

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

BRADFORD COUNTY AREA VO-TECH :
EDUCATION ASSOCIATION :
 :
v. : Case No. PERA-C-16-226-E
 :
NORTHERN TIER CAREER CENTER A/K/A :
BRADFORD COUNTY AREA VOCATIONAL :
TECHNICAL SCHOOL :

PROPOSED DECISION AND ORDER

On July 28, 2016, the Bradford County Area Vo-Tech Education Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Northern Tier Career Center (NTCC or Employer), alleging that the NTCC violated Section 1201(a)(1) through (5) of the Public Employe Relations Act (PERA or Act) by furloughing Michelle Capwell and eliminating her medical records program in retaliation for her protected activity.¹

On September 19, 2016, the Secretary of the Board issued an Amended 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 November 10, 2016, in Harrisburg, as the time and place of hearing, if necessary.

A hearing was necessary and was held before the undersigned Hearing Examiner as scheduled on November 10, 2016, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief in support of its position on January 30, 2017. The NTCC filed a post-hearing brief in support of its position on February 1, 2017.

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 NTCC 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)
3. The Association is the exclusive bargaining representative for a unit of the NTCC's professional employes. (Exhibit C-20)
4. The Association and NTCC are parties to a collective bargaining agreement (CBA), which was effective from July 1, 2013 to June 30, 2016. (Exhibit C-20)
5. Michelle Capwell was employed at the NTCC for approximately 19 years, teaching medical records or medical office technology. She is certified by the Pennsylvania Department of Education to teach medical records, health information. The subject matter prepares students to enter jobs in medical offices, hospitals, and clinics upon graduation. (N.T. 13-15)
6. During her employment at the NTCC, Capwell served as President and Secretary of the Association, switching back and forth with Paul Price, who would also serve as either President or Secretary for two-year terms. (N.T. 15)

¹ The Association subsequently filed an amendment to the charge on August 29, 2016.

7. In January 2013, the Executive Director of the NTCC was Elizabeth Frankhouser. (N.T. 16)

8. In January 2013, bargaining unit members were approaching Capwell in her capacity as Association President with complaints about Frankhouser. Capwell advised her members to put their complaints in writing. (N.T. 16)

9. In late January 2013, Capwell had a meeting with Frankhouser, during which Frankhouser accused Capwell of collecting information against her. For the next year, the relationship between them was strained, as Frankhouser frequently made comments suggesting Capwell and/or her program might not be around the following year. (N.T. 17-18)

10. By letter dated May 29, 2014, Frankhouser informed Capwell that her Medical Records Technology program was being placed on probationary status due to the steady decline in student enrollments over the previous three calendar years, as well as the projected enrollment for the 2014-2015 school year. (N.T. 18; Exhibit C-1)

11. By letter dated May 14, 2014, Frankhouser informed Capwell that she was receiving an unsatisfactory rating for the 2013-2014 school year. Prior to this rating, Capwell had always been rated as proficient and satisfactory. (N.T. 19; Exhibit C-2; C-3)

12. Capwell challenged her unsatisfactory rating and eventually received a satisfactory rating dated June 12, 2014. (N.T. 19-20; Exhibit C-4)

13. Capwell, in an effort to enhance enrollment for her program, reached out to others, including Dr. Joseph Scopelliti, who is the President of Guthrie Health Care, a large healthcare employer in the area. By email dated October 15, 2014, Scopelliti confirmed his willingness to support the program. (N.T. 21; Exhibit C-5)

14. By letter dated May 29, 2015, Frankhouser notified Capwell, in relevant part, of the following:

The Northern Tier Career Center Joint Operating Committee [JOC] conducted an annual review of the enrollment, placement data, and labor market data of all career and technical education programs within the facility, on May 28, 2015.

The enrollment in the Medical Records Technology program is projected to increase. The JOC has elected to continue operating the Medical Records Technology program...during the 2015-2016 school year.

(N.T. 22-23; Exhibit C-9)

15. Just prior to the 2015-2016 school year, Capwell learned at the time of a two-day in-service that her room was being changed and she was being assigned to an old computer lab with less square footage than her previous classroom. Capwell described the newly assigned room as filthy and testified that she had to spend time cleaning it while also participating in the full agenda of activities for the two in-service days. She indicated that the cleaning work is normally performed by housekeeping or janitorial staff. (N.T. 23-28)

16. By letter dated September 11, 2015, Frankhouser informed Capwell that in the course of cleaning and preparing her new workspace, "an undetermined amount of computer equipment, supplies, and software were discarded under your direction." Frankhouser also advised that "a copy of this written warning will be placed in your personnel file." (N.T. 28-30; Exhibit C-11)

17. On September 25, 2015, the Association filed a grievance protesting the September 11, 2015 disciplinary action. (N.T. 30-31; Exhibit C-12)

18. By letter dated September 25, 2015, Frankhouser informed Capwell that her program was again being placed on probation due to the consistent low enrollment over the last three calendar years and the projected enrollment for the 2015-2016 school year. (N.T. 31; Exhibit C-13)

19. In October 2015, Frankhouser left her position with the NTCC and told Capwell on her way out the door that Capwell played favorites and was near worthless as a teacher working with the students. (N.T. 33)

20. On November 18, 2015, Gary Martell became Executive Director of the NTCC. (N.T. 65)

21. On or about April 22, 2016, Martell informed Capwell that the JOC had decided to abolish her program and that she would be furloughed. (N.T. 34-36)

22. By letter dated April 29, 2016, Martell indicated the following, in relevant part:

Dear Mrs. Capwell:

The purpose of this letter is to summarize our conversation on April 22, 2016, and to advise you that the Northern Tier Career Center's Joint Operating Committee voted to eliminate the Medical Records Program (51.0707) effective June 30, 2016. The elimination of this program was due to a change in the Center's organization for instruction and restructuring of programming.

As a result of this action, an additional motion was approved to furlough you as an Instructor effective June 30, 2016. If/when a vacancy occurs for which you are certified to teach, you will be notified by mail. When notified, if you are interested in the position, you must submit a letter of interest to the Director indicating such by the closing date. If you do not accept a position for which you are qualified, you will no longer be eligible to remain on the recall list...

(Exhibit C-14)

23. Martell made the recommendation to the JOC to eliminate medical records from future programming at the NTCC, which resulted in Capwell's furlough. (N.T. 76)

DISCUSSION

In its charge, the Association alleged that the NTCC violated Section 1201(a) (1) through (5) of the Act² by furloughing Capwell and eliminating her medical records program in retaliation for her protected activity. However, the charge under Section 1201(a) (4) of the Act must be dismissed because the Association did not prove or allege that Capwell signed an affidavit, petition, or complaint with the Board, or gave any information or testimony before the Board, prior to her adverse employment action. **Bellefonte Area School District**, 36 PPER 135 (Proposed Decision and Order, 2005). As the Hearing Examiner in **Bellefonte Area School District** noted, Section 1201(a) (4) only addresses discrimination against an employe for activity before the Board, and does not concern alleged discrimination against an employe for union activity that does not involve the Board's processes. **Id.**

Likewise, the charge under Section 1201(a) (2) of the Act fails as a matter of law. The Board will find a violation of Section 1201(a) (2) where an employer creates a company union whose independence is subject to question because of managerial assistance to or involvement in it. **AFSCME District Council 88 v. Berks County Intermediate Unit**, 29 PPER ¶ 29098 (Proposed Decision and Order, 1998) (citing **Montgomery County Intermediate Unit**, 17 PPER ¶ 17124 (Final Order, 1986)). The allegations contained in the specification of

² Section 1201(a) of the Act provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act. (2) Dominating or interfering with the formation, existence or administration of any employe organization. (3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization. (4) Discharge or otherwise discriminating against an employe because he has signed an affidavit, petition or complaint or given any information or testimony under this act. (5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

charges are simply not sufficient to prove a violation of this Section. Nor did the Association offer any evidence to establish a violation of Section 1201(a)(2).

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 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 met its burden of establishing the first two prongs of the Section 1201(a)(3) test. The record shows that Capwell previously served as the Association's President and caused a grievance to be filed in September 2015 protesting the NTCC's disciplinary action against her. Similarly, the record shows that the NTCC was aware of Capwell's protected activity, as Frankhouser, who was the previous Executive Director, met with Capwell in her capacity as Association President in January 2013. In addition, Martell who is the current Executive Director candidly acknowledged being aware of Capwell's grievance shortly after he began his tenure at the NTCC. (N.T. 72). As a result, the issue in this case depends on whether the NTCC was motivated by Capwell's involvement in protected activity when it decided to eliminate her medical records program and furlough her in April 2016.

The Association has not sustained its burden of proving a prima facie case of discrimination under Section 1201(a)(3) of PERA. In support of its argument that the NTCC was unlawfully motivated, the Association points to a number of factors involving the previous Executive Director, Frankhouser, which date from January 2013 through October 2015. However, I am unable to conclude that any of these factors, either individually or in the aggregate, support an inference of unlawful motive on behalf of the NTCC because the record shows that Frankhouser left employment with the NTCC in October 2015. Therefore, Frankhouser had absolutely no role whatsoever in the JOC's decision to eliminate the medical records technology program and furlough Capwell in April 2016. To the contrary, the record shows that Martell became Executive Director at the NTCC in November 2015 and that he made the recommendation to the JOC to eliminate medical records

from future programming, which resulted in Capwell's furlough. Martell also had no knowledge of Capwell's Association duties and background when he took over as Executive Director, nor was he aware of any purported turbulent relationship between Capwell and Frankhouser. (N.T. 68-71)³. In fact, Martell got along well with Capwell and characterized his observation of her as good and satisfactory. (N.T. 69-70).

The Association claims that Martell gave shifting reasons for his recommendation to eliminate the medical records technology program, which supports an inference of unlawful motive. The Association contends that Martell told Capwell in April 2016 that her program was being eliminated because it did not have a competency test to ensure students had mastered a particular set of tasks, which differed from the reasons he provided in his April 29, 2016 letter, which stated that the elimination was due to a change in the NTCC's organization for instruction and restructuring of programming. (N.T. 34; Exhibit C-14). However, the record reveals that when questioned about the reason Martell gave her in their conversation, Capwell stated "[t]hat was because I didn't have a NOCTI test.⁴ I didn't have a program of study. And there was (sic) a couple things. I'm just not remembering." (N.T. 34). Thus, Capwell could not recall each of the reasons Martell gave her when they discussed the matter. This testimony is not sufficient to establish that the NTCC's stated reasons for the adverse employment action were pretextual in nature. Without more, I am unable to conclude that Martell gave shifting reasons for his recommendation to eliminate the medical records program and furlough Capwell, as is necessary to refute or discredit the explanation of the NTCC here. The fact that Capwell's program lacked a competency test could still be entirely consistent with a change in the NTCC's organization for instruction and restructuring of programming. As such, the only factor supporting an inference of unlawful motive adduced during the Association's case-in-chief is the timing between Capwell's September 25, 2015 grievance and the NTCC's letter on the same date to Capwell, placing her program back on probation due to consistent low enrollment and projected future enrollment. However, this timing alone is not sufficient to sustain a prima facie case of discrimination.

In any event, even if the Association had sustained its burden of proving a prima facie case of discrimination under PERA, I have credited the NTCC's explanation for why it chose to eliminate the program and furlough Capwell. Thus, the NTCC has established a legitimate business reason for its conduct here. Martell testified credibly that his recommendation was not because of Capwell's protected activity, which included her September 2015 grievance. (N.T. 76, 94-95). Indeed, Martell convincingly explained how there were several reasons behind his decision to change the organizational structure and the programs offered at the NTCC. (N.T. 82). Martell testified that only seven students per session were being educated in Capwell's program for the 2015-2016 school year and there were only three such programs in the entire state, including the one at the NTCC. (N.T. 78, 85). Martell also indicated that there was no official curriculum for the medical records technology program set forth by the Pennsylvania Department of Education, nor is there any certification recognized by the State for the skills learned through the course. (N.T. 77-78, 83). Martell further described how those skills could be taught in other classes which provide a broader experience and knowledge range. (N.T. 78). The Association may not agree with the NTCC's decision to eliminate the medical records program, but that decision was not the result of discriminatory intent on behalf of the NTCC based on the record here.

What is more, the record shows that Martell actually went out of his way to help Capwell in this situation. As the NTCC points out, Martell contacted the Pennsylvania Department of Education to try to prevent the furlough by utilizing Capwell's specialty as part of the new pre-nursing program, which proved unsuccessful because Capwell was not a registered nurse, but rather a licensed practical nurse. (N.T. 13, 86-88)⁵. In addition, Martell notified Capwell by phone and letter dated August 15, 2016 of an anticipated

³ The record shows that Amanda Connell was the Association President when Martell began his tenure at the NTCC in November 2015 and still currently holds that position. (N.T. 69)

⁴ NOCTI appears to be an acronym for a national occupational competency test for certain fields of study. (N.T. 34).

⁵ The record shows that Capwell's LPN license is inactive. (N.T. 13)

vacancy that would require her to continue her education to be properly certified in another field. (N.T. 89-91; Exhibit E-5). However, Capwell did not respond in time to be considered for the position. (N.T. 92; Exhibit E-5). And, Martell even wrote a May 6, 2016 letter of recommendation on Capwell's behalf. (Exhibit E-8). As the NTCC notes, these are hardly the actions of a person harboring anti-union animus. Accordingly, the charge under Section 1201(a) (3) of the Act must be dismissed.

Finally, the Association has not submitted any evidence or argument regarding the employe interests and impact on wages, hours, and terms and conditions of employment to support the refusal to bargain allegation under Section 1201(a) (5) of the Act. As a result, the charge under that Section will also be dismissed.

CONCLUSIONS

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

1. The NTCC is a public employer within the meaning of Section 301(1) of PERA.
2. The Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The NTCC has not committed unfair practices in violation of Section 1201(a) (1) through (5) 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 charge of unfair practices 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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 6th day of April, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner