COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

EAST ALLEGHENY EDUCATION ASSOCIATION PSEA/NEA	:	
	:	Case No. PERA-C-14-174-W
v.	:	
EAST ALLEGHENY SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On June 3, 2014, the East Allegheny Education Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the East Allegheny School District (District or Employer), alleging that the District violated Section 1201(a)(1),(3), and (5) of the Public Employe Relations Act (PERA or Act).

On June 12, 2014, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation for the purpose of resolving the matters in dispute through mutual agreement of the parties, and designating October 29, 2014, in Pittsburgh, as the time and place of hearing, if necessary.

Hearings were necessary and were held before the undersigned Hearing Examiner on October 29, 2014 and June 10, 2015, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed a post-hearing brief in support of its position on August 17, 2015. The District filed a post-hearing brief in support of its position on September 23, 2015.

The Examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 8-9)

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

3. The Association and District were parties to a Collective Bargaining Agreement (CBA) from 2009 through 2012. Since the expiration of the CBA, the parties have been bargaining under Act 88, but were still working without a contract during the proceedings in this matter. The Association went on strike in September 2014. (N.T. 19-20; Joint Exhibit 1)

4. Cheryl Ihnat has been employed with the District for approximately 17 years and currently works as a counselor for grades four through eight at the Logan Middle School. Ihnat has also been president of the Association since September 2013 and has been involved in bargaining the successor agreement. (N.T. 18-19)

5. In February 2014, Ihnat received a letter from Valerie Ekis, who is a teacher and member of the bargaining unit, and Donald MacFann, the assistant to the superintendent, requesting donations for the junior class prom fashion show fundraising event planned for February 28, 2014. (N.T. 23-26; N.T. II[1] 8-9; Association Exhibit 1 & 2)

6. Ihnat contacted Ekis, and the Association donated gift baskets totaling over $300.00 for the event. In connection with the donation, Ihnat asked Ekis if the

[1] The transcript for the October 29, 2014 hearing is identified as N.T., while the transcript for the June 10, 2015 hearing is identified as N.T. II.

Association could set up a table at the event, and Ekis responded in the affirmative. The Association had set up tables at other District events in the past, including homecoming and academic awards functions. (N.T. 26-27)

7. On February 28, 2014, the Association participated in the prom fashion show, which was held in the school cafeteria. The Association had a table in the back with cups, pens, and postcards, which were labeled with the name of the Association and positive facts about the bargaining unit members. Ihnat was present and manned the table along with two other bargaining unit members, who were wearing t-shirts which contained language about supporting teachers and students.[2] The table also had two posters the size of a piece of paper on each end, which simply read "608," which reflected the number of days the teachers had been working without a contract. (N.T. 28-29)

8. On March 10, 2014, Ihnat attended a School Board meeting along with a number of Association members and filled out a request to speak. When called on to speak, Ihnat introduced herself as president of the Association and attempted to read a prepared statement verbatim. (N.T. 30-35)

9. After a few opening lines, the School Board president, Gerri McCullough interrupted Ihnat by pounding a gavel and told her to be quiet. Ihnat and McCullough had a brief exchange regarding how much time Ihnat was permitted in addressing the School Board, after which the superintendent, Roger D'Emidio, went over to McCullough and spoke to her. At that point, Ihnat was allowed to finish reading her statement. (N.T. 35-36)

10. In addressing the School Board, Ihnat used the word "you" to collectively refer to the entire School Board as a whole, and did not single out any particular School Board member individually. (N.T. 35-37; Association Exhibit 5)

11. After finishing her prepared statement, Ihnat pointed to the door of the School Board meeting room and walked out, as the bargaining unit members in attendance followed. As Ihnat was exiting, McCullough loudly stated "thank you for lying, Ms. Ihnat." (N.T. 37-38)

12. On March 19, 2014, Ihnat represented Ekis in an investigatory meeting with MacFann. Prior to the meeting, Ihnat advised MacFann that she intended to bring Deb Hlavach, the Association's grievance chairperson, to the meeting as well. MacFann responded by advising that only one Association representative could attend due to operational expenses and/or coverage concerns. MacFann had never before denied the Association's request to bring additional representatives to an investigatory meeting. The Association had always been permitted to have more than one representative present for investigatory meetings, if requested, for many years. (N.T. 39-41, 147, 171, 182-185)

13. Ihnat attended the March 19, 2014 meeting with Ekis and MacFann, during which MacFann provided Ekis with what he called a "letter of disappointment," in part, for permitting the Association to attend the prom fashion show. MacFann claimed that he had received complaints regarding the matter and informed Ekis it was not advisable for her to have the Association present for the event. Ekis explained that the Association had donated for the event. MacFann went on to say that the Association is not permitted to have a table at any District functions. (N.T. 41-48, 120-121; Exhibit A-6)

14. On March 21, 2014, Ihnat was called to a meeting with MacFann, which took place after school. Ihnat attended the meeting with Hlavach and Rob Myers, the PSEA UniServ representative. During the meeting, MacFann questioned Ihnat about the comments she had made at the March 10, 2014 School Board meeting. (N.T. 50-55)

[2] Ihnat testified that the shirts either said "supporting teachers means supporting students" or "supporting students means supporting teachers." (N.T. 28-29).

15. On April 2, 2014, Ihnat was called to another meeting with MacFann, during which Hlavach and Myers were again present. At that meeting, MacFann provided Ihnat with a letter dated March 13, 2014, which he signed and which provided in relevant part as follows:

> Dear Mrs. Ihnat:
>
> I am presenting you with this written notification regarding your wrongful criticism, specifically, your inappropriate comments and accusatory language toward the administration and school board. This wrongful criticism was made and witnessed by both parents and students on March 10, 2014, at approximately 7:15 p.m. during the East Allegheny School Board meeting. The comments you made are inappropriate, unprofessional, and unacceptable. As per Article XIX, Section 11, Criticism, I suggest you refrain from making these types of inappropriate comments and using accusatory language in the presence of parents and students, or at a public gathering in the future.
>
> This behavior does not project the image that we strive to present of the East Allegheny School District and is inconsistent with the collective bargaining agreement.
>
> I am presenting you with this written notification to express the District's disappointment with your decision to make inappropriate comments in the presence of parents and school aged children. I trust and expect you will take this opportunity to correct this behavior hereafter.
>
> If you have any questions regarding the above, please feel free to contact me...

(N.T. 55-56; Exhibit A-8)

16. At the April 2, 2014 meeting, MacFann also warned Ihnat about ruining her positive reputation. (N.T. 56-57)

17. Ihnat subsequently wrote a letter of rebuttal to MacFann's March 13, 2014 letter and hand delivered it to MacFann. (N.T. 59-60; Exhibit A-9)

DISCUSSION

The Association has alleged that the District violated Section 1201(a)(1) and (3) of the Act[3] by reprimanding the Association president, barring the Association from the District's prom fashion show, and limiting the number of representatives a bargaining unit member may have at investigatory meetings, in retaliation for protected activity. The Association also submits that the District violated Section 1201(a)(5) of the Act by unilaterally removing the Association from participation at District events and limiting the number of representatives a bargaining unit member may have at investigatory meetings without bargaining. The District, meanwhile, contends that the Association has not sustained its burden of proving a violation of the Act, as there was no protected activity or adverse employment action, and it had legitimate nondiscriminatory reasons for its conduct here.

In a Section 1201(a)(3) discrimination claim, the Complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged

[3] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization...(5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

in activity protected by PERA; (2) that the employer knew the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. **Audie Davis v. Mercer County Regional Council of Government**, 45 PPER 108 (Proposed Decision and Order, 2014) citing **St. Joseph's Hospital v. PLRB**, 373 A.2d 1069 (Pa. 1977). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). Once a prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity. **Teamsters Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order, 1992). If the employer offers such evidence, the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual. **Teamsters Local 429 v. Lebanon County**, 32 PPER ¶ 32006 (Final Order, 2000). The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct. **Mercer County Regional COG**, *supra*, citing **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 (Final Order, 1992).

In addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. **City of Philadelphia**, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities-for example, whether leading organizers have been eliminated; the extent to which the adversely affected employes engaged in union activities; and whether the action complained of was "inherently destructive" of employe rights. **City of Philadelphia**, *supra*, *citing* **PLRB v. Child Development Council of Centre County**, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, **Teamsters Local 764 v. Montour County**, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employe engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. **Berks Heim County Home**, 13 PPER ¶ 13277 (Final Order, 1982).

In this case, the Association has sustained its burden of proving the first two elements of the Section 1201(a)(3) discrimination test. First of all, Ihnat was engaged in protected activity when she spoke in her capacity as Association president during the March 10, 2014 School Board meeting. Likewise, the District clearly had knowledge of the protected activity, as MacFann and the School Board president were both present for the March 10, 2014 School Board meeting. The District, however, disputes that Ihnat was engaged in protected activity when she spoke at the March 10, 2014 School Board meeting. The District avers that Ihnat openly criticized members of the School Board, which is prohibited by the CBA, thus meaning that the Association waived the Act's protection relative to this conduct. The District's argument is without merit.

As the District points out, the United States Supreme Court has recognized that unions may waive the protections afforded to their members by the National Labor Relations Act through the collective bargaining process. **Metropolitan Edison Co. v. NLRB et al.**, 460 U.S. 693, 103 S.Ct. 1467 (1983). In reaching this conclusion, the Court opined that "we will not infer from a general contractual provision that the parties intended to waive a statutorily protected right unless the undertaking is 'explicitly stated.' More succinctly, the waiver must be clear and unmistakable." *Id.* at 708.

In this matter, the CBA provides in Article XIX, Section 11, that "[a]ny question or criticism by a supervisor or administrator of a professional employee and his instructional methodology, or ***by a professional employee of a supervisor, administrator, or [school] board member*** shall be made in confidence, not in the presence of students, parents, or at public gatherings." (Joint Exhibit 1)(emphasis added). Based on this provision, I am unable to conclude that the Association has waived any of its officers' or members' rights to speak publicly in a critical fashion about the School Board as a whole. There is simply no clear and unmistakable waiver to support such a conclusion. Rather, any purported waiver would be strictly limited to any question or criticism of a supervisor, administrator, or

School Board member individually. The record shows that Ihnat, in addressing the School Board, used the word "you" to collectively refer to the entire School Board as a whole, and did not single out any particular School Board member, supervisor, or administrator, individually. As such, Ihnat's conduct at the March 10, 2014 School Board meeting was protected concerted activity under the Act. To hold otherwise would preclude the Association from even filing a charge against the District alleging that the School Board as a whole had committed unfair practices of any sort under the Act. In my view, the record contains no evidence of such a broad waiver by the Association.[4]

The Association has also sustained its burden of proving that the District had an unlawful motive when it issued Ihnat the March 13, 2014 letter, barred the Association from participating in District events, and limited the number of representatives a bargaining unit member may have at investigatory meetings. The first factor which supports an inference of anti-union animus is the close timing of the District's actions relative to Ihnat's protected activity. As previously set forth above, Ihnat spoke in her capacity as Association president at the March 10, 2014 School Board meeting. Shortly thereafter, she was called to a meeting with MacFann on March 21, 2014, during which MacFann questioned her about her comments at the March 10, 2014 meeting. On April 2, 2014, Ihnat was called to another meeting with MacFann, at which point MacFann provided her with a letter dated March 13, 2014 expressing "disappointment with [her] decision to make inappropriate comments in the presence of parents and school aged children" and cautioning her to "correct this behavior." Similarly, MacFann told Ihnat and Ekis that the Association was not permitted to have a table at any District events during a meeting on March 19, 2014. What is more, MacFann refused to permit the Association to have more than one representative present for the investigatory meeting with Ekis on March 19, 2014, in contravention with the parties' longstanding practice of allowing the Association to have multiple representatives present for such meetings. These events all took place less than 30 days following Ihnat's remarks at the March 10, 2014 School Board meeting and were actually much closer in time in several instances.

The next factor which supports an inference of unlawful motive is the lack of an adequate explanation for the District's actions. The District submits that it did not have an unlawful motive in issuing the March 13, 2014 letter to Ihnat because McCullough, the School Board president, and MacFann, both testified that Ihnat used the phrase "you people" when addressing the School Board during the March 10, 2014 School Board meeting, which McCullough perceived to be a racially charged insult since she is African American. (N.T. 191-192, N.T. II 14-15). However, I find that the testimony of McCullough and MacFann lacks credibility. First of all, the March 13, 2014 letter contains absolutely no mention whatsoever of a racially charged insult by Ihnat during her March 10, 2014 comments to the School Board. (*See* Exhibit A-9). In testifying that she only used the word "you" to collectively refer to the entire School Board as a whole, and that she did not use the term "you people," Ihnat was direct, non-evasive, and unequivocal. Further, Ihnat's testimony was corroborated by several other witnesses, including Ekis, Hlavach, and Linda Ripper, each of whom displayed an impressive and straightforward demeanor as well. (N.T. 122, 149-150, 171-172). In contrast, McCullough was evasive during her testimony and not worthy of belief. Likewise, MacFann's testimony was self-serving and wholly unreliable. Indeed, MacFann conveniently recalled points which were favorable for himself, but claimed he could not remember in response to many questions on cross-examination exploring the details of his direct examination, which casts considerable doubt over his account of everything. (N.T. II 28-33). Moreover, MacFann displayed an unimpressive demeanor as he was evasive and non-direct. As a result, I reject as not

[4] The District also contends that the Association's claim fails the Section 1201(a)(3) discrimination test because Ihnat suffered no adverse employment action. However, this argument is not persuasive. Black's Law Dictionary, 6th Edition, defines discipline as "[i]nstruction, comprehending the communication of knowledge and training to observe and act in accordance with rules and orders. Correction, chastisement, punishment, penalty. To bring order upon or bring under control." Under this definition, the March 13, 2014 letter to Ihnat clearly constitutes discipline. The letter specifically instructs Ihnat not to act in a certain way and cautions her to correct her behavior. The fact that MacFann tried to characterize the letter as only one of "disappointment" matters not. In any event, the letter itself indicates that it was copied to Ihnat's personnel file. *See* Exhibit A-8. To the extent, MacFann testified that this was a clerical error, (N.T. II 17-18), this testimony is not accepted as credible.

credible and not persuasive the District's proffered reasons for issuing the March 13, 2014 letter to Ihnat.[5]

It is well settled that, timing, coupled with the failure to provide an adequate explanation for an adverse employment action, together are sufficient to support an inference of anti-union animus. **Palmyra Borough Police Officers Ass'n v. Palmyra Borough**, 46 PPER 52 (Proposed Decision and Order, 2014), 46 PPER 72 (Final Order, 2015). However, the record also shows that the District changed its policies regarding public comments at the very next School Board meeting on April 14, 2014, which further supports an inference of unlawful motivation.

Indeed, the record shows that Ihnat attended the next School Board meeting on April 14, 2014 and filled out a public comment card, which had been changed from three minutes in March 2014 to now only permit two minutes. More significantly, the School Board had also changed the policy to require District residency in order to address the School Board, and Ihnat is not a District resident. (N.T. 60-64; Exhibits A-10 & A-11). The District contends that this is not evidence of unlawful motive since Ihnat was permitted to speak at the April 2014 School Board meeting anyway. However, I find this point unpersuasive. The record shows that the District discriminatorily changed its policy almost immediately following the March 2014 School Board meeting in such a fashion that the Association president could be barred from speaking going forward. The District did not offer any reason or explanation for the sudden change in policy. It is of no consequence that the District permitted Ihnat to speak at the April 2014 meeting, as the District still retains the right to bar her from speaking in the future. To be sure, McCullough, the School Board president confirmed that she could prevent Ihnat from speaking in the future. (N.T. 202-203). The adoption of such a policy, in and of itself, is strong evidence of unlawful motive, especially when coupled with its close timing to Ihnat's March 2014 protected activity.

On this record, I must conclude that the District would not have issued the March 13, 2014 letter to Ihnat, barred the Association from participating in future District events, and limited the number of representatives a bargaining unit member may have at investigatory meetings, had it not been for Ihnat's protected activity. Therefore, the District has violated Section 1201(a)(1) and (3) of the Act.

The Association has also alleged an independent violation of Section 1201(a)(1) of the Act. The Board has held that an independent violation of Section 1201(a)(1) will be found if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive, regardless of whether employes have been shown in fact to have been coerced. **Bellefonte Area School District**, *supra*, citing **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 1201(a)(1). **Northwestern School District**, *supra.*

The record here contains an adequate showing that the District's actions in retaliating against Ihnat and the Association by issuing her the March 13, 2014 letter, and barring the Association from participating in District events and limiting the number of representatives a bargaining unit member may have at investigatory meetings, would have a tendency to coerce employes in the exercise of their rights. Accordingly, the District has also committed an independent violation of Section 1201(a)(1) of the Act.

[5] In its brief, the District did not offer any explanation whatsoever for why it excluded the Association from future District events. Instead, the District simply argued that it took no such action. In doing so, the District relied on the testimony of MacFann, who claimed that he never told Ihnat and Ekis that the Association could not have a table at future events. (N.T. II 23). In addition, the District argued that the parties did not have a longstanding practice of permitting multiple Association representatives at investigatory meetings. As support for this contention, the District again relied on MacFann, who claimed that the Association has been permitted to have multiple representatives only if interviews occur after school or during school hours if it does not interfere with otherwise scheduled duties. MacFann testified that if the additional Association representative's schedule conflicts with the meeting time, then that additional representative cannot attend the interview. (N.T. II 25-26, 51). However, MacFann's denials were self-serving and not credible. Dolores Miklos, a retired District employe and former Association officer, testified convincingly that the Association always had the ability and discretion during her 35 year tenure to have more than one representative at meetings regardless of whether it was during or after school and that the District never advised her of any such restriction in all those years. (N.T. 182-185).

Finally, the Association contends that the District violated Section 1201(a)(5) of the Act by unilaterally removing the Association from participation in District events and by limiting the number of representatives available to bargaining unit members during investigatory meetings without bargaining with the Association. Having found that the District violated Section 1201(a)(1) and (3) of the Act for both of these actions, however, there is no need to consider whether they also violated Section 1201(a)(5). *See* **AFSCME District Council 85, Local 2206 v. City of Erie**, 29 PPER ¶ 29001 (Final Order, 1997) *citing* **Geistown Borough Police Wage and Policy Committee v. Geistown Borough**, 22 PPER ¶ 22209 (Final Order, 1991).

CONCLUSIONS

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

1. The District is a public employer within the meaning of Section 301(1) of PERA.

2. The 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) and (3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering with, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA;

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. Take the following affirmative action:

   (a) Immediately remove the March 13, 2014 letter to Ihnat from all files and rescind the restrictions on both the Association's participation in District events and representation of bargaining unit members during investigatory meetings.

   (b) Post a copy of this Decision and Order within five (5) days from the effective date hereof in a conspicuous place readily accessible to the bargaining unit employes and have the same remain so posted for a period of ten (10) consecutive days;

   (c) 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

   (d) Serve a copy of the attached Affidavit of Compliance upon the Union.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 19th day of November, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

EAST ALLEGHENY EDUCATION ASSOCIATION PSEA/NEA	:	
	:	Case No. PERA-C-14-174-W
v.	:	
EAST ALLEGHENY SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

East Allegheny School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (3) of the Public Employe Relations Act; that it has complied with the Proposed Decision and Order as directed therein; that it has posted a copy of the Proposed Decision and Order in the manner prescribed 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