

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WEST SIDE CAREER & TECHNOLOGY CENTER :
EDUCATION ASSOCIATION, and MARGARET :
S. MULLIN :
 : Case No. PERA-C-15-358-E
v. :
 :
WEST SIDE CAREER & TECHNOLOGY CENTER :

PROPOSED DECISION AND ORDER

On December 3, 2015, the West Side Career & Technology Center Education Association (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the West Side Career and Technology Center (CTC or Employer), alleging that the CTC violated Section 1201(a)(1), (3), and (5) of the Public Employe Relations Act (PERA or Act) by demoting Association member, Margaret Mullin, in retaliation for her protected activity and unilaterally reducing her pay and benefits without negotiating the same with the Association.

On March 9, 2016, 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 20, 2016, in Harrisburg, as the time and place of hearing, if necessary. The hearing was continued twice, once at the request of each party and without objection from the opposing party.

A hearing was necessary and was held before the undersigned Hearing Examiner of the Board on August 22, 2016, 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 November 2, 2016. The CTC did not file a post-hearing brief in support of its position.

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 CTC is a public employer within the meaning of Section 301(1) of PERA. (N.T. 10)
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 10)
3. The Association is the exclusive bargaining representative for a unit of professional employes at the CTC. (Joint Exhibit 2)
4. The Association and the CTC are parties to a collective bargaining agreement (CBA), which is effective from 2011 through 2016, and which contains a provision authorizing individuals, and not just the Association, to file grievances. (Joint Exhibit 1)
5. The CTC is a high school that offers technical education for grades 9 through 12 and services approximately 500 students. (N.T. 24)
6. Margaret Mullin is an art teacher at the CTC, who began working there in 1999 and remained full-time until the start of the 2015-2016 school year. As a full-time teacher, Mullin worked 37.5 hours per week, 7.5 hours per day. (N.T. 24-25, 27)
7. Mullin is the only art teacher at the CTC, which requires every senior student to take art in order to graduate. (N.T. 27-28, 38, 172)

8. As a full-time art teacher at the CTC during the 2014-2015 school year, Mullin was responsible for teaching Art I and Art II classes, a Life Skills class consisting of intellectually disabled students, supervising the senior project for students, which included reviewing their work, portfolios, resumes, and letters, providing the students with assistance, and issuing grades, as well as supervising in-school suspension (ISS), lunch duty, bus duty, and substituting for other teachers. (N.T. 25-27, 30-34, 40-42; Exhibit A-1)
9. The parties' CBA covers employees who work full-time at the CTC and provides terms and conditions consistent only with full-time work. The CBA does not address part-time employment. (N.T. 123-124; Joint Exhibit 1)
10. On August 12, 2013, the parties executed a Memorandum of Understanding (MOU), which created a part-time position for a music teacher and which governed the terms and conditions of employment for that specific position. The parties negotiated the MOU following the retirement of the full-time music teacher. Prior to the 2013 MOU, all of the teachers at the CTC were full-time. After the 2013 MOU, there were no other teachers at the CTC who were less than full-time until Mullin was demoted at the start of the 2015-2016 school year. (N.T. 120-126; Exhibit A-14)
11. On January 16, 2015, the CTC published a budget that it submitted for state approval, showing its present expenditures and projected spending for the next school year in 2015-2016. The budget showed that the CTC had appropriated funds and had the money to pay for Mullin's salary as a full-time teacher at \$82,220.00. (N.T. 63-67; Exhibit A-9 at p. 18)
12. On March 18, 2015, Mullin sent an email to Dr. Thomas Viviano, the Administrative Director of the CTC, following a conversation they had, which stated in relevant part that "I would like to know if I am the only employee/position/subject being considered [for reduction to part-time status], what the reasoning is, and under whose suggestion am I being considered." Mullin wrote the email to Viviano because she was hearing rumors that she might either be laid off or reduced to half-time. (N.T. 49-51; Exhibit A-4)
13. By email dated March 18, 2015, Viviano responded to Mullin, in relevant part, as follows: "I think music at this time is the only course slated for half-time at this time (sic). I'm just glad that we can keep all three humanities courses alive." (N.T. 49-51; Exhibit A-4)
14. On March 19, 2015, Mullin filed two grievances pursuant to the CBA, alleging that her direct supervisor, Principal Richard Rava, was exhibiting a continued pattern of discrimination, bias, unprofessionalism, and abuse of power towards her, and improperly assigning her substitute duties not in accordance with a rotating basis. (N.T. 28-29, 45-48; Exhibit A-3)
15. In the grievances, Mullin indicated that she was seeking relief, which included a change in her supervisor to Viviano, documentation of disciplinary action against Rava, documented evidence that Rava attend sensitivity training, and changes to the assignment of her substitute duties. (N.T. 45-48; Exhibit A-3)
16. Mullin filed the grievances with Viviano, who served above Rava at the time. The grievances were both stamped as received by the Administrative Director's office on March 20, 2015. (N.T. 45-48; Exhibit A-3)
17. On March 23, 2015, Mullin attended a regular monthly meeting of the Joint Operating Committee (JOC), which is the governing body of the CTC, during which she spoke out against curtailing the art program. Rava was also present for the meeting and gave a report in executive session. The JOC voted to curtail the art program to half-time status beginning in the 2015-2016 school year. (N.T. 51-56; Exhibit A-5)

18. On March 27, 2015, Viviano denied the grievance regarding the assignment of substitute duties. (Exhibit A-3)
19. By email exchange dated March 27, 2015, Mullin inquired about the reason for her demotion, to which Viviano replied "[i]t was a budget decision." (N.T. 62; Exhibit A-8)
20. On April 1, 2015, Viviano denied the grievance, which alleged discrimination, bias, unprofessionalism, and abuse of power. In doing so, Viviano wrote on the disposition portion of the form that "Mr. Rick Rava will remain your principal. There will be no disciplinary actions taken against Mr. Rava at this time. To suggest that Mr. Rava receive sensitivity training is preposterous." (N.T. 48-49; Exhibit A-3)
21. By letter dated April 1, 2015, Viviano notified Mullin that the JOC voted to curtail the art program to half-time status beginning with the 2015-2016 school year and advised her of her due process right to a school board hearing. Mullin ultimately chose to challenge the demotion through the grievance arbitration process. (N.T. 57-61; Exhibit A-6, A-7)
22. Mullin's demotion to part-time status went into effect on August 31, 2015, which was the start of the 2015-2016 school year. The CTC cut her salary in half and reduced her health insurance benefits at that time. The CTC also reduced Mullin's leave time, as well as her hours to 18.75 per week or 3.75 per day. (N.T. 24-28, 55-56, 73-76, 78-79, 83, 103; Exhibit A-12, A-13)
23. The CTC did not bargain any of these changes with the Association. (N.T. 75, 79, 81-83, 120)

DISCUSSION

The Association has alleged that the CTC violated Section 1201(a)(1) and (3) of the Act¹ by demoting Mullin in retaliation for filing two grievances on March 19, 2015. The Association also submits that the CTC violated Section 1201(a)(5) of the Act by unilaterally reducing Mullin's pay and benefits without bargaining the same. The CTC, while not filing a post-hearing brief, contended at the hearing that it demoted Mullin for budgetary reasons, i.e. a waning class load and significant economic savings.

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**

¹ 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... (5) Refusing to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

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 sustained its burden of proving the first two elements of the Section 1201(a)(3) discrimination test. First of all, Mullin was clearly engaged in protected activity when she filed two grievances against the CTC on March 19, 2015. Likewise, the CTC also had knowledge of Mullin’s protected activity, as the grievances were received by the Administrative Director’s office, and stamped as such, on March 20, 2015. As a result, the issue in this matter hinges on whether the CTC was motivated by Mullin’s involvement in protected activity when it voted to demote her to part-time status on March 23, 2015 and effectuated that change to her terms and conditions of employment on August 31, 2015, which was the start of the 2015-2016 school year.

The Association has also sustained its burden of proving the third element of the test for discrimination, i.e. that the CTC had an unlawful motive when it voted to demote Mullin to part-time status in March 2015 and implemented that demotion at the start of the 2015-2016 school year. The first factor supporting an inference of unlawful motive on behalf of the CTC is the timing of the CTC’s actions relative to Mullin’s protected activity. Indeed, Mullin filed two grievances specifically naming her direct supervisor, Rava, on March 19, 2015, and the CTC’s governing body voted to demote her to part-time status at a meeting on March 23, 2015, just four days later. It is difficult to imagine that the timing of these events was merely coincidental. In fact, the record shows that Mullin received assurance from Viviano, the Administrative Director of the CTC, that music was the only subject slated for half-time status in an email dated March 18, 2015, just five days before the JOC meeting. This fact belies the CTC’s claim that it was considering reducing the art program to part-time status for several weeks prior to Mullin’s March 19, 2015 grievances. To be sure, Rava testified that he made the recommendation to reduce the art program to Viviano, who concurred with that recommendation, in early March 2015. (N.T. 147-148). However, this testimony is not accepted as credible. Had Rava made such a recommendation to Viviano, in early March 2015, then Viviano would have been aware of the potential reduction of the art program on March 18, 2015. Viviano did not indicate that the art program was being considered for reduction in his March 18, 2015 communication with Mullin, nor did he advise her of the same at any time thereafter until she found out during the March 23, 2015 JOC meeting.²

Next, the Association has also established that the CTC’s explanation for Mullin’s demotion is false and pre-textual. At the hearing, the CTC argued that the demotion was a budget decision, which resulted in significant economic savings. However, the CTC did not offer any testimony or evidence whatsoever demonstrating why it was facing such dire budget constraints for the 2015-2016 school year. To the contrary, the record shows that,

² At the hearing, Rava testified that Viviano’s email contained a typo and that Viviano really meant to say that art instead of music was the only course slated for half-time. (N.T. 158). This testimony is not accepted as credible. First of all, Rava is not competent to testify what Viviano meant to say in his March 18, 2015 email. And, Viviano did not testify at the hearing in this matter. What is more, neither Rava nor Viviano, who both testified at the arbitration hearing, made such a claim during those proceedings. (N.T. 181-182). As such, this testimony is rejected as not credible and not persuasive.

in January 2015, the CTC had appropriated and had the funds available to pay for Mullin's salary as a full-time teacher. (See Exhibit A-9). What is more, the record shows that three veteran teachers in law enforcement, cosmetology, and co-op were scheduled to retire at the end of the 2014-2015 school year, and the CTC was planning to replace them with new hires, who would earn much lower salaries based on their lack of seniority, and which would result in savings of at least \$32,000.00. (N.T. 68-70; Exhibit A-9, p. 59 & 75). Furthermore, the budget shows that \$6,741,208.89 had been allocated for the 2014-2015 school year when Mullin was full-time, while \$6,897,044.13 had been allocated for the next school year in 2015-2016 when Mullin was part-time. (Exhibit A-9 at p. 167). Thus, the CTC had well over \$150,000.00 more in allocated funds for the 2015-2016 school year than it did during the previous school year in 2014-2015. The CTC offered no explanation whatsoever for why it could not spend this money to maintain the art program and Mullin's full-time status during the 2015-2016 school year.

This is especially problematic for the CTC in light of its other proffered reason for the demotion, Mullin's alleged waning class load, as the record does not support such an assertion. In fact, as the Association points out, the enrollment numbers for Mullin's art classes were not declining, but rather were projected to increase slightly from 85 to 88 students from the 2014-2015 school year to 2015-2016. (N.T. 154; Exhibit A-2, ER-1). Similarly, as the Association further notes, Mullin's enrollment numbers actually exceeded those of several other full-time teachers during the 2014-2015 school year, including Maria Arcarese with 73 students, Matthew Hampton with 71 students, Darren Moore with 54 students, Lyle Newell with 72 students, and Patricia Temple with 84 students. (Exhibit ER-1). What is more, Mullin still had more students than several other full-time teachers, even after her demotion, including Arcarese, Moore, and Hampton. (N.T. 154-155, 161-163; Exhibit ER-2). The CTC claimed that these teachers worked in several delineated core subject areas, such as math, English, language arts, and science, upon which the administration needed to focus to maintain state proficiencies. (N.T. 142-146). However, Rava specifically testified that in light of the alleged budget constraints facing the CTC, he undertook an analysis of enrollment in the core subject areas, as well as the humanities, (N.T. 142), which casts considerable doubt over his explanation for Mullin's demotion.

In any event, the record shows that Temple worked in Family Consumer Science, which was not one of the delineated core subject areas, and she was not demoted. (N.T. 156-157). And inexplicably, the record also shows that the CTC had another teacher, Joseph Barrish, who worked in automotive technology in 2014-2015, which is not one of the delineated core subject areas, and who worked as a co-teacher with a Mr. Zalewski, meaning that the CTC had two full-time teachers both drawing full-time salaries, simultaneously teaching the same class. (N.T. 169-172). Yet neither one of these teachers was demoted. (N.T. 172). As the Association points out, this is obvious disparate treatment, which is strong evidence of unlawful motive in and of itself, and which belies the CTC's averments regarding Mullin's alleged waning class load and its dire budgetary constraints. As a result, I reject as not credible and not persuasive the CTC's proffered reasons for Mullin's demotion and find that the Association has sustained its burden of proving an unlawful motive in light of the timing of the demotion, combined with the CTC's false and pretextual reasons for the demotion, and its disparate treatment of Mullin in regard thereto. Accordingly, the CTC has committed unfair practices in violation of 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 employees have been shown in fact to have been coerced. **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). *Id.*

The record here contains an adequate showing that the CTC's actions in retaliating against Mullin for filing two grievances by demoting her would have a tendency to coerce employees in the exercise of their rights. Therefore, the CTC has also committed an independent violation of Section 1201(a)(1) of the Act.

Finally, the Association contends that the CTC violated Section 1201(a)(5) of the Act by unilaterally reducing Mullin's pay and benefits without bargaining with the Association. Having found that the CTC violated Section 1201(a)(1) and (3) of the Act for 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 CTC 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 CTC 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 CTC 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 rescind Mullin's demotion to part-time status, restore Mullin to full-time status, and make her whole with an appropriate award of backpay for the money she would have earned, but for the CTC's unlawful demotion, together with six (6%) percent per annum interest, and all other emoluments of employment, including but not limited to any and all out of pocket medical expenses, pension contributions, and seniority and leave accrual.
 - (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 3rd day of February, 2017.

PENNSYLVANIA LABOR RELATIONS BOARD

John Pozniak, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
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AFFIDAVIT OF COMPLIANCE

The CTC 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 by immediately rescinding Mullin's demotion to part-time status, restoring Mullin to full-time status, and making her whole with an appropriate award of backpay for the money she would have earned, but for the CTC's unlawful demotion, together with six (6%) percent per annum interest, and all other emoluments of employment, including but not limited to any and all out of pocket medical expenses, pension contributions, and seniority and leave accrual; 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