COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WYOMING VALLEY WEST EDUCATION ASSOCIATION, PSEA/NEA	:	
v.	:	CASE NO. PERA-C-18-327-E
WYOMING VALLEY WEST SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On December 17, 2018, as amended January 22, 2019, the Wyoming Valley West Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Wyoming Valley West School District (District) violated Section 1201(a)(1), (3), (5) and (8) of the Public Employe Relations Act (PERA or Act). The Union specifically alleged that the District retaliated against one of its teachers by extending a previous suspension after he filed a grievance.

On January 10, 2019, the Secretary of the Board issued a letter requesting that the Union amend its charge to include the parties' collective bargaining agreement (CBA). On January 22, 2019, the Union filed the requested CBA, thereby amending its charge.

On February 21, 2019, the Secretary of the Board issued a complaint and notice of hearing, directing that a hearing be held on April 19, 2019, in Harrisburg. The hearing was continued, at the request of the complainant and without objection from the respondent, and it was rescheduled for July 10, 2019. During the hearing on that date, both parties were afforded a full and fair opportunity to present testimonial and documentary evidence and to cross-examine witnesses. The Union filed its post-hearing brief on November 12, 2019. The District filed its post-hearing brief on December 4, 2019.

The examiner, based upon all matters of record, makes the following:

FINDINGS OF FACT

1.The District is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-510-C)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (PERA-R-510-C)

3. Robert Panowicz is a first-grade bargaining unit teacher at the District's State Street Elementary School in Larksville Borough. He was also the District's swimming and water polo coach. (N.T. 22-23-34, 124-125)

4. On Saturday, September 8, 2018, Mr. Panowicz overdosed on Fentanyl and emergency responders transported him to an area hospital after reviving him from an unresponsive state. (N.T. 24-25, 27, 33)

5. Matthew Stitzer is a Juvenile Detective at the Larksville Borough Police Department. He is also the School Resource Officer at State Street Elementary School. (N.T. 115-116)

6. On Monday, September 10, 2018, Detective Stitzer learned from another District School Resource Officer assigned to the High School that there was an incident over the prior weekend involving a teacher at State Street Elementary. Mr. Panowicz did not report to work on that Monday. (N.T. 116-119)

7. With this notification, Detective Stitzer reviewed the police incident reports for the weekend and learned that the Larksville Police were dispatched to a house in Larksville for the overdose of Mr. Panowicz. (N.T. 116-119)

8. Detective Stitzer was familiar with Mr. Panowicz as a teacher in the same building where he is a School Resource Officer. The police incident report identified the overdose drug as Fentanyl. (N.T. 119-120)

9. As a police officer, Detective Stitzer is familiar with Fentanyl, and he has administered NARCAN to overdose victims. Detective Stitzer must take extensive precautions, including the wearing of gloves, when dealing with a Fentanyl overdose victim, to ensure that he does not come into contact with the victim because the drug can be absorbed through the skin, thereby causing an overdose to the officer on contact. Fentanyl particles can also be inadvertently inhaled also causing first responders to overdose. (N.T. 120-121)

10. Mr. Panowicz returned to work on Tuesday, September 11, 2018. (N.T. 26-28; Association Exhibit 2)

11. On Wednesday, September 12, 2018, the High School Resource Officer contacted the High School Principal, and Detective Stitzer met with Jacob Sholtis, the Principal of State Street Elementary School, regarding Mr. Panowicz's overdose the previous weekend. At that time, Detective Stitzer advised Mr. Sholtis that he was concerned that children could come into contact with Fentanyl and that breathing small particles of the substance could kill a person. (N.T. 26-28, 33, 121-122, 124-127)

12. After meeting with Detective Stitzer, on September 12, 2018, Mr. Sholtis was contacted by Irwin DeRemer, the District's Superintendent and David Tosh, the Director of Pupil Services at the District. Superintendent DeRemer was first notified about the incident from Dave Navrochi, the High School Principal, and the High School Resource Officer. The school board members also learned of the incident on September 12, 2018. (N.T. 39, 126-128, 133-134, 190)

13. Mr. DeRemer was well aware of the severity and toxicity of Fentanyl, and he knew that someone could instantly die from exposure to it. With this knowledge, Mr. DeRemer directed Mr. Sholtis to meet with Mr. Panowicz and a Union representative to discuss with Mr. Panowicz the accuracy of the officers' accounts regarding the overdose of September 8, 2018. If accurate, Mr. Sholtis was to inform Mr. Panowicz that he was being removed from the classroom and his coaching duties and that he was not to return to those duties until the District contacted him. (N.T. 29-30, 128-129, 133-135)

