COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

COLUMBIA-MONTOUR AREA VOCATIONAL-TECHNICAL SCHOOL EDUCATION ASSOCIATION	:	
	:	Case No. PERA-C-12-367-E
v.	:	
COLUMBIA-MONTOUR AREA VOCATIONAL-TECHNICAL SCHOOL	:	

PROPOSED DECISION AND ORDER

On December 3, 2012, the Columbia-Montour Area Vocational Technical School Association (Association or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Columbia-Montour Area Vocational Technical School (School or Respondent) alleging that the School violated Section 1201(a)(1), (3) and (8) of the Public Employe Relations Act (PERA).

On January 14, 2013, the Association filed an amended charge of unfair practices.

On February 13, 2013, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and August 14, 2013 in Harrisburg was assigned as the time and place of hearing if necessary, before Thomas P. Leonard, Esquire, a hearing examiner of the Board.

The hearing was necessary and held as scheduled, at which time the parties presented testimony, introduced documentary evidence and cross-examined witnesses.

On November 11, 2013, the Association submitted a post-hearing brief. On December 11, 2013, the School submitted a post-hearing brief.

The examiner, on the basis of the briefs and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The parties stipulated and agreed that the Columbia-Montour Area Vocational Technical School is a public employer within the meaning of Section 301(1) of PERA. (N.T. 25-26)

2. The parties stipulated and agreed that the Columbia-Montour Area Vocational Technical School Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 26)

3. The Association is the exclusive representative of the School's professional employees. (N.T. 28-29)

4. The Association and the School are parties to a collective bargaining agreement for the professional employees' wages, hours and terms and conditions of employment. (N.T. 28-29)

5. The CBA contains a grievance procedure that provides for binding arbitration of grievances. (N.T. 28-29)

6. Scott Shaffer was a learning support math teacher at the School for eight years, from 2002 to 2010 when he was terminated. (N.T. 27)

7. On July 14, 2010, Dr. Thomas Rushton, the School's Executive Director, issued Shaffer a letter of reprimand because of a parent's complaint about Shaffer engaging in an improper Facebook exchange with her daughter, a former student and a minor. Rushton stepped down as Executive Director a day or two after July 14, for reasons not related to the discipline of Shaffer. (N.T. 31, 37-38, Association Exhibits 1 and 5)

8. This was the first discipline Shaffer received in his eight years of teaching. (N.T. 49, Association Exhibits 1 and 3)

9. On August 13, 2010, William L. Forsythe, the new Executive Director, issued Shaffer a notice to attend a Loudermill hearing on August 18, 2010 "due to the prior matter regarding M. A. [examiner's use of initials]" the minor involved in the July 14 reprimand. The charges were that Shaffer offered alcohol to a minor. (N.T. 39, Association Exhibit 2)

10. The School held the Loudermill hearing and on August 20, 2010, Forsythe sent Shaffer a letter suspending him from work without pay, pending results of the resolution of a complaint the School filed with the Pennsylvania Department of Education. (N.T. 39, Association Exhibit 2)

11. The Association filed a grievance over the suspension and took the grievance to arbitration. (N.T. 46, Association Exhibit 4)

12. Prior to the arbitration, the Association requested the School to provide documentation about the case, including Shaffer's personnel file. The School produced the file. It showed only one occasion for discipline, in 2010, for the Facebook communication. (N.T. 49, Association Exhibit 3)

13. The personnel file showed no indication that the School had raised concerns with Shaffer before 2010, that it had concerns about an improper relationship with a student or a former student, or that he provided alcohol to a student or a former student. (N.T. 49, Association Exhibit 3)

14. At the arbitration, Shaffer testified that: (1) he had never been disciplined before 2010 (or for any reason other than the 2010 Facebook issue); (2) he had never, before 2010, been accused of behaving improperly toward a student or former student; and (3) he wouldn't give alcohol to minors. (N.T. 53-54; Association Exhibit 4 at 60-61, 100)

15. At the arbitration hearing before Arbitrator Scott E. Buchheit, the School offered testimony of two administrators: Executive Director Forsythe and Principal Bacher. Both Forsythe and Bacher were present when Shaffer testified. (N.T. 46, 55)

16. Although Forsythe and Bacher heard Shaffer's testimony, neither official claimed, in their testimony, that (1) Scott had been disciplined before 2010; (2) Scott had been accused, before 2010, of having an improper relationship with a student or former student or giving alcohol to a student or former student; or (3) a "meeting" had occurred in 2007 between Shaffer and the School where such issues were raised. (N.T. 55, Association Exhibit 4, at 18-58).

17. The School did not present any evidence relating to those three issues at the Arbitration. (N.T. 56-57, Association Exhibit 4)

18. On March 8, 2012, Arbitrator Buchheit issued an Opinion and Award to resolve the Complainant's September 22, 2010 Grievance. The 2012 Award ordered, as a remedy:

> ...The District shall rescind the indefinite suspension on the Grievant and restore him to a teaching position. In addition, the District shall make the Grievant whole for all compensation lost as a result of his indefinite suspension, from the date of the filing of the grievance until the Grievant is reinstated to his former status as an active teacher.

(N.T. 58, Association Exhibit 5 at 28.

19. The arbitrator made specific findings regarding Shaffer's disciplinary history and held there was no discipline before 2010. (N.T. 58, Association Exhibit 5, at 3)

20. At the time of the 2012 Award, the Pennsylvania Department of Education (PDE) was still investigating Shaffer's teacher certification. In his Opinion, the Arbitrator suggested, but did not require, that, in lieu of Shaffer's return to the classroom, the parties could reach an agreement by which Shaffer would remain on a paid leave of absence pending the results of PDE's investigation. The Arbitrator made it clear that the suggestion was not mandatory and that each party would be required to consent to such an agreement. (N.T. 58, Association Exhibit 5, at 27, n.9.)

21. Following the issuance of the 2012 Award, the parties entered a Memorandum of Agreement under which they agreed, *inter alia*: that Shaffer would be placed on administrative leave with pay until the conclusion of PDE's investigation, that the School would pay Shaffer the back pay that had been ordered by the Arbitrator, and that the School would not appeal the 2012 Award. (N.T. 59, Association Exhibit 6)

22. On May 29, 2012, the PDE Hearing Examiner for the Professional Standards and Practices Commission (PSPC), Jackie Wiest Lutz, Esquire, issued a Proposed Report, which said, inter alia

> The Hearing Officer does not believe that the Respondent is a danger to any student or minor child and the evidence does not establish that. Similarly, the evidence does not establish that respondent is a danger to the public. The Respondent has paid a substantial price for his actions. To further suspend or revoke Respondent's teaching certificate under these facts would only be punitive.
>
> Given the range of disciplinary sanctions that can be imposed, a public reprimand is more appropriate commensurate with the nature and severity of Respondent's conduct.

Hearing Examiner Lutz recommended that Shaffer be reprimanded and rejected the School's request that his certification be revoked. The School did not file exceptions to the Proposed Report. (N.T. 123, 130, Association Exhibit 9).

23. On August 15, 2012, Shaffer called Forsythe to inquire when he would begin teaching again, as the school year was to begin on August 20. (N.T. 70-73, 102-103)

24. An hour or so later, Forsythe called Shaffer and informed him there was a new termination issue, and directed Shaffer to come to a Loudermill meeting on August 17, to gather information and make a determination on Shaffer's continued employment. (N.T. 70, 96, 112-113; Association Exhibit 11, School Exhibit 1)

25. Forsythe testified in this unfair practice hearing that on July 25, 2012, he received information from the parent of one of Shaffer's former students, which caused him to initiate an investigation of Shaffer. (N.T. 134)

26. Between July 25, 2012, and August 15, 2012, Forsythe and the School's administration investigated the allegations. (N.T. 140)

27. Shaffer chose not to participate in the Loudermill hearing. (N.T. 98-99)

28. On August 17, 2012, the School suspended Shaffer, with pay. (N.T. 71, Association Exhibit 11 at 2)

29. On September 6, 2012, the School issued charges of dismissal against Shaffer. The charges related to allegations that Shaffer had lied at the September 28, 2010 arbitration in an attempt to deceive the arbitrator. (N.T. 71, Association Exhibit 11 at 5-6)

30. The Association filed a grievance related to Shaffer's dismissal, alleging that the School lacked just cause to dismiss Shaffer. The arbitration regarding Shaffer's dismissal has not been resolved. (N.T. 22-25)

DISCUSSION

The Association's charge of unfair practices alleges that the School violated Section 1201(a)(1),(3) and (8) of PERA by failing to comply with an arbitration award that reinstated Scott M. Shaffer to his employment as a teacher.

Section 1201(a)(8) Allegation

The first charge to be discussed is the allegation that the School violated Section 1201(a)(8) of PERA, which prohibits public employers from [r]efusing to comply with the provisions of an arbitration award deemed binding under Section 903 of Article IX" of PERA. 43 P.S. 1201(a)(8).

In order to prove a violation of this section, the Association must show: (1) the existence of the Arbitration Award; (2) conclusion of all appeals regarding the Award (i.e. that the Award is final and binding); and (3) the Vo-Tech's failure to honor and implement the Award. **State System of Higher Educ.**, 528 A. 2d 278, 281 (Pa. Cmwlth. 1987)

In the present case, the Association has proven all three elements. First, there is an arbitration award. On March 8, 2012, arbitrator Scott Buchheit issued an Opinion and Award that sustained the Association's grievance and ordered Shaffer's reinstatement to active teaching.

Second, the award is final and binding, in that the School did not file an appeal. However, following the award, the case took an unusual turn. The School had also filed a complaint with the Pennsylvania Department of Education (PDE) against Shaffer's teaching certificate. The parties acted on the arbitrator's suggestion and agreed that Shaffer would not return to work until the PDE proceeding concluded, but would still receive full backpay and continue to receive his full salary.

On May 29, 2012, the hearing examiner for the PDE's Professional Standards and Practices Commission (PSPC) issued a Proposed Report summarizing that Shaffer acted improperly in 2010 when communicating on Facebook but did not revoke or suspend Shaffer's teaching certificate. The PDE hearing examiner issued a "public reprimand," which did not impact the validity of Shaffer's teaching certificate and did not bar Shaffer from teaching or being reinstated. Neither party appealed the PDE Hearing Examiner Proposed Report. Therefore, this post-award procedure before PSPC did not change the "final and binding" nature of the Buchheit award, in either a legal or practical sense.

Third, once this post-award procedure concluded, the School has not implemented the award. The School has not returned Shaffer to active teaching. On August 15, 2012, Shaffer contacted the School's Executive Director, William Forsythe, that he wished to return to work. An hour later, Forsythe returned Shaffer's call only to inform him that there was a new termination issue. Forsythe directed Shaffer to a Loudermill hearing on August 17, the Friday before the start of the school year on Monday August 20. On the advice of counsel, Shaffer waived the Loudermill hearing, but preserved his right to challenge any new termination. Shaffer did not attend the Loudermill hearing because he believed he was being treated unfairly and because he was upset and frustrated with the School, having fought for more than two years to win his job back and then learning, less than a week before reinstatement, that there were new "issues" against him.

The School's defense is that it was compelled to suspend Shaffer because of information it learned on July 25, 2012 that convinced the School that Shaffer had "deceived and misled" the arbitrator who had ordered him reinstated to active teaching. On August 17, Forsythe suspended Shaffer with pay and stated that the School would make a decision "on the future of his employment. On August 23, 2012, the School's legal counsel wrote to the Association's legal counsel that the reason for the suspension were that Shaffer had "deceived and misled" the Arbitrator. The School's counsel, in his opening

statement in this unfair practice hearing, stated that Shaffer was deceptive and misleading in two ways: falsely answering the question of whether he was ever disciplined in regard to having improper relationships with a student or former student of this school and falsely stating that he would not provide alcohol to a minor. (N.T. 17)

The School argues that there has been a changed circumstance or "intervening event" that allows it not to comply with the arbitration award. The Board has allowed non-compliance "in those rare instances" when changed circumstances "would place the grievant in a better position than he or she would have been had the improper conduct not occurred." See **AFSCME District Council 88 v. Berks County and Berks County Coroner**, 39 PPER 70 (Proposed Decision and Order, 2008). However, the employer must prove, at the Board hearing, that the "changed circumstance" or "intervening event" actually exists. In **Minersville Area School District**, 19 PPER ¶ 19167 (Proposed Decision and Order, 1988) the hearing examiner found that the District's failure to reinstate a custodian who had been awarded reinstatement by the arbitrator could not be excused by the assertion, without proof, that the custodian was "totally incapacitated." **Id** at 409. The Board ruled that the District had failed to prove the "changed circumstance" an therefore had an obligation to honor the Arbitration Award. **Id.**

The same result will occur in the present case. The School has alleged a "changed circumstance" or "intervening event" that supposedly prevents it from reinstating Shaffer to active employment: newly discovered evidence that Shaffer lied in the arbitration hearing. However, the School failed to offer competent and admissible proof that Shaffer did, in fact, lie in the arbitration hearing. I sustained hearsay objections to documents the School offered to prove these points.

At the unfair practice charge hearing, the School attempted to introduce evidence in the form of an email from a parent and a letter from a student to prove that Shaffer had provided alcohol to a former student who was under 21. Because the alleged authors of these documents were not present to authenticate them, the Association objected to their admissibility and I sustained the objection. The School also attempted to introduce notes of a 2007 meeting between Shaffer and former Executive Director Cosmos Curry to prove that Shaffer had been disciplined before for having an improper relationship with a student or a former student. As Curry was not there to authenticate the notes, the Association objected to these as well and I sustained the objection.

With the record containing only the School's assertion that Shaffer lied in the arbitration hearing, I must deny the School's defense that changed circumstances or an intervening event excuses it from complying with the Buchheit award.

Section 1201(a)(1) Allegation

The Association has also alleged that the School's action violated Section 1201(a)(1) of PERA, which prohibits an employer from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this Act." 43 P.S. §1101.1201(a)(1). An employer commits an independent violation of section 1201(a)(1) of PERA "where in light of the totality of the circumstances the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights." **Fink v. Clarion County**, 32 PPER ¶ 32165 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employes have in fact been coerced. **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985); **Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI**, 35 PPER ¶ 97 (Final Order, 2004).

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

> "An independent violation of Section 1201(a)(1) occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or

interfere with the protected activities of a reasonable employe, regardless of whether anyone was actually coerced. **Fink v. Clarion County**, 32 PPER ¶ 32165 (Final Order, 2001). The employer's motive for its actions is irrelevant. **Northwestern Education Association v. Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985)."

35 PPER at 303.

Based on the totality of the circumstances in this case, the Association has made a legally sufficient case that the School has committed an independent violation of Section 1201(a)(1). The School's conduct would have a tendency to coerce a reasonable employe from exercising his right to file a grievance and take it to arbitration.

After the arbitration award was rendered in Shaffer's favor and after the PDE PSPC Hearing Examiner's Proposed Report dismissed the School's complaint to remove Shaffer's teaching certificate, Shaffer still had to make his own inquiry as to when he would be reinstated. After he did that, and just days before school was to begin, the School announced he was being suspended again. It based this decision on its assertion that he had given false and misleading testimony at the arbitration hearing. As discussed above, Shaffer disputes this and he has an arbitration award that supports his position. It is understandable that an employee in his position, who successfully pressed his case for reinstatement in two forums over two years, would have reason to believe that the employer was not reinstating him as retaliation for his success in those forums when the employer's reasons involve the same issues the arbitrator and the PDE hearing examiner decided.

Section 1201(a)(3) Allegation

The Association has also alleged the School violated Section 1201(a)(3) of PERA, which prohibits an employer 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." 43 P.S. §1101.1201(a)(3).

In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must prove that the employe engaged in protected activity, that the employer was aware of that protected activity, and that but for the protected activity the adverse action would not have been taken against the employe. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). The complainant must establish these three elements by substantial and legally credible evidence. **Shive v. Bellefonte Area Board of School Directors**, 317 A.2d 311 (Pa. Cmwlth. 1974). **St. Joseph's Hospital**, **supra**.

There is no dispute about the first two elements of the **St. Joseph's** test. Shaffer was engaged in protected activity when he filed the grievance that resulted in an award that reinstated him. The School had knowledge of his protected activity.

The disputed issue in this case is the third part of the test, was the School motivated by Shaffer's protected activity when it terminated him. The "motive creates the offense" under section 1201(a)(3). **PLRB v. Stairways, Inc.**, 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), **quoting PLRB v. Ficon**, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969).

Since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. **PLRB v. Montgomery County Geriatric and Rehabilitation Center**, 13 PPER ¶ 13242 (Final Order, 1982); **St. Joseph's Hospital**, **supra**. However, an inference of anti-union animus must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established.' **Shive**, **supra** at 313.

Having observed and listened to the School's witnesses at this hearing, I am not convinced that the School dismissed Shaffer because he exercised protected activity.

Furthermore, the Association has not proven, either directly or by inference, that the School was motivated by anti-union animus in dismissing him.

Rather, it appears the Executive Director Forsythe took action for what he believed was a proper motive, responding to a complaint about Shaffer's unsuitability to return to active teaching. However, as set forth above, such a motivation does not make the School's decision a legally correct one in light of the fact that it was contrary to an arbitration award and in violation of PERA's prohibition against failing to comply with an arbitration award.

Lest it seem anomalous that the School's decision violated Section 1201(a)(8) but not Section 1201(a)(3), it should be noted that the latter statutory section requires proof of an anti-union motivation. Even though Forsythe and the School erred in using an eleventh hour allegation against him as a reason not to reinstate him, thereby violating section 1201(a)(8), I do not believe that Forsythe and the School were possessed of anti-union motivation when they made their dismissal decision.

CONCLUSIONS

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

1. The Columbia-Montour Area Vocational Technical School is public employer within the meaning of Section 301(1) of PERA.

2. Columbia-Montour Area Vocational Technical School Education 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 School has committed unfair practices in violation of Section 1201(a)(1) and (8) of PERA.

5. The School has not committed unfair practices in violation of Section 1201(a)(3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the School 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 refusing to comply with the provisions of an arbitration award deemed binding under Section 903 or Article IX.

3. Take the following affirmative action:

(a) Comply with the provisions of the March 8, 2012 arbitration award;

(b) Reinstate Scott M. Shaffer to active employment and make him whole for all losses, including backpay with statutory interest;

(c) Expunge from Scott M. Shaffer's personnel file any reference that he was charged with dismissal on September 6, 2012, or that he provided false evidence at a hearing;

(d) 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;

(e) 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 and

(f) Serve a copy of the attached affidavit of compliance upon the Association.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fifth day of July, 2014.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner