COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TWIN VALLEY EDUCATIONAL SUPPORT PROFESSIONALS ASSOCIATION PSEA/NEA	:	
v.	:	CASE NO. PERA-C-17-157-E
TWIN VALLEY SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On June 14, 2017, the Twin Valley Educational Support Professionals Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Twin Valley School District (District) violated Section 1201(a)(1), (2), (3) and (5) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that the District retaliated against bargaining unit members and violated its bargaining obligation when it altered a past practice of permitting second shift custodians to work first shift during summers, when regular school was not in session. The Union further alleged that the District retaliated against Union President Donald Refford for his Union activities when it transferred him from the Building Head Custodian position at Honeybrook Elementary, which he held for five years, to the Building Head Custodian position at the Middle School. On June 30, 2017, the Secretary of the Board issued a letter requesting that the Union amend its charge to include the related grievances that were filed and the parties' collective bargaining agreement (CBA). On July 12, 2017, the Union filed its amended charge including the requested documents.

On August 1, 2017, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on September 27, 2017, in Harrisburg. On August 3, 2017, the District requested a continuance due to the unavailability of a prime witness, to which the Union had no objection. I granted the District's continuance request and rescheduled the hearing for November 1, 2017. On August 18, 2017, the District filed an Answer, New Matter and Counterclaim. During the hearing on November 1, 2017, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. Also during the hearing, the Union withdrew its cause of action under Section 1201(a)(2) of the Act on the record. On January 26, 2018, the Union filed its post-hearing brief. The District filed its post-hearing brief on March 12, 2018.

The examiner, based upon all matters 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. 8-9)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8-9)

3. Rita Haddock is the Human Resources Director at the District. Her husband, Scott Haddock, is the Director of Buildings and Grounds at the District, and he manages the custodial and maintenance staff. Mr. Scott Haddock controls the building assignments and schedules for custodians. Mr. and Mrs. Haddock have both worked for the District for over 30 years. (N.T. 13, 186-187, 209, 251, 280, 303, 316; Association Exhibits 1 & 2; District's Answer at 2 n.1)

4. Edwin ("Ted") Kelley is the immediate supervisor for custodial and maintenance staff at the District. Mr. Kelly is a working supervisor who works from 9:00 or 10:00 a.m. to 9:00 or 10:00 p.m., supervising both first and second shifts. Mr. Kelley's responsibilities cover the entire District. He responds to maintenance calls and floats to all the District's school buildings. The High School does not have a full-time Building Head Custodian. Mr. Kelley is not present at the High School full time. He may be the acting Building Head Custodian for the High School. (N.T. 40-41, 85-86, 300-301)

5. Donald Refford has worked for the District for ten years. He is currently the Building Head Custodian at the Twin Valley Middle School. Prior to his Middle School assignment, Mr. Refford was the Building Head Custodian at Honeybrook Elementary School. He works the second shift throughout the regular school year. (N.T. 17-19, 60, 58; Association Exhibit 3)

6. David Hoffman is the Union Vice-President, and he has worked for the District for over 28 years. Ms. Rita Haddock typically speaks with Mr. Hoffman about labor matters because they both work day shift. (N.T. 160-161, 187)

7. Every summer prior to 2017, Mr. Refford worked the first shift, either 7:00 a.m. to 3:00 p.m. or 8:00 a.m. to 4:00 p.m. (N.T. 19)

8. Mr. Refford has been the Union President for three years. He was re-elected June 4, 2017, for another two-year term. His second term began September 1, 2017. Mr. Refford participated in collective bargaining negotiations on behalf of the Union for the current CBA. Ms. Rita Haddock and District Superintendent, Dr. Robert Pleis, negotiated with Mr. Refford on behalf of the District. (N.T. 20-24, 61-63, 85-86)

9. Two custodians assigned to the High School, named David Patterson and Deb Kauffman, wanted to switch shifts with each other. Ms. Kauffman's husband became ill, and she wanted to get home earlier than her regular shift assignment permitted. Mr. Patterson worked at the District for approximately 30 years, and Ms. Kauffman has worked at the District for approximately 20 years. Their request had been previously denied. (N.T. 22-24, 80, 197-198, 205-207; District Exhibit 4)

10. Barry Dewitt is the UniServe representative for the Union. Mr. Dewitt telephoned Ms. Rita Haddock for a meeting regarding the Patterson-Kauffman shift switch. During that telephone conversation, Ms. Haddock explained to Mr. Dewitt that prior requests by those two employes to switch shifts had been denied due to performance issues with Mr. Patterson and the need for him to be supervised. (N.T. 22, 197-198, 291)

11. Also during that telephone conversation, Mr. Dewitt requested that Ms. Haddock meet with Mr. Patterson and Ms. Kauffman to give them another opportunity to state their reasons for a shift switch, to which Ms. Haddock agreed. However, Ms. Haddock informed Mr. Dewitt at that time that there would be no shift changes. One week later, on March 8, 2017, the parties met. (N.T. 21-22, 71-73, 197-198)

12. In attendance at that meeting were Mr. Refford, Mr. Hoffman, Mr. Dewitt, Mr. Patterson, Ms. Kauffman, Ms. Haddock and Superintendent Dr. Robert Pleis. At the meeting, Mr. Dewitt stated that neither employe had documented discipline in their file. In response, Ms. Haddock stated: "If you want documentation, we'll give you some!" Mr. Patterson may have a written reprimand in his personnel file from several years ago. (N.T. 21-25, 29-30, 79, 161-163, 201, 291)

13. Also during the March 8, 2017 meeting, the District presented Mr. Patterson and Mr. Refford with pictures of Mr. Patterson's performance deficiencies regarding the cleaning of desks. Mr. Kelley had verbally counseled Mr. Patterson about his performance problems and cell phone use. Mr. Kelley retained his own notes documenting the counseling, but he did not inform Mr. Patterson about those notes. The March 8, 2017 meeting "took a different turn" as compared to prior meetings where the parties could resolve issues. (N.T. 75-77, 162-163, 179-180, 199-200, 202, 212, 214, 291)

14. After the meeting, on or about April 4, 2017, Mr. Patterson received a written letter of reprimand regarding his performance deficiencies. On the same day, Mr. Refford filed a grievance to the Patterson discipline. (N.T. 25-27, 87-88; Association Exhibit 1)

15. In the April 4, 2017 Patterson grievance, the Union alleged, in the "Statement of Grievance," the following:

> The Twin Valley School District and the District Human Resources Director, Rita Haddock, violated the Collective Bargaining Agreement when a discipline letter which was purely retaliatory in nature was placed in the employee file of Mr. Patterson only after Mr. Patterson and another custodian requested a shift transfer.

(Association Exhibit 1)

16. Mr. Scott Haddock signed the Patterson grievance on April 7, 2017, and he discussed the grievance with his wife, Ms. Rita Haddock. After her meeting with Mr. Refford and Mr. Patterson, Ms. Rita Haddock believed that the Patterson grievance would be withdrawn and told that to her husband. At the time of his signing, Mr. Scott Haddock believed that the Patterson grievance would be or had been withdrawn. He later learned that it would not be withdrawn. (N.T. 113, 209-210; Association Exhibit 1)

17. Jo Shepherd is a part-time second shift custodian who is assigned to the Honeybrook Elementary School. She is also an aide at the District during the first shift during the regular school year. Ms. Shepherd called off sick on a snow day when custodians are required to work. The day before the snow day, Ms. Shepherd requested a vacation day, which was denied due to the impending snow storm. (N.T. 99-101, 146; Association Exhibits 2 & 4; District Exhibit 1)

18. Ms. Shepherd has a history of calling off for parent-teacher conference days, snow days and in-service days. (N.T. 99-101; District Exhibit 1)

19. Article XIII, Section G of the parties' CBA provides, in relevant part, as follows:

> All employees must present a written doctor's note indicating the illness after three (3) days of consecutive absence. In addition, the Director, at his/her discretion, may require the Employee to have a doctor's note if in the opinion of the Director there appears to be a pattern of sick leave and/or abuse of sick leave. Abuse of sick leave may include continued use of sick days before or after a holiday.

(Joint Exhibit 1, Article XIII, § G at 11)

20. On March 22, 2017, Ms. Haddock issued a "Letter of Reprimand for Jo Shepherd." This letter provides, in relevant part, as follows:

> This letter serves as a written reprimand for failure to submit a doctor's note when requested to do so for your sick day absence on March 14, 2017. You submitted a floating holiday request for March 14, 2017 which was denied due to the impending major snow storm forecasted and a limited number of staff. You later sent an email stating "I'm out tomorrow 3/14, I'm out sick!" The circumstances surrounding your absence on March 14, 2017 and a demonstrated pattern of requesting sick days on in-service days, P/T conferences, 2-hour delays and snow days [a total of 14 times] when you are to report to work as a part-time custodian as stated below is inappropriate.

(District Exhibit 1)

21. Also on March 22, 2017, Ms. Shepherd presented for urgent care at Penn Medicine, Lancaster General Health and obtained a doctor's note for her absence on the snow day that occurred on March 14, 2017. In the note, Dr. Anthony E. DiMarco stated that "Ms. Shepherd has been ill with a virus since 3/7/17 to the present time and was not fit to work during the snow storm." (N.T. 106-107; District Exhibit 1)

22. On April 4, 2017, Mr. Refford filed a grievance on behalf of Ms. Shepherd. The "Statement of Grievance" section provides as follows:

> The Twin Valley School District and the District Human Resources Director, Rita Haddock, violated the Collective Bargaining Agreement when a discipline letter which was purely retaliatory in nature was placed in the employee file of Ms. Shepherd because Ms. Shepherd utilized one of her sick days. Ms. Shepherd turned in a physician's note for the day in question, even though the contract specifically calls for a required physician's note for more than three (3) days of consecutive absence.

