

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WILLIAMSPORT AREA EDUCATION SUPPORT :
PROFESSIONALS ASSOCIATION, PSEA/NEA :
 :
v. : CASE NO. PERA-C-19-155-E
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WILLIAMSPORT AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On July 3, 2019, the Williamsport Area Education Support Professionals Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Williamsport Area School District (District) violated Section 1201(a)(1), (2), (3) and (4) of the Public Employee Relations Act (Act or PERA). The Union specifically alleged that the District retaliated against Union Vice President Terry Moore by changing his conditions of employment after he exercised his rights to police and administer the parties' collective bargaining agreement (CBA).

On July 23, 2019, the Secretary of the Board issued a letter to the Union and the District stating that no complaint would be issued on the charge, and he dismissed all four causes of action. On August 7, 2019, the Union filed exceptions to the Board Secretary's administrative dismissal. On September 17, 2019, the Board issued an Order Directing Remand to the Secretary for Further Proceedings. The Board's Remand Order explicitly limited the consideration and investigation of the charge to the Union's claims under Section 1201(a)(1) and (3). The Board expressly stated that "[b]ecause neither of these sections [i.e., 1201(a)(2) and (4)] are applicable to the facts alleged by the Association, nor were they specifically challenged in the exceptions, dismissal of those Charges is proper."

On November 7, 2019, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of January 22, 2020, in Harrisburg. I granted multiple hearing continuance requests from the District due to the military leave and unavailability of its primary witness. The hearing was eventually rescheduled for March 23, 2021. By letter dated March 19, 2021, the District sought clarification of the issues and specifically argued that the Union did not properly preserve an independent cause of action under Section 1201(a)(1).

Due to the COVID pandemic and the closure of Commonwealth buildings to the public, the parties agreed to participate in a video hearing. During the March 23, 2021 hearing, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. Also during the hearing, I sustained the District's objection to consideration of an independent (a)(1) cause of action because it was not properly alleged in the original charge, thereby limiting the viable claims for consideration to the Union's charge under Section 1201(a)(3). (N.T. 7-10). On June 3, 2021, the District filed its post-hearing brief. The Union filed its post-hearing brief on June 4, 2021.

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. (N.T. 7)

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7)

3. Terry Moore was an audio-visual technician (A-V Tech) during the 2018-2019 school year. In that position, Mr. Moore worked with the District's security system, cameras, phone systems, public address systems and white boards. In May 2019, the Union and the District negotiated a Memorandum of Understanding (MOU) that reclassified the positions in the technology department. As a result of the MOU, Mr. Moore was reclassified as a Tier 2 Computer Technician, effective July 1, 2019. Mr. Moore's job duties as a Tier 2 Computer Technician remained the same as when he was an A-V Tech, but his hours were reduced by .5 hours per day for the same salary as before. (N.T. 48-49, 83, 90-91, 105-110; District Exhibit 8)

4. In 2016 or 2017, Mr. Moore was appointed the Union Vice President and became involved in processing grievances. The issue of supervisors performing bargaining unit work was a persistent issue, however, there had not been good proof of these allegations to satisfy the District. (N.T. 56-58)

5. Jeremy Loveland is the Director of the technology department at the District. As Technology Director, Mr. Loveland oversees the entire technology department, all electronic devices and all technology employes, including two network administrators and Mr. Moore. (N.T. 121-122)

6. Dr. Timothy Bowers is the District Superintendent. (N.T. 24; District Exhibit 2)

7. Carey Kurtz is the PSEA UniServ Representative assigned to the District. (N.T. 18-19)

8. Anne Logue is the Director of Human Resources for the District. (N.T. 19, 96-98)

9. Prior to 2019, the security camera system operated with old servers that would malfunction and/or shut off. There was a separate camera server for almost every building. Mr. Moore went to the buildings to reboot the servers. Some cameras would not record properly, and Mr. Moore added more cameras. Cameras and servers malfunctioned regularly. Mr. Moore had his own login password to access the security camera system. His camera access was to ensure proper functioning and recording. (N.T. 50-53, 75, 127)

10. Historically, teachers or administrators submitted work orders generating trouble tickets for technology issues. Those complaints were recorded in a database that Mr. Moore accessed. He then chose the trouble ticket to work on and addressed the complained of issue. The A-V Techs would decide among themselves which trouble tickets they would address. (N.T. 54-55)

11. During the summer of 2018, Mr. Moore was assigned to install white boards throughout the District's buildings. On September 12, 2018, Mr. Loveland held a meeting with Mr. Moore to discuss concerns about perceived deficiencies regarding the white-board project. Also present at the meeting were Mr. Kurtz, Dr. Bowers and Ms. Logue. (N.T. 18-19, 122-123; Joint Exhibit 7)

12. On September 13, 2018, Ms. Logue emailed Mr. Kurtz and Union President Kimberly Kaiser accurately memorializing the meeting held on the prior day. (N.T. 19, 21, 34, 123-124; joint Exhibit 7)

13. The email provides, in relevant part, as follows:

After further discussion regarding our meeting yesterday, we have determined the appropriate course of action pertaining to the issues raised by Jeremy Loveland about Terry Moore's job performance is best addressed via a mid-term evaluation and focused assistance plan. No disciplinary action will be given as a result of the investigatory meeting. However, Jeremy will follow up and complete a mid-term evaluation and focused assistance plan for Terry.

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A meeting was held on 9/12/18 in Dr. Bowers' conference room Mr. Loveland stated Mr. Moore's only assigned project for the summer months (2018) was to successfully install 67 new white boards and projectors at various schools throughout the district. Mr. Loveland stated that while Mr. Moore was on vacation, some of the equipment arrived and a co-worker inventoried, labeled and prepped the equipment to be ready for installation upon Mr. Moore's return. Mr. Loveland stated Mr. Moore did not communicate well to the appropriate personnel throughout these installations, and these installations did not occur timely or efficiently. Additionally, Mr. Moore requested assistance on the project, which Mr. Loveland agreed to but deemed unnecessary given the scope and time to complete the project. Additionally, Mr. Loveland stated Mr. Moore was required to receive a directive on every minute detail of the project, and did not take ownership of it, including where the installations should be, etc. This stalled the completion of the project immensely. As outlined in Mr. Moore's job description, his position includes the ability to problem solve and provide advice and guidance regarding the technical and electronic capabilities and installation of equipment the district purchases. Mr. Moore stated in the meeting that he inventoried all existing boards and projectors in advance of the new equipment arriving, and logged the make, model, serial number, room location and bulb requirements to ensure enough bulbs were onsite. Mr. Loveland indicated this was not a directive given to Mr. Moore to complete. Mr. Moore also advised he spent a large amount of time correcting various issues in the buildings prior to installation. He stated many rooms have "challenges" and this is what took up a large amount of his time. Mr. Loveland stated these issues were poorly communicated to him and the Administrators in the applicable school. Additionally, the issues were not extreme and did not require a lengthy amount of time to remedy.

(Joint Exhibit 7)

14. The mid-term evaluation for Mr. Moore did not occur and neither did the focused assistance plan. Mr. Moore did not receive any discipline for his performance issues. He did not receive an unsatisfactory rating for the 2018-2019 school year. His overall performance review was "meets requirements." (N.T. 23, 50, 105-106, 124)

15. Over the course of approximately one year, the Union filed several grievances complaining that custodial supervisors were performing bargaining unit work. After further investigation of those grievances, the Union learned that the supervisors were assisting bargaining unit employes and not depriving bargaining unit members of their overtime. At a meeting on March 14, 2019, Dr. Bowers had told the Union that if it can show that at any time work was taken away, the District would rectify the situation and compensate bargaining unit employes who lost overtime. (N.T. 24, 31-32, 110-111; Joint Exhibit 8)

16. On Sunday, March 17, 2019, a bargaining unit employe went to work at the Lycoming Valley Intermediate School (Lycoming Valley), and Custodial Supervisor Scott Ferguson was cleaning. The employe knew the date, time, and place Mr. Ferguson was performing bargaining unit work, and reported it to Mr. Moore. (N.T. 36-39, 74)

17. On Tuesday, March 19, 2019, between 8:16 a.m. and 8:18 a.m., Mr. Moore accessed the security camera footage from March 17, 2019, at Lycoming Valley. (N.T. 26, 36, 59, 75, 128-129)

18. Mr. Moore contacted Mr. Kurtz and informed him that he looked at the video for Lycoming Valley and saw Mr. Ferguson doing cleaning work with a dust mop and a wet mop. With that proof, Mr. Kurtz filed Grievance No. 3-2019 (Grievance), on March 26, 2019, with Human Resources Director, Anne Logue. Ms. Logue was away from the District at the time. (N.T. 25-26, 36, 59-62, 101; Joint Exhibit 8)

19. The "STATEMENT OF GRIEVANCE" provides as follows: Scott Ferguson was observed on video cleaning at Lycoming Valley on Sunday, March 17, 2019. The Association spoke to the custodians who work in that building and no one was called and offered overtime or extra hours to work that day." (Joint Exhibit 8)

20. Upon her return to the District, Ms. Logue discussed the Grievance with Dr. Bowers, and they concluded that they needed more time to investigate. Dr. Bowers asked Mr. Loveland to determine if someone accessed the security camera footage from March 17, 2019, at Lycoming Valley. Mr. Loveland asked Network Administrator Josh Klinger to run an audit in the District's network of video recorders to determine what video was accessed and by whom. (N.T. 101, 128, 137)

21. By email exchanges with Dale Crans, the Supervisor of Maintenance and Facilities, Ms. Logue verified that Mr. Ferguson did in fact perform bargaining unit work at Lycoming Valley. (District Exhibit 1)

22. When Dr. Bowers asked Mr. Loveland to determine who accessed the security camera system at Lycoming Valley for March 17, 2019, he did not mention anything about a supervisor doing bargaining unit work. Dr. Bowers also asked Mr. Loveland if he authorized the access, to which Mr. Loveland replied in the negative. Dr. Bowers did not mention anything about someone

accessing the video to support a grievance filing. Mr. Loveland credibly testified that he "had no idea" that there was a grievance about a supervisor doing bargaining unit work. (N.T. 137-138, 148-149)

23. Mr. Klinger informed Mr. Loveland that Mr. Moore logged into the Lycoming Valley server system at 8:16 on Tuesday, March 19, 2019, and specifically performed a search to the camera showing Mr. Ferguson. (N.T. 128-129; District Exhibit 2)

24. On April 1, 2019, Mr. Moore met with Mr. Loveland. During that meeting, Mr. Loveland prohibited Mr. Moore from accessing security cameras until further notice. Mr. Loveland informed Mr. Moore that he breached a trust, that maintaining the integrity and security of the camera systems required Mr. Moore to seek prior approval before accessing the footage and that he should not be accessing information on other employees without permission. (N.T. 32, 50, 60-62, 85, 131-132, 142)

25. Mr. Kurtz knew that Mr. Moore accessed the security camera recordings without prior authorization from the administration, but he believed that Mr. Moore did not need authorization because such access was part of his job as an A-V Tech. Mr. Kurtz also knew that Mr. Moore accessed the video on work time. (N.T. 40-41)

26. Article 11-8 of the CBA provides, in relevant part, as follows:

RELEASE TIME - The District recognizes the right of the Association to designate building representatives to assist in grievance investigation. Grievance investigation will take place, whenever possible, during such time as neither the grievant(s), nor building representatives are scheduled to work. Should processing or investigation of a grievance be necessary during the working hours of the building representatives or the grievant, prior written authorization must be obtained from the Human Resources Director or his/her designee.

(N.T. 46-47; Joint Exhibit 6, Article 11-8)

27. The Union was the grievant. No one from the Union requested release time to investigate the Grievance or to police the contract during working hours from Ms. Logue or her office. It is generally acceptable to Ms. Logue when she learns that some Union business was conducted on work time without prior authorization from her office. (N.T. 105, 114; Joint Exhibit 8)

28. On April 1, 2019, Ms. Logue denied the Grievance because the administration wanted to investigate further. (N.T. 26-27, 100; Association Exhibit 1)

29. Brett Leinbach is the District's Director of Finance and Accounting. While reviewing payment requests for March 2019, Mr. Leinbach noticed that Mr. Moore submitted mileage reimbursement for the use of his personal vehicle for travelling to every building, every day in the month of March 2019, for 756.7 miles, which he thought was unusual. (N.T. 115-118; District Exhibit 3)

30. On April 8, 2019, Mr. Leinbach emailed Mr. Loveland reporting the mileage reimbursement request and questioning the need for Mr. Moore to drive

to every building every day. (N.T. 78-81, 118-120, 125-126; District Exhibit 3)

31. Also on April 8, 2019, Mr. Loveland met with Mr. Moore and told him that he is to use the District vehicle for official travel unless it is not available, which had been the policy, and that the District vehicle had been available during a majority of his travels during March 2019. Mr. Loveland also communicated the same message to all the employes in the technology department. (N.T. 62, 124-127; District Exhibit 6)

32. Although Mr. Moore's mileage reimbursement submission was verified as legitimate, the District requires the use of the technology department vehicle to reduce expenditures for mileage reimbursement. (N.T. 118-120, 145; District Exhibit 4)

33. Mr. Loveland followed up the meeting with an email the same day. This email stated, in relevant part, as follows:

In summary for our meeting earlier today you will be assigned tasks by an administrator each day to be completed. You are not to accept any task or trouble ticket unless assigned to you by an administrator. Unless directed to do so by an administrator, you are not to travel to any building. If you are required to travel to a building to complete an assignment, you are to take the WASD Technology Department vehicle. If that vehicle is not available, you may be directed by an administrator to take your personal vehicle.

Your hours have also been modified to allow for proper supervision and task assignment. Beginning tomorrow, April 9, 2019, your work hours begin at 8:00 AM and end at 4:30 PM, to include a 30 minute lunch break.¹

Also, in summary of the meeting we had on Monday, April 1, 2019, you are not to access the security camera system at WASD for any reason until further directed by an administrator.

(N.T. 65-68, 143-145; Joint Exhibit 9)

34. Mr. Moore was told during the April 8, 2019 meeting that he was not trustworthy. Mr. Moore's new start and end time were an hour later than before. Work hours for the technology department employes vary depending on job responsibilities and personal lives. Although not common, their hours are adjusted at different times, especially during the summer when employes like to start earlier and end earlier. (N.T. 69, 86, 132-133; District Exhibits 4 & 5)

35. Mr. Loveland does not recall whether he learned of the Grievance before or after April 8, 2019, when he changed Mr. Moore's starting and ending time, required him to obtain specific work assignments from an administrator and obtain permission to travel to buildings to complete those assignments. The vehicle policy equally applies to all employes. (N.T. 149-150; District Exhibits 4 & 6)

¹ The shortening of Mr. Moore's workday did not become effective until July 1, 2019.

36. On April 9, 2019, Mr. Kurtz sent the following email to Ms. Logue:

I am writing to inform you that the Association no longer desires a meeting on April 15th regarding this grievance as we will be submitting this grievance to arbitration. Both you and Dr. Bowers asked us to provide evidence that supervisors were taking away work from members of the bargaining unit. We did so, but the grievance was still denied and in addition, the district has chosen to retaliate against one of our officers by removing his access to security video because "he cannot be trusted." We did not want to file another grievance on this issue without proper documentation, so when Terry Moore was informed that Scott Ferguson was working at Lycoming Valley on Sunday afternoon, he viewed video to confirm this fact before we filed the grievance. The administration uses video evidence against our members, but the association is not permitted to have access to similar evidence to prove that the supervisors are violating the contract. Immediately after the grievance was filed, Terry was informed that he could no longer access the security videos. We have attempted to cooperate with the administration on this issue and the response we receive is to punish our officers for providing evidence of contract violation. This action is a clear violation of Pennsylvania labor law and will be addressed separately.

(N.T. 36-38; Association Exhibit 2)

37. On April 11, 2019, Mr. Loveland emailed the entire technology department as follows: "If you need to travel to our buildings, take the Department van if it's available. If it's being used, you are authorized to take your personal vehicle. Do not take your personal vehicle without checking to see if the van is available." (N.T. 81; District Exhibit 6)

38. Mr. Kurtz spoke with Dr. Bowers regarding the Grievance on April 16, 2019, and resolved the Grievance. The same day, Ms. Logue emailed the District's official response. (N.T. 28-30, 102; Joint Exhibit 10)

39. The District's April 16, 2019 response stated, in relevant part, as follows:

Dr. Bowers and Mr. Kurtz discussed the grievance via telephone conference on April 16th. After further review of the facts surrounding the grievance, Dr. Bowers stated that relief will be granted and the most senior custodian at Lycoming Valley Intermediate School will be compensated for overtime for 2 ½ hours, provided the custodian perform 2 ½ hours of custodial duties for the district. Upon completion of such work, the custodian will be compensated for the 2 ½ hours overtime via normal payroll processing.

(Joint Exhibit 10)

40. In July 2020, Mr. Loveland verbally informed Mr. Moore that he could resume accessing his own work orders and the camera system. (N.T. 71)

DISCUSSION

After the close of the Union's case-in-chief, the District moved for the dismissal of the charge for failure to prove the elements of discrimination under Section 1201(a)(3). (N.T. 95). I denied the motion at that time. (N.T. 96). In its post-hearing brief, the District renewed its motion for dismissal of the charge, arguing that the Union failed to establish a prima facie case of discrimination with substantial evidence. (District Brief at 1 & 8). The Union argues that the District retaliated against Mr. Moore when it changed Mr. Moore's terms and conditions of employment immediately after he investigated and processed the Grievance complaining of a supervisor doing bargaining unit work. (Union Brief at 5-6). In changing his employment conditions, argues the Union, Mr. Loveland specifically directed the following: Mr. Moore was not to access the District's camera system, which was part of his duties since 2010; he was directed to use the technology department van for all business travel, unless it was unavailable; he was directed not to assign himself any trouble tickets or work tasks and he was to receive those assignments from an administrator; he was not to travel to any District building, unless assigned by an administrator; and his hours were changed. (Union Brief at 5).

In a discrimination claim, the complainant has the burden of establishing that the employee(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 employee'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 employee'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 explain its action against the adversely affected employee(s), and the effect of the employer's adverse action on other employees 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 Union and the District disagree over whether the manner in which Mr. Moore investigated the Grievance constituted protected activity. The Union argues that accessing the security camera system, which was part of Mr. Moore's daily job duties, to provide the proof that the District had required that supervisors were performing bargaining unit work, was protected and necessary to police the parties' CBA and substantiate the Grievance. (Union Brief at 6-7). The Union further maintains that the fact that Mr. Moore engaged in Union business for less than 2 minutes during his work time is of no moment because the Human Resources Department often overlooked and accepted brief, unauthorized Union activity during work hours. (Union Brief at 7).

I agree with the Union that the District has a past practice of overlooking the performance of some Union business during work time without prior authorization. Mr. Moore's use of two minutes of work time for his activities would not, in this case, render those activities unprotected. However, I agree with the District that Mr. Moore was not engaged in protected activity when he accessed the security camera system for the purpose of viewing Supervisor Scott Ferguson performing bargaining unit work. Although the filing of grievances, investigating grievances and obtaining information to police collective bargaining agreements are protected activities under PERA, the activity in this case was not protected. Mr. Moore had access to the District's security camera system for the purpose of ensuring proper operation of the cameras and the servers as part of his regular job duties. He did not have authorization from any District administrator to access the system for personal or Union business. The proper way to have obtained the footage would have been to file the Grievance, based on the report of the bargaining unit member who told Mr. Moore that Mr. Ferguson was performing the work at Lycoming Valley on Sunday, March 17, 2019, and then submit an information request to the District for the footage to process the Grievance or obtain prior authorization to access the footage himself. The bargaining unit employe's report to Mr. Moore, alone, was sufficient to prove the allegations in the Grievance, without the footage.

Mr. Moore had no more of a right to access the security camera footage to investigate the Grievance or police the contract, without approval, than he did to use the District's vehicle to attend an offsite Union meeting without approval. Similarly, for example, a secretary with access to personnel records does not have the right to rummage through employe records, without prior authorization or a valid, recognized District business purpose, to discover suspected evidence of grievable offenses, such as payroll or promotional violations. The unauthorized use of District equipment for Union business is not protected, but access to information contained on District equipment or through the use of District equipment is attainable through the proper channels by requesting that information from the District in pursuit of policing the contract or the filing of a grievance. If the District were to refuse a valid information request, the Union's remedy would be to pursue an unfair practice charge for that reason.

The fact that Mr. Moore had daily, authorized access to the camera system does not protect his retrieval of the footage of Mr. Ferguson because the retrieval of the two-day old footage was not within the scope of his authorized and recognized duties at the District. Mr. Moore, without authorization, accessed two-day old footage of another District employe's activities on District property. In fact, Mr. Moore testified that his usual access to the camera system had been to ensure proper functionality by viewing camera footage of class changes that occurred the same day. There is no evidence that his duties included access to days old recordings to view employes' activities without a directive to do so from an administrator. The District trusts its employes who have access to certain equipment and information to use that access within the scope of District authorized business. Absent protected activity, the Union is unable to establish a prima facie case of discriminatory retaliation for changing Mr. Moore's terms and conditions of employment, and I have granted the District's renewed motion for dismissal of the charge.

The Union and the District also disagree over whether the District was aware of Mr. Moore's investigation of Mr. Ferguson through the use of the

security camera system when they changed Mr. Moore's working conditions. My consideration of the District's motion for dismissal is limited to the Union's case-in-chief. Based on the Union's case-in-chief, there is no evidence that Mr. Loveland may have learned of the Grievance, either independently or from Dr. Bowers. Therefore, I also grant the District's motion for dismissal because the Union did not establish that Mr. Loveland had the requisite knowledge of Mr. Moore's Grievance investigation activities when he restricted Mr. Moore's camera access.

Moreover, based on the substantial and credible evidence of the record as a whole, I find that Mr. Loveland indeed lacked any knowledge of Mr. Moore's Grievance investigation when he learned that Mr. Moore accessed the security camera system without authorization and restricted Mr. Moore's access to that system. Mr. Loveland credibly testified that, when Dr. Bowers asked Mr. Loveland to determine who accessed the security camera system at Lycoming Valley for March 17, 2019, he did not mention anything about a supervisor doing bargaining unit work. Dr. Bowers asked Mr. Loveland if he authorized the access, and Mr. Loveland replied that he did not. Significantly, Dr. Bowers did not mention anything about someone accessing the video for supporting the Grievance filing, and Mr. Loveland credibly testified that he "had no idea" that there was a grievance about a supervisor doing bargaining unit work. (F.F. 22). Mr. Loveland, and not Dr. Bowers, took administrative action against Mr. Moore to change his working conditions and, therefore, those changes could not have been motivated by the Grievance filing or investigation as a matter of law. Accordingly, Mr. Loveland lacked the requisite knowledge in this case.²

The Union argues that Mr. Loveland's testimony, that he could not remember exactly when he became aware that a grievance had been filed pertaining to the footage of Mr. Ferguson, is not credible. (Union Brief at 8). However, this testimony related to Mr. Loveland's April 8, 2019 meeting with, and same-day email to, Mr. Moore that resulted from Mr. Leinbach's concerns about Mr. Moore's mileage reimbursement submission for the month of March 2019. Accordingly, Mr. Loveland testified that he had no knowledge of the Grievance investigation as of April 1, 2019, but he could not recall if he had such knowledge as of April 8, 2019. Once the District established that Mr. Loveland did not have knowledge of the Grievance or the purpose of Mr. Moore's viewing of the footage of Mr. Ferguson, it was the Union's burden on rebuttal or cross examination to establish that knowledge. Mr. Loveland's testimony, that he did not remember having any knowledge of the Grievance on April 8, 2019, which I credit, does not establish that he had knowledge when he changed Mr. Moore's working conditions on that day. He certainly lacked knowledge on April 1, 2019, when he restricted Mr. Moore's access to the security camera system and network. Additionally, as the District emphasizes in its brief, none of the exhibits referencing the Grievance demonstrate that Mr. Loveland received any notification of the Grievance or the reason for Mr. Moore's accessing the footage. The record, therefore, does not establish that Mr. Loveland had knowledge or notice as of April 1, 2019, or April 8, 2019.

² Mr. Loveland was not questioned about whether his knowledge that Mr. Moore was the Union's Vice President caused him to assume or believe that Mr. Moore's retrieval of the Ferguson footage was Union or Grievance related. The record only establishes that Mr. Loveland viewed the activity as unauthorized and a breach of trust, without actual knowledge of Mr. Moore's purpose.

Also, Dr. Bowers and Ms. Logue were involved with the Union in prior discussions in March 2019, related to supervisors performing bargaining unit work. The record does not establish that Mr. Loveland was part of those discussions, nor would he have been since the cleaning work at issue did not involve his department. Therefore, Mr. Loveland would not have known that the Union was taking issue with the subject when he learned that Mr. Moore viewed two-day old footage of Mr. Ferguson cleaning at Lycoming Valley. The Grievance was filed with Ms. Logue, and Dr. Bowers was copied. Mr. Loveland is not copied on any of the emails related to the removal of bargaining unit work or the filing of the Grievance. (Association Exhibit 1, Joint Exhibits 7 & 10). Discussions about the Grievance were between Dr. Bowers and Ms. Logue, without the involvement of Mr. Loveland. The investigation took place with the Director of Maintenance Facilities, Dale Crans. (N.T. 102).

The Union further contends that Dr. Bower's knowledge that someone accessed the camera system for filing the Grievance can be imputed to Mr. Loveland because Dr. Bowers directed Mr. Loveland to investigate the identity of the person who accessed the system. The Union asserts that the "sole reason that Bowers initiated this investigation was because he was displeased that Moore had accessed the video for the purpose of the [G]rievance." (Union Brief at 10). However, at the time Dr. Bowers initiated the investigation, he did not know the identity of the person who accessed the system. He did not order the investigation of Mr. Moore. Also, the record does not establish that Dr. Bowers directed Mr. Loveland to take any action against the person identified as having accessed the camera system or that Dr. Bowers would have expected Mr. Loveland to take any action. Rather, Mr. Loveland, who did not know about the Grievance or the purpose of viewing footage of Mr. Ferguson, independently restricted Mr. Moore's access to the system. Accordingly, Dr. Bower's knowledge that the footage was accessed to support the Grievance filing cannot be imputed onto Mr. Loveland in this case.

The Union further contends that the changes in Mr. Moore's working conditions were not related to any performance issues but were specifically related to the District's anger and mistrust regarding Mr. Moore's access to the District's camera footage and, therefore, establish unlawful motive. (Union Brief at 12). The District, however, is not disputing that Mr. Loveland denied Mr. Moore access to the camera system because of Mr. Moore's unauthorized access to that system, which Mr. Loveland considered a breach of trust. The problem for the Union is that Mr. Loveland did not know about the Grievance investigation purpose of the access and the access was not protected, even if he had known. Indeed, there is no evidence of record that Mr. Moore ever told Mr. Loveland about the Grievance investigation purpose of his accessing the Ferguson footage either at the April 1, 2019 meeting or the April 8, 2019 meeting. The District actually agrees with the Union that Mr. Loveland was motivated by Mr. Moore's accessing the video, which he considered a breach of trust and confidentiality. That motive, however, is not unlawful in this case. Even if the motive for each of the changes to Mr. Moore's working conditions flowed from his unauthorized video camera access for the purpose of filing the Grievance, the motive is lawful because the activity was unprotected, and unknown to Mr. Loveland.

The Union also claims that the District's proffered reasons for changing Mr. Moore's working conditions were pretextual, supporting an inference of unlawful motive. (Union Brief at 12-13). However, as previously stated, if Mr. Moore's activities were unprotected then adverse employment actions related to those activities are lawful. Additionally, I credit the District's explanations for the changes Mr. Loveland made to Mr. Moore's

conditions of employment as all relating to a perceived need on the part of the District to increase supervision of Mr. Moore after his perceived breach of trust, confidentiality and the vehicle-use policy.

Mr. Loveland immediately restricted Mr. Moore's camera access upon learning that Mr. Moore accessed two-day old footage to investigate a District employe without prior authorization, which the District does not dispute. Mr. Loveland required Mr. Moore to receive work assignments from an administrator instead of assigning work to himself. This flows from the perceived breach of trust after accessing the camera system on work time, and Mr. Moore's violation of existing District policy to use the technology vehicle which was available. Consequently, the District legitimately and credibly wanted more monitoring of Mr. Moore's work activities.

Mr. Loveland's restriction of traveling to other buildings flowed from the complaint he received from the Finance Director over whether Mr. Moore really needed to go to every building in the District every day. Making sure that Mr. Moore used the District vehicle for travel was simply the reiteration of an existing policy. Mr. Moore already knew about the travel policy. Mr. Loveland emailed all technology employes on April 11, 2019, to make sure everyone knew about the travel policy and the need to lower the mileage reimbursements for the use of personal vehicles. Mr. Loveland wanted to make sure that Mr. Moore was not traveling all over the District assigning himself tasks that could have been completed more efficiently by coordinating the work assignments better and reducing constant travel back and forth. Changing Mr. Moore's hours, which is not prohibited by the CBA, was also an attempt to increase supervision of Mr. Moore. The District does not dispute that it wanted to increase supervision after a perceived breach of trust and to coordinate assignments to reduce Mr. Moore's daily traveling. I find that these reasons were credible, not pretextual and not unlawfully motivated.

Mr. Moore has been involved in the processing of grievances at the District since his initial appointment to the position of Union Vice President in 2016 or 2017. After engaging in that protected activity, Mr. Moore experienced some performance issues related to the installation of white boards during the summer of 2018, for which Mr. Loveland and Dr. Bowers counseled him and for which Mr. Loveland planned on implementing a mid-term evaluation and focused improvement plan. The evaluation and improvement plan did not occur because Mr. Loveland thereafter pursued a mentoring approach and seemingly Mr. Moore's performance improved. Significantly, however, the District did not use the white-board deficiencies to discipline Mr. Moore, even though he had filed grievances and disputed work removal for over a year. In effect, nothing adverse came from the white-board incident other than counseling about better communications, following directives and meeting expectations. In this regard, there is no evidence of a pattern of retaliation against Mr. Moore for his protected activities that could serve as a factor from which to infer unlawful intent in this case.

Accordingly, the District has not engaged in unfair practices in violation of Section 1201(a)(1) or (3).

CONCLUSIONS

The hearing 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 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 violated Section 1201(a)(1) or (3) of PERA.

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 seventeenth day of June 2021.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

Jack E. Marino, Hearing Examiner