

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

SHALER AREA EDUCATION ASSOCIATION, :  
PSEA/NEA :  
 : Case No. PERA-C-14-314-W  
v. :  
 :  
SHALER AREA SCHOOL DISTRICT :

**PROPOSED DECISION AND ORDER**

On September 22, 2014, the Shaler Area Education Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Shaler Area School District (District or Employer), alleging that the District violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA or Act) by refusing to hire a bargaining unit member, James Ryan, for a position as head varsity football coach in retaliation for his protected activity.

On October 6, 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 April 29, 2015, in Pittsburgh, as the time and place of hearing, if necessary. On October 23, 2014, the District filed an Answer to the Complaint, denying the material averments contained in the specification of charges.

A hearing was necessary and was held before the undersigned Hearing Examiner as scheduled on April 29, 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 June 30, 2015. The District filed a post-hearing brief in support of its position on August 19, 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. 7-8)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)
3. The Association is the exclusive bargaining agent for a unit of the District's professional employes. (Association Exhibit 1)
4. The Association and District are parties to a collective bargaining agreement (CBA), which was executed on June 13, 2014 and is effective retroactively from 2011 to 2016. (N.T. 12-13; Association Exhibit 1)
5. The parties were subject to a prior agreement, which expired in August 2011. Consequently, the parties went through the Act 88 process and engaged in bargaining from 2011 through 2014. At the beginning of the 2013-2014 school year, the Association engaged in a strike and picketed for six or seven days. (N.T. 13-14)
6. James Ryan has been employed by the District for seven years as a special education and social studies teacher. He holds certifications in social studies for grades 7-12 and special education for K-12. Ryan is a community member who has lived in the District for his entire life, having graduated from Shaler and coached football there for 10 years, beginning in 2004. He played football for Slippery Rock University where he earned his Bachelor and Master degrees. He has coached nearly every position on the field, including offensive line, defensive line, running backs, wide receivers,

linebackers, and secondary. He has also been the weight room coordinator. Ryan did not coach in the District for the 2013-2014 season because he had taken a coaching position at Deer Lakes. (N.T. 22-25)

7. Ryan is a member of the bargaining unit and participated in the strike at the beginning of the 2013-2014 school year, during which he picketed, passed out leaflets, and campaigned on behalf of and against certain School Board members and candidates who were running in the election. Ryan used personal days to work the polls for both the primary and general elections, during which he saw School Board members Joe Fisher and Jim Giel. (N.T. 25-26)

8. In the spring of 2014, Ryan learned that the head football coaching position was vacant, and he submitted his resume with a letter of interest. (N.T. 27)

9. Ryan underwent three interviews for the position, the first of which occurred in April 2014. He interviewed with a panel, which included School Board President Jeanne Petrovich, School Board members Steve Romac and Tim Gapsky, Human Resources Director Gary Mignogna, Athletic Director Paul Holzshu, Building Principal Tim Royall, and Faculty Manager Doug Kepreos, who is in the bargaining unit. (N.T. 30-31, 53, 56-57; District Exhibit 1)

10. After Ryan's first interview, the panel had a discussion regarding his candidacy, as was the customary practice following each interview and during which Petrovich stated "we cannot hire him, he would not cross the picket line." (N.T. 58-59)

11. In response to Petrovich's comment, Royall stood up and said "you can't have this discussion; it's illegal to have that discussion." Petrovich replied "I know that. I just want to make sure everybody knows it." At that point, Royall again stood up and said "you can't have this discussion." (N.T. 59-60)

12. Ryan had a second interview on May 7, 2014 before a panel, which included Petrovich, Romac, Gapsky, Holzshu, and Mignogna, as well as School Board member April Kwiatkowski and Superintendent Wes Shipley. Although they were originally listed on the District's interview schedule, Royall and Kepreos were not present. (N.T. 33-34; District Exhibit 3)

13. Following the second interview, Ryan received a phone call from Mignogna, who indicated he would not be moving on to the third round of interviews. Mignogna cited Ryan's inability to convey his football knowledge as the reason. (N.T. 35)

14. During the first round of interviews, there were 10 candidates. In the second round, there were only four candidates, including Jonathon LeDonne, Don Militzer, Corey Thomas, and Ryan. (N.T. 56-57, 61-62; District Exhibits 1 & 3)

15. After the second round of interviews, Mignogna notified Militzer and Thomas that they were being recommended for the final interview before the School Board. Mignogna also informed LeDonne that he had been eliminated from further consideration. (N.T. 81-82)

16. Prior to the final round of interviews before the School Board, Militzer withdrew from consideration. As a result, the panel called Ryan and LeDonne back for a third interview so that the School Board would have multiple candidates from which to choose. (N.T. 35-36, 82-83)

17. The School Board interviewed LeDonne, Thomas, and Ryan on May 14, 2014. The panel consisted of the entire School Board, including Petrovich, Romac, Gapsky, Kwiatkowski, Fisher, John Fries, Suzanna Donahue, and William Coutts. The panel also included Shipley and Mignogna.<sup>1</sup> (N.T. 83-84; District Exhibit 6)

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<sup>1</sup> Mignogna testified that Coutts, who is an athletic trainer for the University of Pittsburgh Medical Center, recused himself and did not participate in the interviews or deliberations for the football coaching position

18. Prior to Ryan's interview on May 14, 2014, Fisher met him at the door, shook his hand, and said "I don't need to hear you speak; I have already heard you speak twice already." Fisher was not present for Ryan's two previous interviews and did not stay for the third. (N.T. 38-39)

19. On May 21, 2014, the School Board voted to award the position to LeDonne. (N.T. 86-87, 114-118; District Exhibit 7)

#### DISCUSSION

The Association has alleged that the District violated Section 1201(a)(1) and (3) of the Act<sup>2</sup> by refusing to hire Ryan for the position of head varsity football coach in retaliation for his protected activity. The District, on the other hand, contends that it had legitimate nondiscriminatory reasons for not awarding Ryan the position at issue, as the individual chosen for the job was better qualified.

In a Section 1201(a)(3) discrimination claim, the Complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employee engaged in activity protected by PERA; (2) that the employer knew the employee engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employee's involvement in protected activity. **Audie Davis v. Mercer County Regional Council of Government**, 45 PPER 108 (Proposed Decision and Order, 2014) citing **St. Joseph's Hospital v. PLRB**, 373 A.2d 1069 (Pa. 1977). Motive creates the offense. **PLRB v. Stairways, Inc.**, 425 A.2d 1172 (Pa. Cmwlth. 1981). Once a prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity. **Teamsters Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order, 1992). If the employer offers such evidence, the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual. **Teamsters Local 429 v. Lebanon County**, 32 PPER ¶ 32006 (Final Order, 2000). The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct. **Mercer County Regional COG, supra**, citing **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 (Final Order, 1992).

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

In this case, the Association has met its burden of establishing the first two prongs of the Section 1201(a)(3) test. The record shows that Ryan clearly engaged in protected activity by participating in the strike at the beginning of the 2013-2014 school year, during which he picketed, passed out leaflets, and campaigned, in his

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due to his employer's contract with the District to provide athletic training services and his working relationship with the coaches. (N.T. 84)

<sup>2</sup> Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employees 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 employee organization. 43 P.S. § 1101.1201.

capacity as an Association member, for and against certain School Board members and candidates who were running in the primary and general elections. Likewise, the District was well aware of Ryan's participation in the strike, as evidenced by School Board President Petrovich's comment following his first round interview for the head coaching position in April 2014, in which she specifically referenced his protected activity. In fact, the District concedes in its brief that the Association has established the first two elements of the three-part test for discrimination under Section 1201(a) (3). See District's Brief at p. 8. As such, the issue in this case hinges on whether the District was motivated by Ryan's involvement in protected activity when it chose not to hire him for the coaching position.

The Association has established a prima facie case of discrimination under Section 1201(a) (3) of the Act. The School Board President's statement after Ryan's first interview that "we cannot hire him, he would not cross the picket line" clearly supports an inference of anti-union animus. In making this statement, the School Board President directly referred to Ryan's protected activity of participating in the Association's strike at the start of the 2013-2014 school year and indicated her intent to exclude Ryan from consideration for the coaching position due to his participation in that protected concerted activity. In addition, the School Board President, after being admonished for making her original statement by Royall, who stood up and said "you can't have this discussion, it's illegal to have that discussion," then proceeded to state "I know that. I just want to make sure everybody knows it." This second statement also supports an inference of anti-union animus, as the School Board President indicated her intention to convince others on the interview panel to consider Ryan's protected concerted activity in making their decision on whether to support Ryan's candidacy and advance him to the next round of interviews.

The Association also established that very shortly after the first round of interviews for the head football coaching position, the District inexplicably changed its policy regarding who is permitted to attend such interviews and be included on the panel. Indeed, the record shows that Kepreos, the Faculty Manager who is also a member of the bargaining unit, was suddenly excluded from the subsequent rounds of interviews, despite the fact that he had always been included on such panels for the previous nine years. (N.T. 63-65, 99-100). Although Mignogna claimed that Kepreos was typically included only in the initial interviews of coaching candidates, this testimony was not supported by the District's own second round interview schedule, which included Kepreos and Royall on the interview team. (N.T. 99-100, District Exhibit 3). The District offered no reason or explanation for the sudden exclusion aside from a bald statement by Mignogna that the policy changed with the formation of an athletic committee. (N.T. 101-103). As a result, I draw an adverse inference regarding these factors and find that, in connection with the School Board President's statements, they support an inference of anti-union animus.<sup>3 4</sup>

The Association also contends that the District lacked an adequate explanation for its actions, which further supports an inference of unlawful motivation. However, I credit the District's proffered reasons for why it hired LeDonne and chose not to hire

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<sup>3</sup> The Association also argues that Fisher's statement to Ryan just prior to his third and final interview before the entire School Board, in which he stated "I don't need to hear you speak, I have already heard you speak twice already," also supports an inference of anti-union animus. Ryan testified that the only time Fisher would have heard him speak was during his campaign activities on behalf of the Association during which he opposed Fisher's candidacy for office. (N.T. 38-40). Thus, the Association implies that Fisher's comment was a reference to those protected concerted activities of Ryan and that Fisher would not support Ryan's candidacy for the coaching position as a result thereof. However, this argument is unpersuasive as the record shows that Fisher actually did support Ryan's candidacy for the coaching position during the School Board's executive session wherein the School Board conducted their final vote. (N.T. 117, 150, 154, 157). Therefore, this statement by Fisher does not support an inference of anti-union animus.

<sup>4</sup> The Association also maintains that the District's exclusion of Royall from the subsequent rounds of interviews further supports an inference of unlawful motivation, as Royall was the Principal who twice admonished the School Board President for her statements following Ryan's first interview and the individual who advised Ryan that the statement had been made. (N.T. 42-43, 99-100). However, the record shows that Royall did not notify Ryan about the statements of the School Board President until after Ryan's second interview which Royall had already missed. (N.T. 42). Similarly, there is no evidence whatsoever that Mignogna or the School Board members were ever aware that Royall had told Ryan about the statements. (N.T. 98). Further, the record shows that Royall is now a member of the athletic committee, which conducts interviews of coaching candidates. (N.T. 102-103). Thus, although Royall's exclusion from the subsequent rounds of interviews during Ryan's candidacy may be suspicious, I am unable to conclude that it supports an inference of unlawful motivation.

Ryan for the position in question and find that the District has presented persuasive rebuttal evidence of the reasons for its actions.

It is well settled that, although the Board may impute one School Board member's animus to the District, the Board is not required to do so. **Upper Merion Area Education Ass'n v. Upper Merion Area School District**, 30 PPER ¶ 30091 (Final Order, 1999). The decision to ascribe statements of individual members of a governing body to the body as a whole must be made on a case-by-case basis. **Fraternal Order of Police Wyoming Valley Lodge 36 v. Wyoming Borough**, 34 PPER ¶ 148 (Final Order, 2003). In this case, the District has shown that the statements of the School Board President following Ryan's first round interview should not be attributed to the entire governing body as a whole.

The record shows that there were five School Board directors present for the final deliberations regarding the head coaching position. (N.T. 114). Those five directors were Romac, Kwiatkowski, Donahue, Gapsky, and Hunt. (N.T. 114). Fisher had expressed his support for Ryan at the beginning of the deliberations and then left. (N.T. 115-117). Petrovich, the School Board President, expressed her support for Thomas and left early when it became apparent that nobody else supported her preferred candidate. (N.T. 115-117, 136). Fries did not express support for any candidate and also left early. (N.T. 115). The five remaining directors deliberated for a lengthy time between LeDonne, Thomas, and Ryan. (N.T. 114-118).

Romac convincingly explained that he preferred LeDonne because he was a manager, who could oversee the 14 other assistant coaches underneath him, and because he captivated the people in the room during his interviews with his football knowledge. (N.T. 118). Romac felt that LeDonne would definitely be able to captivate the attention of the District's student-athletes in the same fashion. (N.T. 118). Romac also felt that LeDonne's education made him stand out as a candidate. (N.T. 120). Romac testified credibly that he was not influenced by Petrovich's statements following Ryan's first round interview. (N.T. 120). In addition, Gapsky convincingly explained that he preferred LeDonne because of his plan to rebuild the football program through a youth feeder system. Gapsky also felt that LeDonne evinced an impressive demeanor of winning. (N.T. 136-137). Gapsky was not influenced by Petrovich's statements about Ryan after his first round interview. (N.T. 138). Further, Donahue testified persuasively that she favored LeDonne because he volunteered how he would communicate with teachers regarding student discipline and that he even had a form already prepared. (N.T. 149). Donahue described how LeDonne had strong organizational skills. She also preferred LeDonne due to his education, his ideas regarding the feeder program, and his connections to colleges which could provide opportunities for the District's student-athletes. (N.T. 149-151). Donahue was not influenced negatively by the fact that Ryan was a teacher or member of the Union. (N.T. 153). In fact, the School Board members credibly described how being a teacher was a positive attribute for Ryan during their deliberations. (N.T. 119, 152). There was absolutely no evidence whatsoever that Kwiatowski or Hunt were ever even aware of Petrovich's comments about Ryan following his first round interview. In the end, LeDonne was a consensus selection among the five directors for the position. (N.T. 120, 137, 153).<sup>5</sup>

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<sup>5</sup> The District introduced LeDonne's resume and letter of interest as District Exhibit 8, to which the Association raised a hearsay objection. (N.T. 88-90). The District contends that the resume and letter of interest are admissible pursuant to the business records exception to the rule against hearsay. Rule 803 of the Pennsylvania Rules of Evidence provides that "[t]he following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness... (6) Records of a Regularly Conducted Activity. A record (which includes a memorandum, report, or data compilation in any form) of an act, event or condition if, (A) the record was made at or near the time by- or from information transmitted by- someone with knowledge; (B) The record was kept in the course of a regularly conducted activity of a 'business,' which term includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit; (C) making the record was a regular practice of that activity; (D) all these conditions are shown by the testimony of the custodian or another qualified witness, or by a certification that complies with Rule 902(11) or (12) or with a statute permitting certification; and (E) neither the source of information nor other circumstances indicate a lack of trustworthiness. The Commonwealth Court has opined that, although business records can be admissible, they must be authenticated by a witness who can "provide sufficient information relating to the preparation and maintenance of the records to justify a presumption of trustworthiness of the business records of a company." **Bell Beverage v. UCBR**, 49 A.3d 49, 55 (Pa. Cmwlth. 2012). In this case, the District attempted to authenticate the resume and letter of interest through the testimony of Mignogna, the

In light of this credible evidence, I must conclude that the School Board members testifying in this proceeding were not influenced by Petrovich's statements, but rather by their own personal reasons for why they each believed LeDonne was a better candidate for the head coaching position. See **Upper Merion Area Education Ass'n v. Upper Merion Area School District**, 29 PPER ¶ 29222 (Proposed Decision and Order, 1998). As the District points out, the process of selecting a football coach based upon oral interviews is inherently subjective and the ultimate decision arose from the opinions of five individuals. That each of these school directors testified to their own perspectives and bases for choosing LeDonne does not amount to shifting reasons for their actions. See District's Brief at p. 11. As a result, the District has established that the statements of the School Board President should not be attributed to the governing body as a whole. Similarly, the District has shown that it would have taken the same actions even in the absence of Ryan's protected concerted activity, as the School Board believed LeDonne to be the best candidate. Accordingly, the District has not violated Section 1201(a)(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 employees 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*.

In the instant matter, the School Board President's statements referencing Ryan's protected concerted activity following his first round interview in April 2014 would clearly have a tendency to coerce employees in the exercise of their rights under the Act. Indeed, the School Board President expressly indicated her preference to exclude an Association member from consideration for the coaching position based on his protected activity and then tried to convince other participants on the interview panel to do the same. Accordingly, the District has violated Section 1201(a)(1) of the Act. Since I have concluded, however, that the District would have hired LeDonne even in the absence of protected activity, I cannot order the District to award the head coaching position to Ryan, as sought by the Association. See **Upper Merion Area Education Ass'n v. Upper Merion Area School District**, 29 PPER ¶ 29222 (Proposed Decision and Order, 1998), 30 PPER ¶ 30091 (Final Order, 1999).

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

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Human Resources Director. However, Mignogna did not provide any information regarding the mode of preparation for the documents at issue, as they were prepared by somebody outside of the District. Likewise, Mignogna did not satisfy all of the conditions necessary for a business record to be admissible under Rule 803(6). As such, the Association's objection is sustained. However, the resume and letter of interest are admissible for the limited purpose of showing any effect their receipt may have had on District officials, but not for the truth of their contents.

**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, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act.

2. Take the following affirmative action which the Examiner finds necessary to effectuate the policies of PERA:

(a) 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;

(b) 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

(c) 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 pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this 28<sup>th</sup> day of August, 2015.

PENNSYLVANIA LABOR RELATIONS BOARD

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John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

SHALER AREA EDUCATION ASSOCIATION, :  
PSEA/NEA :  
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v. :  
 :  
SHALER AREA SCHOOL DISTRICT :

**AFFIDAVIT OF COMPLIANCE**

Shaler Area School District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) 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