(Association Exhibit 2)

23. Once Ms. Shepherd produced the Doctor's note from Penn Medicine, the District accepted the note and removed the reprimand from her file. Ms. Shepherd's grievance was resolved within a few weeks of the incident involving her calling off sick. The Patterson grievance remained unsettled. (N.T. 32, 108-110, 251)

24. Before the two grievances filed in April 2017, no grievances had been filed from this bargaining unit. Mr. Scott Haddock knew about the Patterson and Shepherd grievances because he signed both. (N.T. 58, 68, 153, 210-212, 282-283; Association Exhibit 1)

25. After a meeting on April 30, 2017 between Mr. Hoffman, Mr. Refford and Ms. Haddock to discuss a cafeteria worker, Ms. Rita Haddock asked Mr. Refford and Mr. Hoffman to stay behind to discuss the Patterson grievance. When the Union officials informed Ms. Haddock that the grievance would not be withdrawn, Ms. Haddock said: "Do you really want to go down this road?" or "Do you really want to do this?" Also, Ms. Haddock telephoned Mr. Hoffman several times about the grievance in an attempt to stop the grievance matter from moving forward. During one of the telephone conversations, Ms. Haddock stated that "the Union shouldn't go down this road," or that "it's a road we don't need to go down." (N.T. 34-36, 95-96, 163-167, 195)

26. On May 3, 2017, Mr. Refford emailed the Honeybrook custodial work schedule for the summer of 2017, which begins the first work day after school ends for the year, to Scott Haddock's assistant, Karen Johnson. On May 4, 2017, Ms. Johnson forwarded the schedule to Mr. Haddock. (N.T. 40-41, 43-44; Association Exhibit 3)

27. The proposed summer Honeybrook custodial schedule for 2017 made up by Mr. Refford, Head Custodian, was as follows: Donald Refford: 8:30 a.m. -4:30 p.m.; Kathy Hoffman: 6:30 a.m.-2:30 p.m.; Jo Shepherd: 1:00 p.m.- 4:30- p.m.; Jim Norris: 8:30 a.m.-12:00 p.m.; Jim Seldonbridge: 8:30 a.m.-12:00 p.m. (Tuesday, Wednesday and Thursday only). (Association Exhibit 3)

28. On May 4, 2017, Mr. Scott Haddock returned an email to Mr. Refford containing the summer hours for Honeybrook custodians, wherein Mr. Refford and the other second-shift custodians, did not receive their requested first-shift schedule for the summer. According to the summer schedule issued by Scott Haddock, there was one first-shift custodial assignment for Kathy Hoffman, who is assigned first shift throughout the school year, and three second-shift assignments for custodians assigned to second shift throughout the school year. Mr. Haddock did not permit any of the second-shift custodians to work first shift the summer of 2017. (N.T. 36-42, 116-117, 209; Association Exhibit 3)

29. For at least the past twenty-eight years, the District always approved the summer shift change permitting second-shift custodians to work the first shift during the summer. Mr. Scott Haddock always approved the summer switch, and he knew that second shift custodians liked to work the first shift during the summer. The practice was the same from year to year. The District did not bargain with the Union over the change in the practice of permitting second-shift custodians to work first shift during the summer. Mr. Scott Haddock's change affected approximately 16 second shift custodians. (N.T. 64-66, 116-117, 125, 154-155, 168-171, 279-280; Joint Exhibit 1)

30. During past summers, the second shift custodians were always permitted to work first shift and most did. In the summer of 2016, approximately half the second shift custodians chose to remain on second shift. None of the second shift custodians in the District were permitted to work first shift during the summer of 2017. The summer of 2017 was the first year that second shift custodians in the District were not permitted to work first shift. The CBA does not contain a provision that specifically permits second shift custodians to work first shift during summers. (N.T. 40-43, 47-48, 64-66, 149, 221, 272-278, 294, 315)

31. Article XI, Section G of the CBA provides as follows:

> G. Notification of Assignment
>
> All Employees covered by this Collective Bargaining Agreement shall be given written notice of the next year's assignments no later than July 30. The Employer reserves the right to make changes in assignments, after notification to the Association, if vacancies or other extenuating circumstances occur after this date.

(Joint Exhibit 1)

32. The District hosts summer school, events and other clubs, organizations and activities every summer. The District has historically hosted summer day camps from 9:00 a.m. to noon for 8-10 weeks. The custodians work in non-occupied areas of the school buildings during these activities and events. There are sufficient first-shift hours remaining to work in those areas of the buildings that were occupied in the morning. During past summers, all custodial work was completed during the first shift. There was always a second shift custodian available if needed for individual events at school buildings that occurred during the second shift. Custodians rotated by seniority to cover the specific event. Weekend events were also covered by seniority rotation. Also, there are second shift custodians who choose to remain on second shift during the summer for various personal reasons. (N.T. 48-49, 50-52, 119-120, 123-124, 171-173, 214-215, 219, 233-237, 241, 302-303)

33. The District had a five-year roofing project at Honeybrook Elementary. The custodians were able to complete all custodial work for the past five summers during the first shift while roofing work and other capital projects were being completed, including the refinishing of the gym floors. (N.T. 50, 222)

34. The roofing project at the High School did not interfere with custodial work at the High School or any other school. To check for leaks during the roofing project required only one second shift custodian. Roof leaks that occurred throughout the night were left uncleaned until morning. (N.T. 155-156, 174, 314)

35. On June 3, 2017, or June 4, 2017, Mr. Refford won a re-election as Union President. At that time, Mr. Refford was working the 2:30 to 10:30 shift at Honeybrook. On June 12, 2017, Mr. Kelley informed Mr. Refford that he was transferred to the Middle School in the 3:00 p.m.-to-11:00 p.m. shift, effective June 19, 2017. After two weeks at the Middle School, Mr. Redford's hours were changed to 1:00 p.m. to 9:00 p.m. for a period of six weeks. For the last two weeks of

the summer of 2017, Mr. Refford's hours were again changed to the 12:00 p.m. to 8:00 p.m. shift. (N.T. 53-57, 132-134, 137, 140)

36. Mike Kazmierczak was a head custodian at the Middle School. Towards the end of May 2017, Mr. Kazmierczak informed the District that he no longer wanted to be a Building Head Custodian and that he wanted to step down. The Middle School is larger than Honeybrook Elementary. Although there are more custodial positions at the Middle School, it is currently short staffed and has vacant positions. (N.T. 134-137, 141, 190-195)

37. The District promoted a regular custodian, Lynn Bingaman, at the High School to Building Head Custodian at the Honeybrook Elementary School, replacing Mr. Refford. Mr. Kazmierczak was then assigned to Mr. Bingaman's regular custodian position at the High School. Mr. Refford was transferred to the Building Head Custodian position at the Middle School vacated by Mr. Kazmierczak. Scott Ebling, the Middle School Building Head Custodian before Mr. Kazmierczak, caused personnel problems at the Middle School, and he was transferred to Robeson Elementary School. Consequently, the District did not want to move him back to the Middle School to fill the Building Head position vacated by Mr. Kazmierczak. The Building Head at Twin Valley Elementary, Donald Holland, has two years' experience as a Building Head; Mr. Refford has four or five years of experience. (N.T. 190-195, 260-262; District Exhibit 3)

38. There is no full-time Building Head Custodian at the High School. (District Exhibit 3)

39. The District has purchased new floor cleaning equipment that does not require the drying time that the old equipment required. With the older equipment, the first shift would clean the majority of the floors. Those floors would dry overnight until the first shift returned the next day to finish the floors. The classroom floors are cleaned once during the summer. Building areas that are used regularly during the summer, like the cafeteria and the hallways, are cleaned regularly. (N.T. 215-218, 309-312)

DISCUSSION

Immediately following the Union's case-in-chief at the hearing in this matter, the District moved to dismiss the discrimination claims arguing that District management personnel responsible for the summer 2017 schedule were unaware of any protected or concerted activity. The District further argues that there was no change in regularly assigned hours with respect to both the assignment of summer 2017 hours and Mr. Refford's transfer to the Middle School. Therefore, maintains the District, the District did not take any adverse action against Mr. Refford or other bargaining unit employes. (N.T. 228-231; District's Post-hearing Brief at 9-11). In its Post-hearing Brief, the District further contends that the record fails to establish the existence of any anti-Union animus. (District Post-hearing Brief at 11-13).

Although not part of the original motion to dismiss, the District also argues that the Union did not prove a change to a past practice or that the so-called practice, regarding summer hours for second-shift custodians, constitutes a mandatory subject of bargaining. (District's

Post-hearing Brief at 14-19).[1] The District maintains that it increasingly required second-shift custodians to work second shift during past summers. "Blanket grants of first shift hours have not been the "`normal' and `proper' response of the Administration to summer scheduling for the past several years." (District's Post-hearing Brief at 21). Consequently, there was no past practice. (District's Post-hearing Brief at 19-21).

In support of this argument, the District cites SEPTA v. PLRB, 654 A.2d 159, 162 (Pa. Cmwlth. 1995), appeal denied, 543 Pa. 700, 670 A.2d 145 (1995), where the Commonwealth Court reversed a Board finding of a past practice. (District's Post-Hearing Brief at 19-21). The District argues that the SEPTA Court concluded that the tuition reimbursement program in that case was not a past practice because it was gradually phased out. Moreover, the District argues that there can be no bargaining violation where the parties bargained for express language in the contract that allows the District to establish year-long custodial assignments in its sole discretion. (District's Post-hearing Brief at 19-20). Having assessed the District's arguments against the record, I conclude that the Union established a prima facie case of discrimination, during its case-in-chief, for both alleged adverse actions (i.e., transferring Mr. Refford and changing the summer shift change policy). The Union further established the existence of a past practice regarding a mandatory subject of bargaining. Accordingly, I have denied the District's motion to dismiss.

The Union contends that the District retaliated against the Union, its President, Mr. Refford, and bargaining unit members for filing two grievances, refusing to settle and withdraw the Patterson grievance, bringing in the PSEA UniServe Representative to advocate for the Patterson-Kauffman shift swap and contentious grievance meetings. The Union also argues that the District violated its duty to bargain when it unilaterally changed the past practice of permitting second shift custodians to work first shift during the summer.

In a discrimination claim, the complainant has the burden of establishing that the employe(s) engaged in protected activity, that the employer knew of that activity and that 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). 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

[1] The original motion to dismiss sought dismissal based on the Union's case-in-chief and was limited to the discrimination claims only. The District's post-hearing brief in support of its motion to dismiss contains new grounds for dismissal pertaining to the Union's bargaining violation claim. Because the District sought dismissal of the bargaining claims after the record was closed, evaluating the Union's bargaining violation case will not be limited to the Union's case-in-chief and will be evaluated on all the evidence in the entire record as presented and developed by both parties.

Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Examining the entire background of the case, other factors include: 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. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing of an employer's adverse action alone is not enough to infer animus, when combined with other factors, close timing 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).

The record contains substantial evidence that decision-making management personnel from the District were well aware of Mr. Refford's and Mr. Hoffman's protected activities. The District Superintendent, Dr. Pleis, the Human Relations Director, Ms. Rita Haddock, and her husband, Mr. Scott Haddock, were all aware of Mr. Refford's Union activities, which included negotiating contracts, filing grievances and attending contentious grievance meetings with his Union Vice-President, Mr. Hoffman and the UniServe Representative, Mr. Dewitt. The entire background of the case also contains substantial evidence from which to infer that District management was improperly motivated when the District no longer permitted second-shift custodians to work first shift during the summer and when it transferred Mr. Refford to the Middle School.

Notwithstanding whether any of these actions would constitute managerial prerogative, absent unlawful motive, a public employer in this Commonwealth may not use managerial prerogatives in a discriminatory manner or as an offensive weapon of retaliation. Teamsters, Local No. 205 v. Brentwood Borough, 35 PPER 112 (Final Order, 2004); United Steel Workers of America, Local 8125 v. East Taylor Township, 24 PPER ¶ 24166 (Final Order, 1993). In the Brentwood Borough case, the Board stated the following:

> Where a change in schedule affects only a part of the bargaining unit and where the employer puts forth managerial concern for the change, the employer has a managerial prerogative to make a unilateral schedule change. Reading Fraternal Order of Police Lodge No. 9 v. City of Reading, 30 PPER ¶ 30121 (Final Order, 1999). However, a public employer's managerial prerogative does not insulate it from the statutory obligation to exercise that authority without anti-union discrimination. Mid Valley Education Association v. Mid Valley School District, 25 PPER ¶ 25138 (Final Order, 1994). Consequently, while Butelli's actions may have constituted an allowable exercise of managerial prerogative absent an improper purpose, his discriminatory motive behind the schedule change transforms the permissible action into an unfair practice.

Brentwood Borough, 35 PPER at 351. Additionally, in East Taylor Township, the Board stated: "Under color of this [managerial] right, an

employer does not have authority to retaliate against employes who engage in protected activity." East Taylor, 24 PPER at 435.

In this case, the District emphasized the historical lack of adversity with the Union. Before the Patterson and Shepherd grievances, the Union had not filed any grievances in many years. The District typically resolved any disputes directly with the employes. However, as a result of having its control and authority suddenly challenged by the UniServe Representative and the grievance process (which could result in an adverse arbitration award), the ire of District management became manifest through statements and adverse employment actions.

Although the Shepherd grievance was resolved, Ms. Haddock repeatedly telephoned Mr. Hoffman and met with Mr. Hoffman and Mr. Refford pressing for the withdrawal of the Patterson grievance. During those phone conversations and meetings, Ms. Haddock, on more than one occasion, made threatening statements about the Union's pursuit of the Patterson grievance. With regard to Mr. Patterson, Mr. Dewitt noted that Mr. Patterson's performance issues had not arisen to the level of placing written discipline in his file. In response, Ms. Haddock stated: "If you want documentation, we'll give you some!" Indeed, the District issued written discipline to Mr. Patterson almost one month following the March 8, 2017 meeting. Mr. Refford, in the Patterson grievance, expressly alleged that Ms. Haddock retaliated against Mr. Patterson for involving his Union in the shift-swap matter. During a subsequent meeting on April 30, 2017, to discuss a cafeteria worker, Ms. Haddock again stated to Mr. Hoffman and Mr. Refford regarding the Patterson grievance: "Do you really want to go down this road?" Also, during multiple telephone conversations with Mr. Hoffman, in an attempt to persuade the Union to withdraw the Patterson grievance, Ms. Haddock stated: "The Union shouldn't go down this road!" I credit the Union witnesses who testified that Ms. Haddock made these statements on multiple occasions.

There is very close timing between Mr. Refford's filing of grievances, grievance meetings with the UniServe Representative and the Union's refusal to withdraw the Patterson grievance, on the one hand, and Mr. Refford's building reassignment and the denial of summer shift changes, on the other hand. This close timing in combination with other factors yield the inference of animus. Such factors include: Ms. Haddock's threatening, anti-union statements and her manifest frustration from contentious meetings with the Union and its UniServe Representative instead of meeting with the employes to resolve matters unchallenged, as was customary. At the hearing and in the District's Post Hearing Brief, the District emphasized how cooperative the parties have been historically, in an effort to demonstrate the lack of animus. However, the Union's sudden challenge to the District's authority regarding the Patterson and Shepherd grievances, as well as Mr. Refford's accusation that Ms. Haddock retaliated changed the landscape and raised the ire of Mr. and Ms. Haddock. Although the District proffered business reasons at the hearing, for reassigning Mr. Refford and changing the summer shift practices, I do not credit the District's proffered reasons. I find those reasons to be pretextual, further supporting the inference of unlawful animus in this case.

For at least 28 years, the District has allowed second shift custodians to work the first shift during the summer break. Mr. Scott Haddock always approved the shift and schedule changes for the summer, and he knows that many of the second shift custodians like the first shift during the summer. Due to personal reasons and other jobs, approximately half of the second shift custodians choose to remain on second shift. There was always coverage for summer building use during the second shift hours and weekends, as arranged by the Building Head Custodian.

Ms. Haddock testified for the District. I find her testimony incompetent to establish why her husband Scott Haddock could not maintain the practice of permitting second shift custodians to switch to first shift. Ms. Haddock is the Human Resources Director whose expertise and first-hand knowledge pertains to personnel matters. Mr. Scott Haddock, on the other hand, is the Director of Buildings and Grounds. His expertise pertains to the custodial and maintenance operations of the District. I have drawn a negative inference from the fact that the District did not present his testimony and his first-hand knowledge of the nature and requirements of custodial work at the District, as well as his reasons for changing the summer hours policy.

Moreover, the reasons Ms. Haddock provided to explain why her husband changed the summer shift policy do not support the need for the change. The District stated that they host summer school, summer camps, and other summer events at the school buildings. However, the District has hosted all these same events for many years and permitted the second shift custodians to work the first shift during the summer. The District relied on District Exhibit 2 to try to establish that there has been an increase in summer activities at the District. However, District Exhibit 2 only lists requests by various community groups to use District facilities from the spring of 2017 prospectively to the spring of 2018. There is no comparison to prior years to establish or even quantify the alleged increase, other than the unsubstantiated and uncorroborated testimony of the Human Resources Director that there has been such an increase. In fact, I have drawn a negative inference from the fact that the District compiled the building usage requests for 2017-2018 in a document prepared for litigation without preparing similar documentation quantifying and comparing the prior years' summer buildings uses. Even assuming that I credited Ms. Haddock's testimony, that there was an increase in activities for the summer of 2017, she was not the management person in charge of determining how custodial work is to be accomplished at the District nor is she the management employe responsible for determining custodial shifts, schedules or assignments based on custodial needs. Therefore, I cannot credit her testimony regarding the need to eliminate the summer shift change policy.

The District also tried to explain that the roofing project at the High School in 2017 required the District to eliminate the summer shift change policy. However, the credible testimony of record established that the roofing project did not interfere in any way with any custodial work that was being done. Moreover, the five-year roofing project at the Honeybrook Elementary School did not interfere with any custodial work there and has been completed. Significantly, the Union established that, even assuming that the roofing project at the High School had some effect on custodial work there, it did not and

could not have affected the custodial work in the remainder of the District's buildings and, therefore, does not justify changing the summer shift change policy for the entire bargaining unit of second shift custodians in all buildings across the District.

The District proffered testimony that the High School had leaks during the roofing project which required custodians to be assigned second shift during the Summer to check for leaks. However, the District could not explain why it was so important to have second shift custodians to check for leaks when rain water entered the building through the night, after the second-shift custodians left, undoing any cleaning they had done. The District also did not explain why, after discovering leak locations, the District could not utilize other parts of the High School during the summer when the building was not fully utilized. Moreover, Mr. Kelley credibly testified that the District would not need more than one custodian on second shift to clean wet floors from the leaky roof.

Year after year, the custodians proved capable of completing all the necessary custodial work during the first shift enduring roofing projects, summer camps, summer school and a multitude of other activities. Yet the District neglected to present Mr. Scott Haddock at the hearing to explain, with credible first-hand knowledge, why it was necessary to change the first-shift policy that had existed for over 28 years at the District. Even more significant is the fact that second shift was more than adequately covered because only half of the second shift custodians chose to change their hours to first shift in the summer. Also, the Building Head Custodians always had volunteers to cover any second-shift or weekend events for which there was no scheduled custodian, or the Building Head assigned a second shift custodian based on seniority. The District simply did not prove or credibly explain why they terminated a decades old condition of employment that permitted second shift custodians to work the first shift during the summer, while it still had plenty of second shift custodians remaining on second shift.

The District argues that the purchase of new floor cleaning equipment also required more custodians to work second shift during the summer. The evidence shows that with the former equipment, the floors took a long time to dry. So, the first shift custodians would clean the majority of the floors with that former equipment and the floors were left to dry during the second shift and overnight until the first shift returned the next day to continue cleaning. The District claims that, with the new equipment, the floors are dry by the second shift and the second shift-custodians can continue cleaning. However, the record also shows that, during the summer, the buildings are not used nearly as much as during the school year. Indeed, classrooms are cleaned only once during the summer because they are not in use. Only areas that are subject to frequent summer use, such as the cafeterias and gymnasiums, are regularly cleaned.

In this regard, the record yields the distinct inference that the first shift custodians are not required to clean most of the flooring over the summer, and they are completing all the floor cleaning that needs to be done during the first shift. Therefore, there is no need for second shift custodians to clean and, if so, second shift custodians that remain on second shift are a sufficient complement for

completing that work. The record shows that second shift custodians function more in a security capacity to lock and unlock doors, secure the buildings, adjust environmental controls and set alarms during and after second shift building use. Accordingly, the District did not adequately explain why, during the summer, the remaining second shift custodians after some second shift custodians switched to first shift, could not complete their second shift duties just because the floors cleaned during the first shift were dry, where the majority of the building space was not in use and those floors were only cleaned once during the summer.

The District also offered an explanation to justify its transfer of Mr. Refford to the Building Head Custodian position at the Middle School. Although the District can assign work and reassign personnel, it may not do so in a discriminatory manner. Brentwood Borough, supra; East Taylor Township, supra. In this case, the District explained that they reassigned Mr. Refford from Honeybrook to the Middle School to accommodate the wishes of Mr. Kazmierczak who asked to be demoted from the Building Head at the Middle School to a regular custodial position. The District further explained that it did not want to return the former Middle School Building Head Custodian, Scott Ebling, to the Middle School from Robeson Elementary School, even though he had more experience than Mr. Refford. Ms. Rita Haddock explained that Mr. Ebling had been moved from the Middle School because he caused personnel issues there. The District emphasized that it needed a Building Head with experience to replace Mr. Kazmierczak, and Mr. Refford had the more experience as a Building Head Custodian than Mr. Holland, who was the Building head at Twin Valley Elementary.

Consequently, the District promoted a regular custodian at the High School, Mr. Bingaman, into Mr. Refford's Building Head Position at Honeybrook. Mr. Kazmierczak was moved into Mr. Bingaman's regular custodial position at the High School and Mr. Refford was transferred to the Middle School as Building Head. In response to Mr. Refford's claims that the Middle School is bigger and, therefore, more work and responsibility for the same pay, the District contends that the work load is the same because there are more custodial positions at the Middle School.

The District's explanation seems plausible on its face. However, in transferring Mr. Kazmierczak, Mr. Bingaman and Mr. Refford, the District accommodated the interests and desires of everyone but Mr. Refford. The District did not explain why it placed a premium on accommodating Mr. Kazmierczak and not Mr. Refford. By entering discussions with Mr. Kazmierczak and accommodating his desires regarding responsibility and placement without similarly reaching out to Mr. Refford to accommodate his desires regarding placement and responsibility, the District demonstrated disparate treatment of Mr. Refford. No one from management discussed the transfers with Mr. Refford before assigning him to the Middle School. The abrupt, discourteous treatment of Mr. Refford in transferring him without any prior discussion, as compared to velvet glove treatment received by Mr. Kazmierczak, with other factors demonstrates animus.

The District also did not explain why Mr. Holland's two years of Building Head Experience was insufficient for the Middle School Building Head position, considering that the High School functions just

fine without a full-time Building Head Custodian.[2] Although Ms. Haddock testified that it was important to appoint someone who was familiar with the energy management systems and leadership duties, she also admitted that someone who is trained on energy management at another building, like Mr. Holland, could properly manage the energy systems at the Middle School. Regarding leadership, the record shows that the District does promote regular custodians to Building Head Custodians based on their individual aptitude for leadership. Although the Middle School has more positions to manage, there are also many vacancies in the Middle School. With respect to the District's claims that the Middle School Building Head Custodial position is not more work because there are more custodial positions there, the record also reflects that there are many custodial vacancies at the Middle School, which means there is more work.

I conclude that the timing of the change in summer shift policy with respect to the filing and pursuing of grievances combined with the statements made by the Human Resources Director, who is the spouse of the Director of Buildings and Grounds, and the lack of adequate explanation for terminating the summer shift change policy yields the inference that the District was unlawfully motivated when it terminated the summer shift change policy and transferred Mr. Refford without prior discussion with him about his desires while accommodating others.

The Union further claims that the District changed a past practice involving a mandatory subject of bargaining when it refused to allow some second shift custodians to work first shift during the summer of 2017. The District contends that there was no change in shift assignments and the CBA provides that it may assign shifts within its discretion.

In Minersville Area Educational Support Personnel Association v. Minersville Area School District (**Minersville II**), 41 PPER 31 (Final Order, 2010), the Board stated the following:

> A past practice is a separate enforceable condition of employment that cannot be derived from the language in the parties' collective bargaining agreement and develops as the normal and proper response to a recurring type of situation in the workplace. County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977); AFSCME District Council 88 Local No. 790 v. Reading School District, 35 PPER 111 (Final Order, 2004). A unilateral change in an established past practice constitutes an unfair practice under Section 1201(a)(5) of PERA if it pertains to a mandatory subject of bargaining. Id.

Minersville, 41 PPER at 115.

The District argues that Article XI of the CBA preserves the District's managerial right to change custodial work assignments. The District contends that, under this provision, the District is

[2] Mr. Kelley seemingly provides direction and supervision to the High School custodians. However, his time and his responsibilities are divided among all District buildings every day.

authorized to maintain custodians on their original school-year assignment or make changes to those assignments if necessary. The District, therefore, maintains that it was contractually privileged and authorized, under this provision, to transfer Mr. Refford to the Middle school and maintain second shift custodians on second shift. It further maintains that there was no past practice because more custodians have been working second shift in recent years and the District never actually assigned second shift custodians to first shift. The District further argues that, even if there were shift changes that changed a past practice here, those changes did not affect a mandatory subject of bargaining, as required by Board law. The District relies on Minersville Area School Services Personnel v. Minersville Area School District (**Minersville I**), 18 PPER ¶ 18025 (Final Order, 1986) for the proposition that the shift changes here, do not rise to the level of a mandatory subject of bargaining.

Article XI, Section G of the CBA provides as follows:

G. Notification of Assignment

All Employees covered by this Collective Bargaining Agreement shall be given written notice of the next year's assignments no later than July 30. The Employer reserves the right to make changes in assignments, after notification to the Association, if vacancies or other extenuating circumstances occur after this date.

(Joint Exhibit 1)

The CBA does not specifically address whether second shift custodians may work first shift during the summer recess. For at least the past 28 years, the District has applied the above CBA provision in a manner by which it maintained a practice of approving the requests of a percentage of second shift custodians to work first shift during the summer. The past practice manifests the clear understanding of both parties that Article XI, Section G is limited to the school-year assignments, and not summer assignments. Although Article XI permits changes to the school-year assignment, it also requires extenuating circumstances. The District did not credibly offer extenuating circumstances that would explain the need to terminate the past practice of summer shift changes across the entire District and bargaining unit. In this regard, I conclude that there was a past practice, consistent with the CBA, of permitting second shift custodial employes to work the first shift during the summers. What remains to be determined is whether the deprivation of changing to first shift affects a mandatory subject of bargaining.

I am persuaded by the District's reliance on Minersville I, where the Board held that requiring certain custodians to work a second shift with a shift differential for the same number of hours to meet operational demands was a discretionary act within that district's rights under Section 702 of PERA. However, Minersville II involved facts that were identical to the facts here. In Minersville II, the hearing examiner concluded that the district violated an established past practice by eliminating the policy of allowing second shift custodial and maintenance employes to work first shift during school vacation periods for the past 18 years. In affirming the hearing examiner, the Board held that "hours of work and schedule changes are mandatory subjects of bargaining." Minersville II, 41 PPER at 115. Minersville II governs the disposition of this case. It involves the

identical facts as the instant case, it is a significantly more recent decision of the Board and the District did not present credible, competent evidence that operational demands necessitated changes to the summer shift policy, as required by Minersville I.

Additionally, the District's reliance on SEPTA, supra, is misplaced. In that case, SEPTA established a tuition refund program in 1974 for which union members were eligible. From its inception, SEPTA expressly made clear in the SEPTA Operations Manual that the program was discretionary, limited and would only be available if there was sufficient money in SEPTA's budget for the program. The Commonwealth Court noted the following:

> The policy expressly stated that the tuition refund program was a permissive program; it was not available to SEPTA employees as a matter of right, but rather as a discretionary program; and that the program was expressly conditioned upon business needs or budget limitations.

654 A.2d at 160.

In 1976, the tuition refund program was suspended due to financial problems. In 1978, SEPTA reinstated the program and issued a pamphlet expressly stating that the program was discretionary and permissive. The program was again suspended in 1992 and the union filed an unfair practice charge alleging that SEPTA violated its duty to bargain over a mandatory subject of bargaining. Under these facts, the Commonwealth Court held as follows:

> Given SEPTA's unilateral actions regarding its tuition refund program—to which the Union never responded—and given SEPTA's continued express statement that the program was dependent on budget limitations and financial circumstances, no employee should have had a reasonable expectation that such benefit was guaranteed as wages. . . . . SEPTA's tuition refund program did not rise to the level of a past practice.

654 A.2d at 162. SEPTA, supra, however, is distinguishable from the instant case.

At no time in the past 28 years has the District expressly informed bargaining unit members that the summer shift change policy was permissive, discretionary or dependent on financial or budgetary constraints. The District never published such limitations in an operations, policy or employe manual and never suspended the practice. The District consistently offered the summer shift change to second shift custodians without limitation, either express or implied, for more than 28 years. Moreover, the District did not provide credible reasons or operational demands that justify or explain the cancellation of the summer shift change policy. Therefore, SEPTA is inapposite to the disposition of the instant case. Accordingly, I find that the summer shift change was a "normal and proper response to a recurring type of situation in the workplace," County of Allegheny, supra, that raised the reasonable expectations of the bargaining unit members. Therefore, depriving second shift custodians in this case from working first shift during the summer was a change that involved a mandatory subject of bargaining.

Although the Union also argues that the District independently violated Section 1201(a)(1) of PERA, the Union did not specifically

identify an independent violation of Section 1201(a)(1) in its specification of charges. Accordingly, the Union did not preserve the cause of action within the four-month limitations period and the district was not afforded adequate notice or opportunity to defend such a claim at the hearing. Therefore, I am without authority or jurisdiction to consider whether the District's actions constituted an independent violation of Section 1201(a)(1).

CONCLUSIONS

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

1. The District 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 District has committed unfair practices in violation of Section 1201(a)(1), (3) and (5) 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 or coercing employes in the exercise of the rights guaranteed in Article IV of the Act;

2. Cease and desist from 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;

3. Cease and desist from 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;

4. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Immediately return Mr. Refford to the Building Head Custodian position at Honeybrook Elementary School;

(b) Immediately return to the status quo ante of permitting second shift custodians to work first shift during summers;

(c) 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

(d) 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-seventh day of March 2018.

PENNSYLVANIA LABOR RELATIONS BOARD

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JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

TWIN VALLEY EDUCATIONAL SUPPORT PROFESSIONALS ASSOCIATION PSEA/NEA	:	
v.	:	CASE NO. PERA-C-17-157-E
TWIN VALLEY SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

The Twin Valley School District hereby certifies that it has ceased and desisted from discriminating against bargaining unit employes and unilaterally changing bargainable terms and conditions of employment in violation of Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act; that it has returned Donald Refford to the position of Building Head Custodian at Honeybrook Elementary School; that it has restored the past practice and policy of permitting bargaining unit employes assigned to second shift throughout the school year to work the first shift during summer school breaks; 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