COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

FINAL ORDER

The Abington Heights Education Association (Association) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on January 12, 2016 to a Proposed Decision and Order (PDO) issued on December 24, 2015, in which the Hearing Examiner dismissed the Association's Charge of Unfair Practices alleging that the Abington Heights School District (District) violated Section 1201(a)(1), (3) and (5) of the Public Employe Relations Act (PERA). The District filed a response to the exceptions on February 3, 2016, and following an extension of time granted by the Secretary of the Board, timely filed a supporting brief on February 23, 2016. The Findings of Fact in the PDO are summarized as follows.

Joe Doe,[1] a student at the District, suffered from food allergies that could result in anaphylaxis.[2] (FF 5). Joe Doe's condition is so serious that any allergic reaction must be considered an emergency. In Joe Doe's 504 Plan,[3] his physician explained that even the slightest hint of a hive on Joe Doe is an emergency. The doctor indicated that non-nursing staff members (teachers and bus drivers) must be able to give Joe Doe the proper medication to prevent respiratory failure. (FF 17). In the 504 Plan, Joe's physician prescribed using Triaminic antihistamine strips on Joe's tongue if a teacher or bus driver sees a hive, to prevent escalating anaphylaxis. (FF 6). The 504 Plan, and the District, require non-nursing staff, such as Joe's bus driver and teachers, to administer the medication because the school nurse is never on the bus and is not always present in the school building where Joe takes classes. (FF 5, 17).

The District has an obligation under the 504 Plan to properly train non-nursing staff with respect to how and when to administer medication to Joe Doe. The Hearing Examiner found that District Superintendent Dr. Michael Mahon credibly testified as follows: "what we don't want to live with is the outcome if we withhold that treatment early on in the case of an anaphylactic reaction." (FF 16). The emergency plan is designed to prevent Joe Doe from undergoing a cascade of reactions, resulting from anaphylaxis, through the use of Triaminic strips and the Epi-pen, and is designed to prevent Joe Doe from experiencing a cessation of respiratory function. (FF 10). Even if Joe is not actually experiencing an allergic reaction, there are no adverse effects from using the Triaminic strips other than possibly becoming sleepy or tired. (FF 6).

Deborah Shane is a registered nurse at the District, and is in a position of authority regarding the administration of health services. (FF 11). At a monthly health services meeting, Ms. Shane expressed her concerns about the 504 Plan and her opinion that only a licensed school nurse may administer non-emergency medication under Pennsylvania school law.[4] (FF 7). The Association also filed a grievance over the District's requirement that non-nursing staff administer medication (in the form of

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[1] In the PDO, the Hearing Examiner changed the student's name to protect his privacy.

[2] Anaphylaxis is a severe, potentially life-threatening allergic reaction that requires immediate medical treatment.

[3] A 504 Plan is a plan that sets forth the specific aids, services or accommodations that are to be provided to a particular student to meet the student's educational needs under Section 504 of the federal Rehabilitation Act of 1973. The Rehabilitation Act protects otherwise qualified students who have physical, mental or health impairments from discrimination because of those impairments. *See* 22 Pa. Code §§ 15.1 - 15.11.

[4] Dr. Mahon agreed with Nurse Shane's position that only nursing staff should administer medications to students in non-emergency situations. (FF 7).

Triaminic strips and Epi-pen injections) to Joe Doe under his food allergy plan. On September 13, 2011, Ms. Shane provided testimony on behalf of the Association at the grievance arbitration hearing. (FF 5).

The Hearing Examiner found that Superintendent Mahon was present at the arbitration hearing and understood Ms. Shane's testimony to indicate that teachers should not use the Epi-pen until Joe Doe stops breathing, which contradicted the mandated procedure specified by Joe's physician. Dr. Mahon indicated that Ms. Shane, on cross-examination, did seem to modify her position to acknowledge that the Epi-pen should be used if Joe Doe's breathing is labored. However, Dr. Mahon also testified that Ms. Shane then reiterated her prior statements that Joe Doe would have to stop breathing to trigger the use of the Epi-pen. Joe Doe's mother was sitting next to Dr. Mahon at the arbitration hearing and began to cry as Ms. Shane gave her testimony. (FF 9). Ms. Shane's testimony occurred in the presence of teachers who were charged with implementing the 504 Plan. (FF 11).

Motivated by concerns of federal liability if the District failed to follow the 504 Plan and the effect on Joe Doe and his family if District staff let an allergic reaction progress too far, Dr. Mahon issued a written memorandum to Ms. Shane on September 28, 2011, which was placed in her personnel file. (FF 12, 13). The reason Dr. Mahon placed the written memo in Ms. Shane's personnel file, rather than having an unrecorded side conversation with her about her opinions regarding Joe's 504 Plan, is that, in his view, Ms. Shane expressed an incorrect position regarding when the Epi-pen should be used and her statements in this regard could affect the health and safety of a child. He wanted "absolute clarity regarding [Ms. Shane's] obligations to [Joe Doe]." Dr. Mahon believed that there could be no ambiguity about directing Ms. Shane to follow the 504 Plan. Dr. Mahon believed that the memo protected the District's legal position if something happened to Joe Doe and the District was sued for damages because staff did not properly follow the 504 Plan. (FF 16). Dr. Mahon's September 28, 2011 letter to Ms. Shane stated as follows:

> During your testimony in the arbitration hearing on September 13, 2011, you made numerous statements that fundamentally call into question your ability and willingness to respond to an emergency involving [Joe Doe]. As a result, it is my obligation to take the extraordinary step of demanding in this memorandum that you follow his emergency plan. In particular, you must follow the physician's directives in the plan.
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> While your testimony was contradictory and convoluted, you left the clear impression that teachers are somehow unable to determine if [Joe] has a hive. You further described the need for the nurse to develop some form of medical history or analysis before administering the Triaminic strip in spite of the presence of a hive.
>
> The welfare of [Joe Doe] and, less significantly, your continued employment in Abington Heights are dependent upon your willingness and ability to provide the care required in his plan in a faithful and expeditious manner.
>
> It is further expected of you to train and assist non-medical members of the staff to do the same.
>
> Your testimony regarding the use of epi-pens in a crisis situation was no less than frightening. You stated that teachers did not have the requisite knowledge or judgment to identify any of the indicators in the plan, such as appearing blue, that call for administration of the epi-pen. You stated that the standard for the administration of the epi-pen is met when the "student stopped breathing". Upon cross examination of this reckless position, you modified your statement to mean something approaching extreme breathing difficulty. Later in your testimony, you reiterated that the standard for epi-pen administration was if the "student stops breathing".
>
> While your testimony and analysis were unclear at best, there must be absolute clarity regarding your obligations to [Joe Doe]. The criteria for him to receive the epi-pen are spelled out in his emergency plan. The emergency plan is, itself, the standard for epi-pen administration that must

> be used by both you and the staff. You must not add your own standards or conditions that undermine the plain meaning of the plan. You must always use good judgment in administration of Triaminic strips and especially the epi-pen. You are reminded of both the fragility of [Joe Doe's] health and of the severe implications of epi-pen administration.
>
> Failure to follow the emergency plan or failure to train others to follow the emergency plan will result in disciplinary action, up to and including termination. I am willing to discuss the matters referenced in this memo at any time. If you wish to do so, contact my secretary, Nettie Lowe, to arrange an appointment.
>
> Finally, you are directed to read the attached agreement that references your obligations to [Joe Doe]. If you agree, you must sign and return a copy of the agreement to me. The agreement and this memo will be placed in your file. You must contact me immediately if you disagree or refuse to sign.

(FF 14).

Based on the above Findings of Fact, the Hearing Examiner concluded that the September 28, 2011 letter to Ms. Shane was a directive and not discipline. Further, the Hearing Examiner accepted Dr. Mahon's concerns over Joe Doe's safety and the potential liability for the District as legitimate business reasons for issuing the September 28, 2011 letter and placing it in Ms. Shane's personnel file. Accordingly, the Hearing Examiner dismissed the Association's charge under Section 1201(a)(3) of PERA. The Hearing Examiner further concluded that the District's asserted legitimate business reason outweighed the alleged coerciveness of Dr. Mahon's letter, and thus the District established a defense to the charge of an independent violation of Section 1201(a)(1) of PERA.[5]

In its exceptions, the Association argues that the Hearing Examiner erred in making certain Findings of Fact and in dismissing the Association's charge under Section 1201(a)(1) and (3) of PERA. Generally however, absent compelling circumstances, the Board does not disturb the credibility determinations of its Hearing Examiners who are able to observe the manner and demeanor of the witnesses during their testimony. *E.g.* **Hand v. Falls Township**, 19 PPER ¶ 19012 (Final Order, 1987); **AFSCME District Council 84 v. Department of Public Welfare**, 18 PPER ¶ 18028 (Final Order, 1986). Here, we find no compelling reasons to reverse the Hearing Examiner's credibility determinations, which are not only the basis for the challenged Findings of Fact, but also are the basis for the Hearing Examiner's conclusion that the District had significant legitimate business reasons for its action and did not have an unlawful discriminatory motive.

More specifically, the Association challenges Findings of Fact 7 through 9, 11, 12 and 17. In this regard, we note that the Hearing Examiner's Findings of Fact may be derived from credibility determinations and reasonable inferences drawn from the record as a whole. **St. Joseph's Hospital v. Pennsylvania Labor Relations Board**, 473 Pa. 101, 373 A.2d 1069 (1977); **Pennsylvania State Corrections Officers Association v. Commonwealth, Department of Corrections Fayette SCI**, 40 PPER 104 (Final Order, 2009). On review of the record, the challenged Findings of Fact are supported by the credited testimony of Dr. Mahon. Although the Association points to contrary testimony, merely because there is other testimony in the record that could support other findings does not require reversal of the Hearing Examiner's credibility determinations and resultant findings of fact. *See* **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981); **Temple University Health System**, 40 PPER 3 (Final Order, 2009). Accordingly, the Association's exceptions to the above Findings of Fact are dismissed.

Findings of Fact 15 and 16 pertain to the District's motive for issuing the September 28, 2011 letter and placing it in Ms. Shane's personnel file. The Association challenges those Findings of Fact, as well as the Hearing Examiner's discussion of the

[5] The Hearing Examiner also dismissed the Association's charge under Section 1201(a)(5) of PERA because no evidence was introduced to support a failure to bargain in good faith. The Association has not filed exceptions to the dismissal of the charge under Section 1201(a)(5). 34 Pa. Code §95.98(a)(3).

facts and his conclusion that the Association's claim of discrimination under Section 1201(a)(3) of PERA should be dismissed. The Association's exceptions in this regard are a challenge to the Hearing Examiner's credibility determinations regarding the District's motive for its action. The Hearing Examiner accepted as credible Dr. Mahon's testimony that the wording of the September 28, 2011 letter, and the decision to place the letter in Ms. Shane's personnel file, were motivated by his concerns for Joe Doe's health and the potential liability for the District. The Hearing Examiner accepted these concerns as legitimate business reasons motivating the District's issuance of the letter. As noted above, there are no compelling reasons of record to reverse the credibility determinations of the Hearing Examiner. **Falls Township**, *supra.* Indeed, it cannot be disputed that Joe Doe has a severe allergic condition that requires immediate medical attention in response to any exposure to prevent anaphylaxis and possibly death. Thus, regardless of whether the letter could have been worded more congenially, or recorded elsewhere than in her personnel file, or even that the whole ordeal could have been handled differently in the eyes of the Association, the fact of the matter is that the Hearing Examiner found that the District was not motivated by union animus over Ms. Shane testifying at an arbitration, but by a sincere concern over Joe Doe's medical care and potential liability for the District. Accordingly, on this record, as found by the Hearing Examiner, the Hearing Examiner did not err in inferring that the District harbored no unlawful motive, and thus did not err in dismissing the Association's charge of discrimination under Section 1201(a)(3) of PERA. *See* **Pennsylvania State Troopers Association v. Pennsylvania State Police**, 42 PPER 46 (Final Order, 2011); *see also* **Wright Line**, 251 NLRB 1083, 105 LRRM 1169 (1980), *enforced*, 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989, 102 S.Ct. 1612 (1982).

The Association also argues that the Hearing Examiner erred in the application of **Ringgold Education Association v. Ringgold School District**, 26 PPER ¶26155 (Final Order, 1995), to its allegation of an independent violation of Section 1201(a)(1) of PERA. The test applied by the Board to determine whether there has been an independent violation of Section 1201(a)(1) of PERA is based on the totality of the circumstances in which the particular acts occurred, and whether the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable employe. **Fink v. Clarion County**, 32 PPER ¶ 32165 (Final Order, 2001); **Northwestern Education Association v. Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985). The employer's credible legitimate reasons, *i.e.* motives, are not an absolute defense to a charge under Section 1201(a)(1) of PERA but are among the many factors falling within the totality of the circumstances.

We certainly do not condone characterizing an employe's arbitration testimony as "contradictory and convoluted", "no less than frightening", "reckless", and "unclear at best", and memorializing that characterization in an employe's personnel file. *See* **Pennsylvania State Troopers Association v. Pennsylvania State Police**, 36 PPER 121 (Final Order, 2005). However, that is not the entirety of the totality of the circumstances in this case. As found above, Dr. Mahon had legitimate reasons and good intentions for issuing a directive to Ms. Shane to follow Joe Doe's 504 Plan. Here, Ms. Shane was responsible for instructing teachers on the use of the Epi-pen under Joe Doe's 504 Plan. (J-2). The 504 Plan clearly instructed that the immediate administration of the Epi-pen and Triaminic strips is prescribed by Joe Doe's physician to prevent anaphylaxis. Dr. Mahon believed that at the arbitration hearing, in the presence of the teachers whom Ms. Shane had a duty to instruct in the use of the Epi-pen, Ms. Shane testified that teachers should not administer the Epi-pen until the student stops breathing. Indeed, Dr. Mahon's directive to Ms. Shane did not concern the fact that she testified on behalf of the Association at the arbitration, but rather the content of her testimony that raised concern by the District regarding her commitment to follow the emergency protocol prescribed by Joe Doe's physician. In our judgment given the particular totality of circumstances of this case, the District's issuance of the September 28, 2011 directive to Ms. Shane would not coerce reasonable employes from giving testimony at an arbitration hearing. Accordingly, the Hearing Examiner did not err in dismissing the Association's claims of an independent violation of Section 1201(a)(1) of PERA.

After a thorough review of the exceptions and all matters of record, the Hearing Examiner did not err in concluding that the District did not violate Section 1201(a)(1) and (3) of PERA. Accordingly, the Association's exceptions to the PDO are dismissed and the December 24, 2015 PDO shall be made final.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the Abington Heights Education Association are hereby dismissed, and the December 24, 2015 Proposed Decision and Order, be and hereby is made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Robert H. Shoop, Jr, Member, and Albert Mezzaroba, Member this nineteenth day of July, 2016. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.