14. Linda Houck is the Union President. Mr. Sholtis met with Mr. Panowicz in his office and called Ms. Houck who participated in the meeting on speaker phone. Mr. Panowicz confirmed the accuracy of his weekend overdose on Fentanyl, and Mr. Sholtis removed him from his classroom and coaching duties effective immediately until further notice from the District. (N.T. 18-20, 128-129)

15. The District offered to support Mr. Panowicz in receiving treatment. The District required that Mr. Panowicz receive inpatient

treatment. Mr. Panowicz agreed to enter inpatient treatment, and the District worked with the Union to secure approval from the District's health insurance provider for an inpatient treatment program and to find a treatment center for his recovery. (N.T. 29-31, 36, 136-137, 156-158)

16. The District discussed with Ms. Houck that, once Mr. Panowicz completed his treatment program and received a medical certificate that he completed the program successfully and was fit to return to work, the District would permit him to return. (N.T. 31-32)

17. Also on September 12, 2018, the District's Solicitor, Attorney Charles Coslett, was made aware of Mr. Panowicz's overdose. (N.T. 220-221)

18. Ms. Houck and the District's Social Worker, Mr. Cinti, worked together for two days contacting inpatient facilities and obtaining insurance clearances for Mr. Panowicz. Mr. Panowicz checked into Huntington Creek Recovery Center on Friday, September 14, 2018. The District allowed Mr. Panowicz to use his sick days while he was in treatment. (N.T. 32-37, 137; Association Exhibit 3)

19. On October 5, 2018, after 21 days of treatment, Mr. Panowicz's counselor at Huntington Creek called Ms. Houck and informed her that the insurance company refused to extend another week. The insurance company felt that Mr. Panowicz had completed treatment and was ready to return to work. (N.T. 38)

20. On that same date, Ms. Houck requested that Huntington Creek send a certification to the District certifying that Mr. Panowicz successfully completed his treatment program, which Huntington Creek faxed to Mr. DeRemer the same day. The letter was signed by a nurse practitioner. (N.T. 38-39, 139, 156-158, 182; Association Exhibit 3)

21. The October 5, 2018 letter from Huntington Creek to Mr. DeRemer provides as follows:

> Mr. Robert Panowicz was admitted to Huntington Creek Recovery Center, a residential treatment center for Drug and Alcohol Addictive Diseases, on September 14, 2018. Mr. Panowicz will successfully complete treatment on October 6, 2018, and is cleared to return to work on October 9, 2018 with no limitation.

(Association Exhibit 3)

22. The District was not satisfied with the credentials of the person who signed the letter clearing Mr. Panowicz to return to work and requested a Doctor's signature. The District was also very concerned that Huntington Creek was certifying Mr. Panowicz's treatment as completed at the same time that the medical insurance provider would no longer pay for inpatient treatment. The administration and the school board members were concerned that the end of Mr. Panowicz's inpatient treatment was dictated by insurance and not what was actually required for recovery; they were concerned that 21-22 days of treatment was insufficient for recovery from Fentanyl abuse. (N.T. 40-41, 138-140)

23. On October 9, 2018, Mr. Panowicz could not return to work because he had a meeting at the treatment center to set up his aftercare program. Mr. Panowicz's aftercare program was to be a five-month treatment program involving weekly individual counseling sessions and drug testing, which would not interfere with work time. A positive drug test would result in his dismissal from the program, and the District would be notified. He returned

to work on October 10, 2018, and worked a full day. On October 11, 2018, Mr. Panowicz worked part of the day. (N.T. 41-42, 50-51)

24. Also on October 11, 2018, Ms. Houck attended a meeting at the District's central office with Mr. DeRemer, Mr. Tosh, the District's Solicitor, Attorney Coslett and Frank Mariano, the District's Special Education Consultant. At the meeting, the administrators informed Ms. Houck that the school board was not comfortable with Mr. Panowicz's return to work. At this time, the District was requesting an Independent Medical Examination (IME) of Mr. Panowicz because it questioned the Huntington Creek certification of completion of treatment and fitness for duty. (N.T. 43-45)

25. Attorney Coslett was advising the District to require that a medical doctor sign the certificate of completion from Huntington Creek and to send Mr. Panowicz for an IME which is authorized under Section 1418(c) of the School Code. (N.T. 220-221)

26. Later on October 11, 2018, Ms. Houck attended another meeting with District administrators and Mr. Panowicz at the central office during which administrators informed her that the school board members still had concerns over whether Mr. Panowicz had sufficient treatment and wanted a person with higher credentials to sign the certificate of completion of treatment. Ms. Houck called Huntington Creek about the matter. That same day, Dr. Rifai, the Medical Director at Huntington Creek and Stephanie Fischer, Clinical Director, both signed off on the same exact letter that was previously dated October 5, 2018, and faxed it to Mr. DeRemer. The District also requested Mr. Panowicz's aftercare information, and he was not permitted to return to work after the meeting. (N.T. 40-41, 46-49, 141, 156-158, 182; Association Exhibit 3)

27. On Friday, October 12, 2018, Ms. Houck and Mr. Panowicz attended another meeting with Mr. DeRemer and the District's Solicitor, Attorney Charles Coslett, and Frank Mariano. By this time, the District had received the faxed certificate of completion signed by Dr. Rifai at Huntington Creek. The administrators conveyed that the school board wanted layers of insulation and not to fire Mr. Panowicz. After a break at about 9:30, the administrators said that Mr. Panowicz could return to work based on the second letter signed by Dr. Rifai. He worked the rest of the day. (N.T. 50-51, 142, 159)

28. On Monday, October 15, 2018, the school board president called an emergency meeting for 9:00 a.m., during which board members expressed deep emotion about the severity and dangerousness of Fentanyl to the administrators. The board members were not convinced that Mr. Panowicz was ready to return to work and the children, after only 21-22 days of treatment, even after Dr. Rifai certified his return contemporaneously with the cessation of insurance coverage for the treatment. The school board felt that the two letters from Huntington Creek were insufficient to establish Mr. Panowicz's recovery from Fentanyl abuse, and the Board members wanted an IME. That same day at 11:30 a.m. the District called Mr. Panowicz into a meeting and told him not to finish the work day. A meeting was scheduled for the next day. (N.T. 52-54, 142-143, 146-147, 159-162, 177-178, 250-251)

29. During the October 15, 2018 emergency school board meeting, school board members also expressed their belief that, due to the potent nature of Fentanyl, Mr. Panowicz should be excluded for another 60 days from the school as an appropriate safeguard. There was no discussion over a grievance being filed. The only discussion was over the health and safety of children and staff. (N.T. 177-178, 181, 198)

30. Joseph Muth is the District's Personnel Director and Federal Programs Director. The Chief of the Larksville Borough Police Department had given a copy of the police incident report of Mr. Panowicz's September 8, 2018 overdose to Mr. Muth.

31. David Usavage is a District school board member who taught first grade for 15 years and kindergarten for 3 years. Mr. Usavage had 2 younger brothers who had become drug addicts. His brothers had attended numerous treatment and rehabilitative programs of various lengths of time, sometimes for several weeks, sometimes for a month, but they always had to return to treatment. Both of Mr. Usavage's brothers died from overdoses. With this personal experience, Mr. Usavage's primary concern was that Mr. Panowicz's 21 days of inpatient treatment was insufficient for Fentanyl abuse. (N.T. 184, 191-196)

32. As a first-grade and kindergarten teacher, Mr. Usavage experienced how children of that age like to hold the teacher's hand, especially at recess, which catches on with other children and soon everyone is holding hands. Mr. Usavage credibly described how infectious the physical contact was among the teacher and students and how the children would compete for a piece of the teacher and even hold on to Mr. Usavage's belt loop. Mr. Usavage knows from his own teaching experience that the skin of first graders and kindergarteners is tissue-paper thin. (N.T. 191-197)

33. Mr. Usavage had never met Mr. Panowicz until he saw him at the hearing in this matter. Mr. Usavage learned that Fentanyl is approximately 100 times more powerful than Morphine, and it is undetectable unlike the smell of alcohol. (N.T. 191-197)

34. Mr. Usavage expressed his aforementioned concerns to the other school board members and administration officials during the emergency meeting of October 15, 2018. At the October 15, 2018 meeting, although he was aware of the two letters clearing Mr. Panowicz to return to work, Mr. Usavage proposed the 60-day extension because he believed that 21 days of inpatient treatment was insufficient. His concern was to keep Mr. Panowicz away from the children, other faculty members and staff. It was never personal; he never met Mr. Panowicz. (N.T. 198-199, 202-203)

