COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

GREENVILLE AREA EDUCATION ASSOCIATION	:	
	:	Case No. PERA-C-08-462-W
v.	:	
GREENVILLE AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On December 1, 2008, the Greenville Area Education Association (Complainant or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Greenville Area School District (Respondent or District), alleging that the District violated Sections 1201(a)(1) and (3) of the Public Employe Relations Act (PERA).

On December 12, 2008, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and March 11, 2009, in Pittsburgh was scheduled as the time and place of hearing if necessary.

A hearing was necessary, but was continued to June 17, 2009 at the complainant's request without objection from the respondent. The hearing was held on the rescheduled date and on nine additional days: June 18, August 18, September 19, October 9, 26 and 30, and December 7 and 8, 2009.

At the hearings, the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

The parties submitted post-hearing briefs and reply briefs.

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 parties stipulated and agreed that Greenville Area School District is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act (PERA), 43 P.S. § 1101.301(1). (N.T. 27)

2. The parties stipulated and agreed that the Greenville Area Education Association is an employe organization within the meaning of Section 301(3) of PERA, 43 P.S. 1101.301(3). (N.T. 27)

3. Jon Ross was at all times relevant to this proceeding a professional employe of the District. He began his employment with the District in 1988. He taught in the first and third grades. (N.T. 31, 598-599)

4. Prior to his suspension in 2008, Ross was teaching third grade at Hempfield Elementary School. (N.T. 599)

5. Ross has been a member of the Greenville Area Education Association since 1988. (N.T. 599)

6. Ross served as Association vice president in the mid-1990s, grievance chair in the late 1990s and again vice president in the early 2000s. (N.T. 600)

7. For the five years prior to his termination, Ross served as president of the Association. (N.T. 600)

8. During Ross' entire time as an Association officer, Dr. Patricia Homer served as the District's superintendent. (N.T. 600)

9. In the 2001-2002 school year, Ross filed a grievance on his own behalf challenging an unpaid suspension. The grievance was sustained at arbitration, and Ross received three days of back pay in the award. (N.T. 604, District Exhibit 24)

10. This was the only grievance in the past eight years which proceeded to arbitration. (N.T. 663-664)

11. In April, 2006, the Association filed an unfair practice charge against the District, alleging that the District denied Ross an assistant track coach position in violation of PERA. (Case No. PERA-C-06-159-W). The Association has requested that this charge be held in abeyance. (N.T. 605-606, Association Exhibit 20)

12. As Association president, Ross met with Homer on various occasions regarding grievances and other concerns of Association members. (N.T. 600, 601)

13. During the 2003-2004 school year, Ross brought to Homer issues involving two part-time teachers whose pay did not match their work hours. (N.T. 600-604)

14. The matters were resolved on behalf of these two teachers, although neither teacher was brought back for the following school year. (N.T. 604)

15. On another occasion in the winter of 2006, Ross and another Association representative, Bradley Solderich, met with Homer to advocate on behalf of teacher Genna Rossi, who was being asked to do paperwork amounting to two positions. (N.T. 640)

16. Homer refused to discuss the issue and told Ross and Solderich that the Association could not discuss with her how employes were used in their positions or how they were paid. She slammed the desk and excused them. (N.T. 640)

17. As Association president, Ross actively engaged in negotiations for the current contract. (N.T. 605-606)

18. For prior contracts, Ross served on the negotiation committee but was not actively involved in the negotiations. (N.T. 607)

19. The negotiations for the current contract lasted for two years. (N.T. 606)

20. During those contract negotiations, the professional employees worked for an entire year without a contract. Since Ross has worked for the District, this is the first time this occurred. (N.T. 607)

21. Ross expressed his opinion that the negotiations were difficult because of the District's placing roadblocks in the way of the Association's requests to discuss daily concerns of their members. (N.T. 720)

22. The Association took a right to strike vote for the first time during those contract negotiations. (N.T. 607)

23. The District hired Attorney Charles Steele as labor counsel to negotiate with the Association. Steele made negative comments to PSEA UniServ Representative, Barbara Henning, concerning Ross' participating in bargaining. Steele contended that Ross' behavior at the bargaining table was impeding the negotiations. (N.T. 88-89)

24. Board members Michael Downing and Dennis Webber also made unfavorable comments regarding Ross' participation in bargaining. (N.T. 507-510)

25. Henning, the PSEA UniServ representative, was also at the negotiating table. She observed no such behavior by Ross. (N.T. 88-89)

26. Dr. Homer testified that Ross was not a problem at negotiations. (N.T. 519)

27. In February, 2008, Ross made plans to speak at the upcoming school board meeting. The District scheduled the meeting for the Hempfield Elementary School as opposed to the usual location of the high school. (N.T. 610-612)

28. Ross intended to discuss the Dr. Seuss Read Across America Program being done in his classroom. He planned to invite the board members to attend his classroom. He did not inform the administration or the board that he wished to speak. (N.T. 611)

29. The evening of the meeting, school board president Michael Downing and high school principal Don Ziegler came to Ross' room. They warned him not to speak at the meeting. Ross said he was not comfortable having a meeting with them without another Association person there as a second representative and he tried to make his way to the door to leave. Downing interrupted him and said, "You don't have to talk, you need to listen." Downing then shut his door and went on to tell Ross that he was not to speak at the Board meeting. Downing said that he had contacted Barbara Henning and was under the impression that she had also told him not to speak. (N.T. 612-613, 727-729, Association Exhibit 22)

30. Attorney Steele, on behalf of Dr. Homer, had earlier called Henning, to discuss Ross' plans to speak to the school board. Steele said that to do so was "problematic" and he asked Henning to dissuade Ross from doing so. (N.T. 74-77, 727, 730)

31. Ross did attend the meeting and spoke about the program. (N.T. 613)

32. A few days after the meeting, Hempfield Principal Nancy Castor told Ross that he was "out of line" to speak at the meeting and that he should first come to her with any issues for discussion. (N.T. 614-615)

33. Ross responded that he has observed other teachers speak to the Board about programs on several occasions. (N.T. 614, 615)

34. Principal Castor replied, "Well, you have to understand you are not other people." (N.T. 614, 615)

35. Castor went on to warn him to watch what he was doing because prior to the board meeting, the board held an executive session to discuss his personnel file and history with the District. (N.T. 615)

36. School Board member Dennis Webber testified that Dr. Homer went over Ross' personnel file with the board in February, 2008. She discussed the record of disciplinary actions against Ross. (N.T. 379-380)

37. That from February to June, 2008, Emily Castor Jackson was employed by the District as a long term substitute teacher at the Hempfield Elementary School. Jackson graduated from college in December, 2007. (N.T. 892)

38. On March 7, 2008, Jackson complained to her immediate supervisor, Deanna Grantham, about Mr. Ross' making inappropriate sexual comments to her. She wrote a statement of her complaint. (N.T. 902-903, District Exhibit 22)

39. Grantham advised her to take the matter to the building principal, Nancy Castor. (N.T. 902)

40. Castor is Jackson's mother. (N.T. 436, 902)

41. Principal Castor referred her daughter's complaint to another elementary building principal, Brian Bronson, because the complaint was from her daughter. Bronson referred the case to Dr. Homer. (N.T. 445-446, 902)

42. That Deanna Grantham is an elementary teacher who worked with Ross in the Hempfield Elementary School. She began working in the District in 2002. (N.T. 436, 853-875)

43. On March 7, 2008, Grantham complained to Castor about Ross screaming at a student. When she talked with Castor about that incident, she also brought up her complaint that in February, Ross made inappropriate sexual comments to her. (N.T. 445-446, 852-875, District Exhibit 18, pp. 235, 259))

44. Principal Castor also referred Grantham's complaint to Principal Bronson because her daughter Emily Castor Jackson had similar complaints against Ross. (N.T. 867)

45. At some point in March, Dr. Homer decided to turn the complaints over to the District's labor solicitor Attorney Steele. (N.T. 269-271, 784-786, Association Exhibits 4 and 5)

46. Also in March, Dr. Homer reported these allegations to school board president Downing, and vice president Nancy Kremm, who is also the chairman of the personnel committee. (N.T. 306, 411)

47. Dr. Homer delegated full authority to Steele to conduct the investigation of the complaints against Ross, including the authority to recommend the level of discipline. (N.T. 270-271)

48. Even though Principal Castor turned the complaints over to another principal, she again became involved in the investigation in March when Steele asked her to arrange for the meetings and interviews with the complainants. (N.T. 436)

49. Steele first met with Jackson and Grantham in March, 2008 in a meeting that lasted approximately one hour. (N.T. 823, 903, 911-912)

50. Following Steele's meeting with the women, he met with Castor to discuss the cases. He needed more information and advised Castor that the District should keep the investigation open and he would do so. (N.T. 792)

51. In April, 2008, Ross, in his role of Association president, engaged in and assisted his members in deciding whether to take a vote of no confidence against two high school principals as well as Superintendent Homer. (N.T. 620-623)

52. Ross' work in the matter of the no confidence vote took place over two meetings of membership in April, 2008. (N.T. 620

53. In mid to late April, Steele learned of the possibility of the Association's no confidence vote and request for a meet and discuss with the board. (N.T. 793, Association Exhibit 10)

54. On May 1, 2008, the faculty of the junior and senior high school voted no confidence in the principals. The full membership voted no confidence in Superintendent Homer. (N.T. 623, Association Exhibit 1)

55. In early May, 2008, the Association sent a letter to board President Downing to alert him of the vote results. (N.T. 624)

56. Until this present unfair practice charge hearing, the Association did not publicly disclose the results of the no confidence vote. (N.T. 722)

57. On May 14, 2008, after the no confidence vote, Attorney Steele called PSEA UniServ representative Barbara Henning and told her that one teacher and one aide "filed sexual harassment charges [against Ross] within the last six months, but dropped them when the investigation began." (N.T. 79-80)

58. In this conversation, Steele related the specifics of the Jackson and Grantham March, 2008 complaints about Ross. (N.T. 80)

59. This was the first time that Steele reported the complaints to Henning even though Steele knew about them two months earlier. (N.T. 80)

60. On May 28, 2008 Principal Castor completed Ross' year-end rating on the Pennsylvania DEBE form. She rated Ross with a perfect score of 80 out of 80. The evaluation made no mention of the March 7, 2008 allegations by Ross' fellow employes. (N.T. 214-215, Association Exhibit 6)

61. The evaluation form included a note from Dr. Homer, which stated, "I disagree with this rating." Dr. Homer signed her note, but put no date on it or reasons for her disagreeing. (N.T. 214-215, Association Exhibit 6)

62. The District has previously used ratings as a means to critique teachers in all aspects of their employment. Ross himself once received a lower evaluation score for alleged problems with his interactions with administration. (N.T. 1139-1141, Association Exhibit 33)

63. When Ross received his most recent evaluation in 2008, he was not aware, at that time, that anyone had made any complaints against him. (N.T. 625)

64. On June 4, 2008, Steele and Henning were speaking about their negotiations that were taking place in another school district. In Henning's words, "all of a sudden," Steele began discussing "J.R." (Steele's initials for Ross). (N.T. 82)

65. Steele referenced the no confidence vote and the Association's meet and discuss request. He said nothing about the sexual harassment allegations and, at that point, Henning believed nothing was to happen with the sexual harassment allegations because Steele had previously told her the employes dropped the charges. (N.T. 82-83)

66. On June 14, 2008, Ross and board President Downing met at a restaurant for breakfast to set up the meet and discuss meeting before the school board. They agreed to June 26, 2008 at 7:30 in the high school library as the time and place of the meeting. (N.T. 760-761 Association Exhibit 26, District Exhibit 10)

67. On June 26, 2008, the Association engaged in the meet and discuss session with the board. Ross and five teachers representing the various buildings made presentations to the Board. The meeting lasted a little over two hours. (N.T. 61, 326, 633-636, Association Exhibit 2)

68. On July 1, 2008, Steele had another phone conversation with Henning. The conversation began with a discussion over interpretation of IRS rules. Then Steele turned the conversation to his concerns about a custodian bringing up allegations against Dr. Homer. Steele stated that he believed Ross was also involved in those allegations. Steele insisted that Ross produce documentary proof of the custodian's allegations, stating that he never saw a union president do anything like this. Finally, Steele said he wanted to give Henning a "heads up" that the two sexual harassment accusations discussed earlier may be brought back up by Homer. (N.T. 84-87, Association Exhibit 3)

69. Henning warned Steele that if Homer brought those accusations up it would be considered retaliation for Ross' engaging in the no confidence vote and the meet and discuss session. She warned him that the Association would file an unfair labor practice charge. (N.T. 86)

70. Genna Rossi was an elementary teacher who worked with Ross at Hempfield Elementary from 2002 to December, 2007. She later married and used Zelinsky as her last name. (N.T. 1024-1026)

71. In 2002, Zelinsky complained about Ross making inappropriate sexual comments to her. As a result of Zelinsky's complaint, the District issued Ross a written reprimand that stated, inter alia: "All sexual joking, bantering, and innuendos were to stop immediately not just with Miss Genna Rossi but with all staff members. There is to be no retaliation against Miss Rossi by Mr. Ross or anyone else. Any further violations of your Action Plan would result in unpaid leave and/or another unsatisfactory rating." (N.T. 461, 462 District Exhibit 4)

72. After 2002, Ross made no more sexual comments to Zelinsky. (N.T. 1064)

73. However, Zelinsky believed Ross shunned her in this period to the point where she was unable to receive Ross' cooperation in helping students whom they both taught. (N.T. 1069-1070)

74. In 2006, Zelinsky complained of Ross' uncooperative behavior to principal Castor. Because of Zelinsky's complaint, Castor transferred her to another location. (N.T. 1070)

75. At that time, the District did not discipline Ross for the alleged shunning or retaliation against Zelinsky. (N.T. 1165-1166)

76. On or about August 11, 2008, at the Hermitage Restaurant in Hermitage, Pennsylvania, Attorney Steele first met with Zelinsky to investigate her relation to the charges by Jackson and Grantham. This was a few days before Zelinsky was to leave for Germany where her husband was on military assignment. (N.T. 442, 1060, 1072-1073)

77. The August 11, 2008 was the first contact between Steele and Zelinsky. The meeting was arranged by principal Castor. (N.T. 441, 811-813, 821-822)

78. Zelinsky was in Pennsylvania from June 14 through August 15, 2008. She stayed with her parents in Sharon, Pennsylvania, which is near Greenville. No one from the District contacted her until August 11, just days before she was to return to Germany. (N.T. 1072-1073, 1080)

79. On September 8, 2008 Jackson signed an affidavit about the March 7 incident that had been prepared by Attorney Steele. (N.T. 916, District Exhibit 23)

80. In October, 2008 Steele, meeting in executive session with the school board, first informed the entire board about the two employes' allegations against Ross. (N.T. 814-817)

81. At this meeting, Steele described Ross as wearing a "bulls eye" on his back. He then raised his hands as if holding a rifle, and said "we've got him in our sights." (N.T. 212-214, 231, 233, 334)

82. On October 20, 2008, the District issued a written statement of charges against Ross, including but not limited to, sexual harassment, retaliation and mistreatment of children under Ross' supervision. The District suspended Ross without pay. (N.T. 592, District Exhibit 7)

83. The parties' collective bargaining agreement provides teachers with a choice to appeal dismissals via an appeal to the Greenville School Board of Directors or to a labor arbitrator. (N.T. 298)

84. Ross chose to have his case heard by the Greenville School Board of Directors. (N.T. 298, 638)

85. The board conducted nine days of hearing on the charges against Ross: January 13, 14 and 21, February 2, 12, 23, March 2, 4, 2009. (N.T. 781, 925, District Exhibit 18)

86. On March 4, 2009, the board voted to find Ross guilty of violating two sections of the School Code, Persistent and Willful Violation or Failure to Comply with School Laws (by a vote of 8-1) and Immorality (by a vote of 6-3). (N.T. 1012, 1015, District Exhibits 18, 36-F and 36-G)

87. The school board then returned to deliberation to determine the appropriate discipline. On April 20, 2009, The board ultimately concluded that a discharge was appropriate, but also decided to offer Ross a last chance agreement providing for Ross' return to work with certain conditions. (N.T. 375, 381, District Exhibit 2)

88. This disciplinary action was approved by a 9-0 vote of the school board. (N.T. 1012, 1015, District Exhibit 36-A)

89. Ross chose not to accept the last chance agreement. The District terminated his employment.

90. The District has a progressive discipline policy that provides for (1) an oral reprimand; (2)an oral reprimand with notation; (3) a written reprimand; (4) a disciplinary suspension and (5) dismissal. (N.T. 272, 326, Association Exhibit 5)

91. From the time the District issued Ross a written reprimand in 2002, it did not issue him any other discipline until the October 2008 charges were brought. (N.T. 303-304)

DISCUSSION

The Association's charge of unfair practices alleges that the District violated Sections 1201(a)(1) and (3) of PERA by suspending Association President Jon Ross without pay with intent to discharge because of his protected activities. Subsequent to the charge being filed, the District proceeded to terminate Ross' employment.

The first cause of action to address is the alleged violation of Section 1201(a)(3), that the District suspended and discharged Ross as an act of discrimination because of his activities as Association president. In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainants must prove that the employe engaged in protected activity, that the employer was aware of that protected activity, and that but for the protected activity the adverse action would not have been taken against the employe. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). The complainant must establish these three elements by substantial and legally credible evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). St. Joseph's Hospital, supra.

The complainant proved the first two elements of the St. Joseph's test. First, the complainant proved that Ross engaged in protected activity. Ross was the local Association president for the five years prior to his termination. He filed grievances on behalf of teachers, including one that proceeded to arbitration, the first time that ever happened in the District. Also, he was a member of the Association's negotiating team during collective bargaining negotiations for the current agreement. During those negotiations, the Association took its first ever strike vote. Closer in time to the employer action at issue in this case, Ross was the Association president during a 2008 faculty vote of no confidence against the superintendent and two principals. At the same time, he organized and participated in a meet and discuss session with the District school board, the first ever with the full board.

Second, the complainant proved that the District officials knew about Ross' protected activities. As set forth in the findings of fact, the nature of these activities made the officials directly aware of Ross' activities because the officials were in Ross' presence when they occurred.

The dispute in this case is over the third element, whether the District was motivated by anti-union animus in bringing the charges against Mr. Ross and then terminating him. In a charge of discrimination it is the employer's motivation which creates the offense. Perry County v. PLRB, 364 A.2d 898 (Pa. Cmwlth. 1994).

As the Board and the Commonwealth Court set forth in Perry County, even if the District can show that the school board of directors was not aware of a superintendent's discriminatory motives, the District will be guilty of an unfair practice if the complainant can prove the superintendent had discriminatory motivation because motivation of a supervisory employe is imputed to the employer.

Since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. PLRB v. Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982); St. Joseph's Hospital, supra. But an inference of anti-union animus

must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." Shive supra at 313.

In Child Development Council of Centre County (Small World Day Care Center), 9 PPER ¶ 9188 (Final Order, 1978), the Board stated:

> There are a number of factors the Board considers in determining whether anti-union animus was a factor in the layoff of the Complainant: the entire background of the case, including any anti-union activities by the employer; statements by the discharging supervisor tending to show the supervisor's state of mind; the failure of the employer to adequately explain the discharge, or layoff, of the adversely affected employe, the effect of the discharge on unionization efforts-for example, whether leading organizers have been eliminated; the extent to which the discharged or laid-off employe engaged in union activities; and whether the action complained of was "inherently destructive" of important employe rights."
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> 9 PPER 9188, at 380.

The Board has also noted that the timing of the adverse action against the employes would be a factor that could be used to infer that anti-union animus was the motivation for the employer action. PLRB v. Berks County (Berks Heim County Home), 13 PPER ¶ 13277 (Final Order, 1982).

In this case, the Association argues that animus can be inferred from four factors: the entire background of the case, which includes a new degree of contentiousness in contract negotiations; statements by District officials showing a hostility toward Ross; that the subject of the discharge was the Association president and the timing of the District's decision to charge Ross.

The first, second and third factors are intertwined. The background of the case includes evidence that the negotiations for the CBA now in place took longer than the prior contract negotiations. The parties went a year without a new contract in place. This delay caused the Association to take its first ever strike vote. All this in itself is not a reason to infer the District was possessed of anti-union animus. However, during the negotiations, the District's labor solicitor and two board members stated that Ross' behavior at the table was the cause of the extended negotiations. Ross was on the Association's team in the most recent collective bargaining negotiations. As for his behavior being the cause of the delay, these allegations were rebutted by another participant in the meeting, PSEA's Barbara Henning, who testified that Ross' behavior was not objectionable. Also, Superintendent Homer admitted on cross-examination that Ross was not a problem during negotiations.

Ross was more than a figurehead Association president. He took an active and visible role in this leadership position. Ross' posture resulted in hostility from the District. Besides the hostile statements cited above, there are others: Dr. Homer slamming her hand down on a desk in a 2006 grievance meeting with Ross to bring an end to the meeting; board president Downing and principal Zeigler warning to Ross not to speak at the February, 2008 school board, cornering him in his classroom the night of the school board meeting and principal Castor's warning to Ross the day after the board presentation that he should have first come to her before he spoke to the Board. In that discussion Castor told him that she saw him as different from other teachers who had spoken to the Board and warned him that the school board was discussing his personnel file in executive session just prior that board meeting.

As for the fourth factor, timing, the Association argues that the District charged Ross after, and because of, the no confidence vote and Ross' meet and discuss presentation for the Association. The Association points out that it took seven months between the teachers' allegations against Ross and the District bringing formal charges against him. The Association argues that in this period from March 7 to October 20, 2008, the District could have presented the charges to the school board but only did so after Ross supervised an Association no confidence vote on May 1, and after Ross made a meet and discuss presentation to the school board on June 26.

The Association argues that by Superintendent Homer delegating to Attorney Steele the full authority to investigate and charge Ross, Steele became the superintendent's agent and his conduct must be subject to scrutiny as if he was the superintendent. Perry County, supra. The Association contends that Steele's conduct of the investigation demonstrated an animus toward Ross, as revealed by the timing of Steele's charges against Ross. His October presentation of charges leads to the conclusion that the charges were made in reaction to Ross' meet and discuss presentation and not as a result of a bona fide investigation into the employes' allegations.

The Association has raised reasons for discrediting the District's explanation for the delay in bringing charges. Dr. Homer testified that in March, she turned everything over to Steele. Two months later, on May 14, Steele told Henning about the two women's complaints, mentioning them by name, but that they had dropped the charges. Then, on June 4, in a conversation that was intertwined with a discussion about the no confidence vote and the meet and discuss session, Steele mentioned Ross again, but said nothing about the sexual harassment. Then on July 1, in another conversation with Henning following the meet and discuss session, Steele mentioned how unusual it was for a union president to be making certain charges against a superintendent. Steele then offered a "heads up" to Henning and said that Superintendent Homer might bring back up the sexual harassment charges.

The District tries to explain the timing of the charges by asserting that Steele did not know until sometime after March that there was another alleged victim to Ross' sexual harassment, Genna Rossi Zelinsky. The District contends that Ross shunned Zelinsky as an act of retaliation against her for the bringing the 2002 charges. The District contends that Zelinsky's experience with Ross retaliating against her following the 2002 incident bolstered the claims of the other employes' reluctance in March to go forward with their sexual harassment claims against Ross.

The District's explanation is hard to accept for three reasons. Steele could have obtained Ross' personnel file, which would have disclosed the relevant facts of the 2002 case and learned about the existence of Zelinsky. Second, principal Castor was the supervisor of all of these employes. Castor knew of Zelinsky's earlier problems with Ross, the alleged shunning. She agreed to move Zelinsky because of problems she was having with Ross. Third, in the five years after the District disciplined Ross for the incident with Zelinsky, no one in the District said anything to Ross about him shunning or retaliating against her.

Even if one accepts the District's argument that Steele had to interview Zelinsky, the question that must be asked is why did it take Steele another month and a half, until August 11, to interview her? The District claims it could not locate Zelinsky. However, she was at her parents' home in nearby Sharon for most of the summer. Steele interviewed her just days before her return to Germany.

Having reviewed these explanations, I am not persuaded that the District did all it could to conduct a swift and sincere investigation of the March 7 sexual harassment charges. Accordingly, the factor of timing must be considered as a factor to infer that anti-union animus motivated the bringing of charges against Ross.

From all these factors discussed above, it is reasonable to infer that the District brought charges against Ross not as a result of a bona fide sexual harassment investigation but rather as a result of animus against the Association president for the exercise of protected activity. The Association has satisfied the third element of the St. Joseph's test for proving discrimination.

The District argues that it presented a credible and non-discriminatory basis for the decision to charge Ross. The District asserts that the April 20, 2009 school board decision finding Ross guilty of violating two sections of the School Code validated the October, 2008 decision to charge and suspend Ross. The District introduced the record of the nine days of school board hearings that resulted in the school board voting in the affirmative on two of the grounds for discharge. The District also presented as witnesses the school board members who testified that there was no display or expressions of anti-union animus from Board members during their deliberations.

The Association responds that when all the evidence is considered, the District has failed to prove that it would have even brought charges against Ross, much less terminated him, had he not been engaged in protected activity. The Association contends that it has presented a prima facie case of discrimination and that it has also rebutted the District's contention that it would have charged and terminated Ross even if he was not engaged in protected activity.

The Association contends that the evidence of animus in this case is similar to the evidence found to support a finding of anti-union animus in Lehighton Area School District v. PLRB, 682 A.2d. 439, (Pa. Cmwlth. 1996). In that case, the Commonwealth Court upheld the PLRB's determination that the discharge of a shop steward was motivated by anti-union animus and that the employe would not have been dismissed but for his union activities. The Court accepted the PLRB's finding of animus from the failure of District supervisors to discipline the employe for his performance of weekend building checks (that enabled him to receive overtime pay) until he had filed a grievance and from statements by supervisors expressing displeasure at the employe's grievance filing. The Court stated, "These facts support the inference drawn by the PLRB that Smith's union activities caused the District to 'seize upon' and/or 'overreact' to Smith's continued building checks." Id. at 443.

The Court also found that the District's failure to follow its own progressive discipline policies supported an inference of anti-union animus. The District terminated an employe who had never before been disciplined.

The present case is similar to Lehighton Area School District, supra. The District did not charge Ross for seven months after the March 7 complaints were made. Subsequent to time the complaints were made, Ross supervised the no confidence vote and made the meet and discus presentation. During that time, Ross received an 80 of 80 perfect score on the DEBE annual evaluation from Castor, the building principal in the building where the complaints arose. In that same period, the labor solicitor had his conversations with the PSEA representative indicating that the charges were going to be dropped, then another conversation that they could be brought back up. In September, another school year began and the District allowed Ross to return to work, saying nothing to him about the allegations. The District still did not charge Ross until late October. Allowing this teacher to remain in the school for all this time casts doubt on the seriousness with which the District took the March 7 allegations.

When the charges were brought to the school board in executive session, the solicitor made the unusual comment that "Ross has a target on his back," using a rifle gesture. He seemed happy as he made the remark, in the opinion of one board member. Steele testified that he did not recall making the remark. However, three board members testified that he made such a statement. The remark implies that Steele was treating Ross as hunted prey, not as a professional employe who was subject to an investigation.

Furthermore, the District's decision to charge Ross and then terminate him ignored its progressive discipline policy. Six years' earlier, the District gave Ross a written reprimand for sexual harassment. If the progressive discipline policy had been followed, the next disciplinary step would have been suspension, but the 2008 allegations jumped to the maximum discipline of termination.

In light of this evidence, the school board decision upholding the charges can not cure the tainted decision to initially charge Ross.

The District's conduct described above also constitutes a violation of Section 1201(a)(1), which prohibits public employers from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA. 43 P.S. 1101.1201(a)(1). The Board has held that

Section 1201(a)(1) of PERA prohibits a public employer from "interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of PERA." 43 P.S. 1101.1201(a)(1).

This Board has adopted the "tendency to coerce" test of NLRB v. Brookwood Furniture Division of the United States Industries, 701 F.2d. 452 (5th Cir. 1983) to determine whether an independent violation of Section 1201(a)(1) has occurred. An independent violation of Section 1201(a)(1) will be found if the actions of the employer, in light of the totality of the circumstances in which the particular act occurred, tend to be coercive regardless of whether employes have been shown to, in fact, have been coerced. Northwestern School District, 16 PPER 16092 at 242 (Final Order, 1985).

In Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order 2004), the Board reiterated the law with respect to section 1201(a)(1) as follows:

> "An independent violation of Section 1201(a)(1) occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable employe, regardless of whether anyone was actually coerced. Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). The employer's motive for its actions is irrelevant. Northwestern Education Association v. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)."

35 PPER at 303.

If the employer's conduct was not coercive, then no violation of section 1201(a)(1) may be found. Id. Nor may a violation of section 1201(a)(1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. Temple University, 23 PPER ¶ 23118 (Proposed Decision and Order 1992), affirmed on another ground, 25 PPER ¶ 25121 (Final Order 1994); Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order 1989). But if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 1201(a)(1) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order 1995).

Based on all of the circumstances of this case, it must be concluded that the District's actions in this case were coercive. The timeline of events certainly could lead a reasonable person to conclude that the District's decision to charge Ross was a reaction to Ross' exercise of protected activity and not the result of a swift and sincere investigation of sexual harassment allegations.

CONCLUSIONS

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

1. That Greenville Area School District is a public employer within the meaning of Section 301(1) of PERA.

2. That the Greenville Area Education Association is an employe organization within the meaning of Section 301(3) of PERA.

3. That the Board has jurisdiction over the parties hereto.

4. That the District has committed unfair practices in violation of Sections 1201(a)(1) and (3) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall:

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

2. Cease and desist from discriminating against employes to encourage or discourage membership in an employe organization.

3. Take the following affirmative action:

(a) Offer unconditional reinstatement to Jon Ross to his former position without prejudice to any right or privilege enjoyed by him and pay him a sum equal to the amount he would have earned as wages had he been retained as an employe, along with interest.

(b) The back pay shall be computed on the basis of each separate calendar quarter or portion thereof during he period from the date Mr. Ross was suspended to the point of the proper offer of reinstatement. The quarterly period shall begin the first day of January, April, July and October. Loss of pay shall be determined by deducting from a sum equal to that which the officers would normally have earned each quarter or portion thereof, their net earnings actually earned or which would have been earned with the exercise of due diligence during that period, earnings which would have been lost through sickness and any unemployment compensation received by Mr. Ross. Earnings in one particular quarter shall have not effect on the back pay liability for any other quarter.

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

(d) 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

(e) Serve a copy of the attached affidavit of compliance upon the Association.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

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

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this twenty-ninth day of December, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner