory protection under PERA to raise his or her reasonable belief that there is a legitimate safety concern that needs to be addressed. Id., citing Roadway Express, Inc., 217 N.L.R.B. 278, 279 (N.L.R.B. 1975) (holding that complaints concerning safety matters are concerted and protected under the National Labor Relations Act).

In this matter there is substantial and legally credible evidence that Boyd was acting on behalf of the employes for their mutual aid and protection by addressing safety concerns at NHS. The Federation has a policy whereby it encourages its members to consult with the Federation about safety issues and to keep the Federation informed about safety

issues. (N.T. 26-27, 38, 64-65). As president of the Federation, Boyd commonly addressed unit member's safety concerns and addressed safety issues with unit members. (N.T. 15, 17). Boyd's email to McGee was motivated by her concern for the safety of fellow unit members based on information she received in a phone call from Horschheimer, who was a fellow unit member. (N.T. 20, 22). In this phone call, Horschheimer expressed concerns about safety in his classroom relating to guns. Id. Boyd then expressed her reasonable concern to McGee about safety issues and administrative responses to them. (Federation Exhibit 1). In her email, Boyd also stated the Federation's policy, as described above, that unit members should notify the Federation about safety issues and that the Federation will take efforts to protect student confidentiality. Id. Thus, as Boyd was acting on behalf of the employees for their mutual aid and protection by addressing safety concerns at NHS, her communication about safety issues in the work place is statutorily protected as a concerted activity under PERA. See AFSCE District Council 88, supra. Moreover, Boyd's email was the product of protected concerted activity as it was the end result of concerted activity on the part of unit members to communicate safety concerns to the Federation in addition to itself being a protected communication regarding safety concerns.

With the protected status of Boyd's email in mind, and based on the totality of the circumstances, McGee's response has a tendency to coerce or interfere with the protected activities of a reasonable employee. McGee's email directly addresses and concerns protected concerted activity. He refers to Boyd's email and says he "disagrees" with it, that unit members have been given "inaccurate advice", and that unit members "have no right to discuss rumors and allegations with other staff remembers". (District Exhibit 1). He also states that "the disclosure of a student's name to the [Federation] by NHS staff is a clear violation of FERPA." Id. In context, and bearing in mind that he attached Boyd's email to his, the statements in McGee's directly countermand the Federation's lawful policy of engaging in concerted activity regarding workplace safety issues. While setting out his disagreement with Federation policy, McGee also intended to threaten discipline with his email to unit members (N.T. 123, 145-146). Even if he did not intend to threaten discipline, a reasonable employee would have interpreted his use of the words "not be tolerated," "unprofessional" and "unethical" to have the tendency to coerce or interfere with the performance of that protected activity. Indeed, subsequent to McGee's email, Boyd noticed that unit members were upset by it and that unit members stopped bringing information to her. (N.T. 33, 51, 54).

While McGee's email was coercive, following the reasoning in Temple University, supra, there will be no Section 1201(a)(1) violation if the employer has a legitimate basis for its actions that outweigh any coercive effect. In this matter, McGee sent his email to NHS staff to correct a rumor that was not true and because he thought there was a violation of a particular student's right to privacy based on McGee's interpretation of FERPA. (N.T. 106, 122). While these are legitimate bases for a communication, under the totality of the circumstances, they do not outweigh the coercive effects of the email. The legitimate basis of McGee's email is undercut by the sentence "the disclosure of a student's name to the NFT by NHS staff is a clear violation of FERPA" which is a misstatement. (N.T. 145). Furthermore, McGee sent the email to the entire staff of NHS, even though the email from Boyd was directly to him (and copied to the Superintendent and Dunkley). Sending out a blanket response in this manner was an overly blunt tool to address what was, at its core, a disagreement between him and Boyd over interpretation of FERPA and student confidentiality issues. While McGee's concerns over FERPA and rumors are legitimate, the tone, context and content of the email had a coercive effect which is not outweighed by his legitimate bases to send his email.

For the reasons above, I find that the District committed a violation of Section 1201(a)(1) of PERA.

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 within the meaning of Section 301(1) of PERA.
2. The Federation is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has committed unfair practices in violation of Section 1201(a) (1) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the hearing examiner

HEREBY ORDERS AND DIRECTS

That the District shall:

1. Cease and desist from interfering, restraining and coercing employes in the exercise of the rights guaranteed in Article IV of PERA.
2. Take the following affirmative action:
 - (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 the bargaining unit 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.
 - (c) Serve a copy of the attached Affidavit of Compliance upon the Union.

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-third day of July, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

STEPHEN A. HELMERICH, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

NESHAMINY FEDERATOIN OF TEACHERS,
LOCAL UNION NO. 1417

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v.

NESHAMINY SCHOOL DISTRICT

AFFIDAVIT OF COMPLIANCE

The Neshaminy School District hereby certifies that it has ceased and desisted from its violation of Section 1201(a)(1) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order as directed therein; and that it has served an executed copy of this affidavit on the Federation 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