35. Brian Dubaskas is also a school board member at the District. Mr. Dubaskas's niece had drug issues. As a result, Mr. Dubaskas had done a lot of research into opiates and Fentanyl and learned that as little as 2 milligrams, comparable to a couple of grains of salt, is so powerful that it can be absorbed through the skin and could kill a person on contact. (N.T. 205, 209-212)

36. Mr. Dubaskas was aware that a Hazleton police officer overdosed on Fentanyl when he was trying to save an overdose victim by administering NARCAN and accidentally touched the victim's skin and ingested the Fentanyl through contact. (N.T. 209-212)

38. Mr. Dubaskas had concerns that Mr. Panowicz was a first-grade teacher, and he feared that Mr. Panowicz could have contact with first graders backpacks and clothing. He had concerns over the accidental overdose of a child and that there is no standard amount of time for rehabilitating an opiate user. Mr. Dubaskas's research revealed that there is a 60% chance that an overdose victim will overdose again. Mr. Dubaskas's niece overdosed several times. The son of a teacher in the District overdosed 3-4 times and went to rehabs in Florida and California until he eventually died from an overdose of Fentanyl. He also has relatives and friends in the school as students and employes. Mr. Dubaskas expressed all these concerns to the other

school board members. Like Mr. Usavage, Mr. Dubaskas never met Mr. Panowicz, and the school board members' only consideration was Mr. Panowicz's use of Fentanyl. As a result, Mr. Dubaskas wanted to be sure that Mr. Panowicz did not return to using Fentanyl, and he also advocated for the 60-day extension at the October 15, 2018 meeting. (N.T. 210-214)

39. Mr. Dubaskas is "scared to death" of Fentanyl. There was never any discussion among the board members about the Union filing a grievance when they decided to impose a 60-day extension on Mr. Panowicz's suspension. He believes that it is 100% the responsibility of the school board to maintain a safe environment for students, teachers and staff and that allowing a known Fentanyl user into a school cannot promote a safe environment for anyone in the school. (N.T. 214-215)

40. The District's Solicitor, Attorney Coslett, also attended the emergency school board meeting at 9:00 a.m. on October 15, 2018. He credibly testified that the school board members were very concerned about the volatility of Fentanyl and that returning Mr. Panowicz to the classroom could expose children to great risk, even though Huntington Creek had cleared Mr. Panowicz to return to work. The school board members wanted to ensure that returning Mr. Panowicz to the classroom would not pose a danger to the health safety and welfare of first graders, faculty and staff at State Street Elementary. The board members wanted Mr. Panowicz to spend more time in aftercare to make sure he would not use Fentanyl again before returning. The school board and Attorney Coslett supported the 60-day extension as a fair time period. (N.T. 223-227)

41. On Tuesday, October 16, 2018, at 8:35 a.m., there was a meeting at the District with Ms. Houck, Mr. Panowicz, Mr. DeRemer, Mr. Tosh, Attorney Coslett, and Mr. Panowicz's father. At this meeting, the District presented Mr. Panowicz with a letter, dated October 15, 2018, to which the administrators wanted Mr. Panowicz to agree. The terms of the letter required Mr. Panowicz to be absent from work for another 60 days for which he could use sick leave. The letter was written by Attorney Coslett for Mr. DeRemer's signature. Mr. Panowicz refused to consent to terms and refused to sign the letter. (N.T. 54, 58-65, 145-148, 223-226)

42. The school board members expressed a lot of emotion about Mr. Panowicz's recovery from Fentanyl abuse. Several board members have grandchildren in the District's elementary schools. They were concerned that 21 days of inpatient treatment was insufficient. (N.T. 140)

43. The letter dated October 15, 2018, and presented to Mr. Panowicz on October 16, 2018, which he refused to sign, provides, in relevant part as follows:

> 1. With respect to the random drug testing which is involved in your aftercare program, you will execute with your aftercare provider all necessary authorizations required for the provider to notify the Superintendent of the results of all such tests.
>
> 2. In the event of an unsatisfactory discharge from your aftercare program, you agree that the provider is to notify the Superintendent, and you will execute all necessary authorizations required by the provider to accomplish same.

3. Any other paperwork required by your provider to fully effect the aforestated paragraphs shall be executed by you, and you will provide a copy of this letter to your aftercare provider.

On Monday morning, we discussed your status with School Board members in Executive Session, limited to a strong concern of the Board to ensure a safe learning environment. Those in attendance included all six (6) retired educators. Unanimously, the Board believes that you must remain outside the classroom for sixty (60) school days. This measure is not to be construed as punitive, and you may opt to use all accrued sick and personal days during the period aforementioned. The sixty (60) day exclusion from the classroom is to reduce stressful interference with your aftercare and to extend the period of time from the unfortunate events of September 8. Assuming your complete, satisfactory compliance with the terms of your aftercare program, this respite will both benefit you and lessen the anxiety of the Board with respect to your classroom return.

The contemplated execution of paperwork required to fulfill the foregoing terms shall be accomplished by you without undue delay.

Please indicate your voluntary consent to the content of this letter by signing and returning the duplicate copy of this letter no later than 3:00 pm on Thursday, October 18.

(Association Exhibit 4)

44. The 60-day exclusion was not meant as a guarantee of a maximum number of 60 days. The body of the letter provides that 60 days was the period of exclusion provided Mr. Panowicz successfully complied with his aftercare program during that 60-day period. (N.T. 242)

45. Also on October 16, 2018, Ms. Houck informed Mr. DeRemer that a grievance would be filed, and she composed grievance no. 2018-19-02 (Grievance). The Grievance was in response to the District's October 15, 2018 letter and therein alleged that the District violated the CBA "by refusing to allow Grievant [Mr. Panowicz] to return to employment following medical treatment." The Grievance further provided, inter alia, that "[d]espite the Grievant's compliance with all aspects of treatment at a facility approved by the District and his fitness to return to work as certified by several medical professionals, the District has twice within 1 week removed him from his teaching position to impose further requirements and refused to allow him to work for an additional period of 60 days." The Grievance was signed and delivered to the District on October 17, 2018. (N.T. 66, 78, 85-86, 148, 151; Association Exhibit 4)

46. Attorney Coslett was out of town on October 17, 2018, when the Grievance was filed. After his return, on October 18, 2018, at 9:00 a.m., Attorney Coslett met with the administration and learned that the Grievance was filed the day before. That same day, Attorney Coslett drafted a letter to Mr. Panowicz for Mr. DeRemer's signature. (N.T. 155, 172-173, 227-228; Association Exhibit 6)

47. The October 18, 2018 letter provides as follows:

I have received Grievance 2018-19-02 together with your declination to the terms and conditions of my October 15, 2018 letter.

> Because of the School Board's concern with protecting the safety of the faculty, staff, and students at State Street Elementary School, your exclusion from the classroom, of which you were notified on Tuesday, shall continue until the matters raised by the events of September 8, 2018 are satisfactorily resolved. During the period of the exclusion your health coverage shall remain intact, but you will not be paid.

(Association Exhibit 6)

48. During this time period, Attorney Coslett had been advising the District to require Mr. Panowicz to submit to an IME. By stating that Mr. Panowicz would be excluded until his Fentanyl issues were "satisfactorily resolved," Attorney Coslett and the District meant that Mr. Panowicz would have to be cleared by the Independent Medical Examiner. (N.T. 231-232)

49. The Grievance was addressed by the school board at its November 13, 2018 board meeting. On November 14, 2018, the District distributed the "Superintendent's Letter," which is in the form of meeting minutes and reports on all the matters addressed at the school board meeting. The Superintendent's Letter provides, in relevant part, that the school board ratified "the interim action of the Superintendent on October 18, 2018, relating to Emp. # 644761 [Mr. Panowicz] requiring said employee's continued exclusion from the classroom pending receipt of additional information which will ensure the safety of the students within said employee's classroom." (N.T. 81-85; Association Exhibit 7)

50. During all of the discussions between Ms. Houck and District administrators, the District consistently stated the position that Fentanyl was different than other substance abuse cases, and the District considered Fentanyl to be much more serious than other substances. To Mr. DeRemer's knowledge, no one at the District had ever been involved with Fentanyl. (N.T. 101-102, 104-105, 135, 152)

51. Mr. Panowicz provided all the drug test results from his aftercare program to the District for the months of October, November and December of 2018, which showed that he passed all the drug tests. (N.T. 89-92, 95; Association Exhibits 8 & 9)

52. Although the District resolved to require an IME as early as the October 11, 2018 meeting, Mr. DeRemer did not identify Dr. Fischbein as its IME doctor until December 18, 2018. It took the administrators some time to find a reliable and reputable IME doctor. Due to Dr. Fischbein's busy schedule, it was longer than 60 days before he could evaluate Mr. Panowicz. Mr. Panowicz's continued exclusion was a function of the availability of Dr. Fischbein. (N.T. 226-227, 238, 250-251)

53. Mr. Panowicz's evaluation with Dr. Fischbein was January 25, 2019. Mr. DeRemer received Dr. Fischbein's report two weeks later on February 7, 2019. One week after receiving Dr. Fishbein's report, on February 14, 2019, Mr. Panowicz was called to a meeting at the District, and he was returned to work the next day, February 15, 2019. (N.T. 99, 230-231, 251-252)

DISCUSSION

On the face of the charge form, the Union indicated that it was charging the District with violations of Section 1201(a)(1), (3),(5) and (8) of the Act. However, the Union did not specifically allege how the District

committed any bargaining violations under Section 1201(a)(5) or how the District refused to comply with an arbitration award under Section 1201(a)(8). Accordingly, the District was not placed on notice that it had to defend those charges. The specification of charges does allege the following: "The Association and the District are parties to a Collective Bargaining Agreement that contains a grievance and arbitration process for resolving any and all disputes arising under said Collective Bargaining Agreement. The CBA also addresses the discipline and termination of the Association's members." (Specification of Charges at ¶ 5). However, the allegations do not articulate how the CBA, the grievance and arbitration procedure, or the disciplinary provisions contained in the CBA were allegedly violated. Also, the Union did not present substantial, competent evidence at the hearing supporting a cause of action under Section 1201(a)(8). Additionally, the Union did not provide argument in its brief explaining how the District violated Section 1201(a)(5) or (8). Therefore, the causes of action under Section 1201(a)(5) and (8) are hereby dismissed.[1]

In a discrimination claim, the complainant has the burden of establishing that the employe(s) engaged in protected activity, that the employer knew of that activity and that the employer took adverse employment action that was motivated by the employe's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employes Union v. City of York, 29 PPER ¶ 29235 (Final Order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Other factors include: any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employe(s), the effect of the employer's adverse action on other employes and their protected activities. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing of an employer's adverse action alone is not enough to infer animus, when combined with other factors, close timing can give rise to the inference of anti-union animus. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984).

In this case, the District was aware that Mr. Panowicz engaged in the protected activity of filing the Grievance challenging the District's October 15, 2018 letter to Mr. Panowicz imposing a 60-day exclusion from teaching at the District after he completed his inpatient treatment, as evidenced by the District's October 18, 2018 letter. The Union contends that the District retaliated against Mr. Panowicz for filing the Grievance when it issued the October 18, 2018 letter, which states, in relevant part, as follows:

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[1] In Finding of Fact number 27 of its proposed findings of fact, the Union asserts that the District violated a verbal agreement to return Mr. Panowicz to work once he completed his residential treatment program. Notwithstanding the fact that the Union did not argue that this constituted a bargaining violation of Section 1201(a)(5), the Union did not allege in its charge that the District violated said agreement or that such alleged conduct violated Section 1201(a)(5).

> Because of the School Board's concern with protecting the safety of the faculty, staff, and students at State Street Elementary School, your exclusion from the classroom, of which you were notified on Tuesday, shall continue until the matters raised by the events of September 8, 2018 are satisfactorily resolved. During the period of the exclusion your health coverage shall remain intact, but you will not be paid.

(F.F. 47; Association Exhibit 6). The Union contends that this letter extended Mr. Panowicz's exclusion from the District beyond the 60-day exclusion and prohibited him from receiving paid sick leave benefits in retaliation for filing the Grievance and that the District treated Mr. Panowicz differently than it treated other employes who had substance abuse problems.

The letter dated October 15, 2018 (and given to Mr. Panowicz on October 16, 2018) predates the Grievance and provides for the 60-day suspension to Mr. Panowicz after the insurance provider, not medical personnel at Huntington Creek, dictated that his residential treatment last only 21 days. Clearly, the District was justifiably skeptical about Mr. Panowicz's "full" recovery, as claimed by personnel at Huntington Creek, under those circumstances. This same letter also requires the "complete, satisfactory compliance with the terms of your aftercare program." On October 9, 2018, Huntington Creek established the parameters of Mr. Panowicz's aftercare program as a five-month program to continue into March 2019. The District, therefore, in this pre-Grievance letter, according to the credible testimony of Attorney Coslett (N.T. 242-244), informed Mr. Panowicz that his suspension was for 60 days at a minimum and that it may not reinstate him until he satisfactorily completed his aftercare program, potentially in five months.

The second letter dated October 18, 2018, which is the subject of this litigation and which post-dates the Grievance, by comparison provides that "your exclusion from the classroom, of which you were notified on Tuesday, shall continue until the matters raised by the [Fentanyl overdose] events of September 8, 2018 are satisfactorily resolved." Accordingly, the language in the second letter constitutes a reiteration, corroboration and clarification of the first October 15, 2018 letter. Both letters make Mr. Panowicz's return to work contingent upon the satisfactory completion of his program. The October 18, 2018 letter does not increase the suspension after the Grievance. Although the Union emphasizes the suspiciousness of the timing of the October 18, 2018 letter, it seems equally puzzling that the District would so honestly and blatantly acknowledge the Grievance in the October 18, 2018 letter if the District was using that letter to allegedly increase employment action and retaliate against Mr. Panowicz as a result of the Grievance, which as previously concluded herein, the record does not establish.

The Union further claims that the October 18, 2018 letter increases employment action against Mr. Panowicz by converting his leave from sick leave at full pay, which he was permitted to take under the October 15, 2018 letter, to unpaid leave in the October 18, 2018 letter. However, the record establishes that the District was permitting Mr. Panowicz to use his sick leave. The Union could not establish that, by using the term "unpaid" in the October 18, 2018 letter, the District had changed its position that he could use sick leave and the term "unpaid" simply referred to his status of not

receiving his regular salary during the time period. (N.T. 102-103). What is even more puzzling is that, given the extensive communications between the District, the Union and Mr. Panowicz, neither the Union nor Mr. Panowicz sought clarification of this point from the District. The record is clear, however, that Mr. Panowicz did not wish to use his sick leave to preserve an end-of-career buyout. Accordingly, I agree with the District that the letter of October 18, 2018, does not constitute an increase in employment action, as compared to the October 15, 2018 letter.

Alternatively, assuming, without concluding, that the October 18, 2018 letter constituted an extension of Mr. Panowicz's exclusion and not a clarification, the Union did not establish a prima facie case of discrimination and the record lacks substantial, competent evidence from which to infer that the District's October 18, 2018 letter was unlawfully motivated. Indeed, the only evidence tending to show unlawful motive is the timing of the letter, which the Board has held is insufficient by itself to establish unlawful motive. There are no other factors, no statements, no behaviors and no pretextual or shifting reasons from which to construct or develop an inference of unlawful motive.

The record also establishes that other employes, who had been treated for substance abuse, were not similarly situated. The evidence of record shows that no one at the District had ever been involved with abusing the highly potent and dangerous substance Fentanyl, thereby requiring their exclusion from schools at the District to eliminate the risk of exposure of children to the toxic substance. Also, the record does not show whether the other substance abusing employes, who were seemingly involved in alcohol related substance abuse, filed grievances regarding the District's handling of their recovery or if any of them were excluded and for what period of time.

The Union asserts that the District treated Mr. Panowicz "very differently (and more harshly) than the other Union members who, in the past, had substance abuse issues and were always allowed back to work when they finished a residential treatment program." (Union's Brief at 8, Proposed Finding of Fact No. 27). However, the record does not establish this point of fact. There is no evidence about other employes' treatment programs, their length of exclusion from the District, if any, their length of treatment, whether their treatment was terminated due to certified completion or the cessation of insurance coverage or the nature and extent of the abuse or the specific substances at issue in those individual cases. Moreover, there simply is no comparison between Mr. Panowicz's substance abuse problem with Fentanyl and other employes who may have abused alcohol, and the District justifiably treated Mr. Panowicz differently for using Fentanyl where the record is clear that, to the administrators' knowledge, no other employe had ever been involved with that substance before.

Additionally, even had the Union established a prima facie case of discrimination, the District established with overwhelming, credible and uncontradicted evidence that it was absolutely and without a doubt motivated by its desire to protect the children and staff, for whose safety the District is responsible. Indeed, the record is clear that the administrators and school board members were very motivated by the concerns over the safety of students and staff above all other considerations. It matters not whether the District's motivation for

the manner in which it handled Mr. Panowicz's exclusion from the classroom was right, wrong, scientifically accurate, justifiable or reactionary. What matters is that their motivation had nothing to do with the filing of the Grievance.

Moreover, the District credibly and convincingly explained the timing of the letter. Mr. Coslett, the District's Solicitor, wrote the letter for the Superintendent. He had been wanting an IME, as authorized by the School Code, to satisfy the District's administrators and school board members that Mr. Panowicz was in fact recovered and was no longer a threat to children, since October 11, 2018, when he told Ms. Houck about the IME. Mr. Coslett credibly testified that the point of the October 18, 2018 letter was to require proof, to the satisfaction of the District through an IME, that Mr. Panowicz was no longer using Fentanyl, even though the October 18, 2018 letter does not specifically use the term "IME." He further credibly explained that the timing of the letter, being issued a day after the Grievance was filed, was a function of his being out of town on business.

Relying on the testimony of Attorney Coslett, the Union also argues that the District did not require an IME until after the Grievance was filed. The Union specifically contends that: "Attorney Coslett admitted that the District did not require an IME until after Robert [Panowicz] had filed the Grievance (and after the District learned of the grievance)." (Union's Brief at 21). However, this point of fact is not supported in the record. Ms. Houck admitted that the District told her that it wanted an IME on October 11, 2018, before the Grievance was filed. (F.F. 24; N.T. 43-45). Attorney Coslett's testimony is not inconsistent with that of Ms. Houck. Attorney Coslett testified regarding the numerous meetings during a "rapidly developing week." He further testified that, on October 18, 2018, "the game plan started to crystallize about getting the IME." Attorney Coslett's testimony concerning the IME clearly states that there was an existing "game plan" for the IME, as conveyed to Ms. Houck on October 11, 2018, and that the Districted started developing (i.e., "crystalliz[ing]")the logistical details, such as locating a forensic specialist, in furtherance of the existing plan on or about October 18, 2018. Accordingly, both Ms. Houck and Attorney Coslett testified consistently that a plan for an IME already existed before October 18, 2018, and before the Grievance was filed.

The Union also maintains that the District's alleged exclusion extension of Mr. Panowicz on the heals of his filing the Grievance had a chilling effect on protected activity and the grievance process, thereby interfering with employe rights in violation of Section 1201(a)(1) of the Act. (Union's Brief at 25-30).

An independent violation of Section 1201(a)(1) occurs, "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); Northwest Area Educ. Ass'n v. Northwest Area Sch. Dist., 38 PPER 147 (Final Order, 2007). Under this standard, the complainant does not have a burden to show improper motive or that any employes have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order, 2004). However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with

employe rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER 26155 (Final Order, 1995).

In this case, even if the October 18, 2018 letter and the timing of it had a tendency, under the totality of circumstances, to interfere with the bargaining unit employes' protected right to file grievances over adverse employment actions, the District's credible and overwhelmingly legitimate reasons justifiably outweigh those concerns. At least two school board members had friends and family involved with opiates. Mr. Usavage lost two brothers. The board members know how delicate and physically expressive first-graders are, and they know the dangers of Fentanyl to people in general, but especially to the thin-skinned, hand-holding children. Mr. Dubaskas is "scared to death" of Fentanyl. The board members wanted to protect the innocent children. They also wanted to insulate the District from the potential liability of allowing a known Fentanyl user to expose their school children to even small, but toxic amounts, of the drug.

The local news had reported a story of a first responder who overdosed trying to administer NARCAN to an overdose victim, and school board members knew that a couple of grains of Fentanyl on a child's skin could kill the child. Fentanyl is not like any other substance; Mr. Panowicz could not justifiably be treated like any other employe with an alcohol problem. The administrators and school board members acted responsibly in this case. They were vigilant and proactive, while supporting Mr. Panowicz's recovery and returning him to work, without terminating him. The board members did nothing discriminatory or coercive in their treatment of Mr. Panowicz. Indeed, the manner in which the school board and its administrators extensively deliberated over and navigated through the process of addressing Mr. Panowicz's Fentanyl overdose, while communicating openly with the Union and Mr. Panowicz, supporting his recovery and maintaining his employment status with benefits, was reasonable given their unanimous fears for the safety of others. On balance, the safety concerns for children and staff are paramount to any unintended coercive effect on protected grievance activities.

Accordingly, the Union did not meet its burden of proving the necessary elements of its independent claims under Section 1201(a) (1), (3), (5) or (8), and the charge of unfair practices is dismissed in its entirety.

CONCLUSIONS

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

1. The District is a public employer under PERA.

2. The Union is an employe organization under PERA.

3. The Board has jurisdiction over the parties hereto.

4. The District has not committed unfair practices within the meaning of Section 1201(a) (1), (3), (5) or (8) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of PERA, the hearing examiner:

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this fifth day of December, 2019.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner