COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

GOVERNOR MIFFLIN EDUCATION ASSOCIATION	:	
v.	:	Case No. PERA-C-09-348-E
GOVERNOR MIFFLIN SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On August 28, 2009, the Governor Mifflin Education Association (Complainant or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Governor Mifflin School District (Respondent or District) alleging that the District violated Sections 1201(a)(1),(3),(4) and (5) of the Public Employe Relations Act (PERA).

On September 24, 2009, 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 December 16, 2009, in Reading, was scheduled as the time and place of hearing, if necessary.

A hearing was necessary but was continued to March 3, 2010. At that time, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.

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 Governor Mifflin Education Association is an employe organization within the meaning of Section 301(3) of the Public Employe Relations Act (PERA), 43 P.S. § 1101.301(3). (N.T. 8) PERA

2. The Governor Mifflin School District is a public employer within the meaning of Section 301(1) of PERA, 43 P.S. 1101.301(1). (N.T. 8)

3. The Association is the exclusive bargaining representative of the professional employes of the District and has been a party to several collective bargaining agreements with the District covering the wages, hours and terms and conditions of employment of the professional employes. (N.T. 43, 85, Association Exhibit A)

4. The Association and the District are parties to a five year collective bargaining agreement that was due to expire on June 30, 2010. (N.T. 43, 85, Association Exhibit A)

5. The District employs approximately 310 professional employes. (N.T. 67)

6. Daniel Potts was one of those professional employes. He began teaching for the District in 1992. His entire career in the District has been at the high school. (N.T. 12)

7. For the past five years, Potts has been assigned as a secondary education counselor. (N.T. 12)

8. Potts has held a variety of positions with the Association, most recently co-chief negotiator and co-president. (N.T. 19)

9. The District's superintendent is Dr. Mary Teresa Weiss, who has held the position for the past seven years. (N.T. 53)

10. Weiss met at various occasions with Potts and co-president Richard Yenser as they advocated on behalf of fellow Association members. (N.T. 57-58)

11. Weiss admitted that at some of the meetings, she did not get along with Potts. She also admitted that she preferred to negotiate with Yenser alone because they had a stronger relationship that allowed them to resolve matters. (N.T. 72)

12. At the beginning of the 2009-2010 school year, Weiss was faced with difficult parameters in making a budget. The Board of School Directors had determined that the budget for the coming year would have no increase in expenditures. At the same time, the board directed her to fill seven positions at a newly opened elementary school building - Mifflin Park - covering kindergarten through 4th grade. (N.T. 59, 76)

13. Rather than hiring seven new employes for the new building, Weiss decided to hire from within the District. To fill four of the seven openings at the new school she reconfigured the District's existing staff of K-6 teachers. To fill the remaining three positions she decided to take employes from four programs that she believed could either be eliminated or reduced in size. (N.T. 59)

14. Weiss also aimed to do this without any existing teacher losing their jobs or benefits during this process. (N.T. 61)

15. Weiss decided that art, gifted, aquatics and guidance could be eliminated or reduced. She directed Todd Stitzel, director of human resources, to look at the personnel files of the employes in these programs to determine the employes' certifications for their eligibility to transfer. (N.T. 76-78, District Exhibit B)

16. Stitzel developed a chart for Weiss to use to analyze the personnel moves that would have to be made to fill the three positions with employes in these four departments who had elementary certification. (N.T. 76-78, 80-81, District Exhibit B)

17. The chart showed nine employes holding positions in art, gifted, aquatics and guidance. (N.T. 76-78, District Exhibit B)

18. Stitzel recommended the following teachers be transferred to elementary from the eliminated or reduced programs: Tracy Astheimer from art; John Hyneman from aquatics and Potts from secondary guidance. (N.T. 81)

19. On June 11, 2009, Weiss sent Potts a letter stating that the District was assigning him to the position of sixth grade regular education teacher at the Governor Mifflin School District. The letter went on to state that Potts could choose another position instead for one year. He did so, choosing a one year long term substitute (LTS) counselor for the 2009-10 school year. By making this choice, the District then elected to deem him holding the sixth grade Governor Mifflin Intermediate School (GMIS) position as of the conclusion of the 2009-10 school year. (N.T. 20, 52, 68, Association Exhibit A and District Exhibit B)

20. Weiss saw Potts as the only one of the nine teachers in the eliminated and reduced programs with elementary experience prior to working at Governor Mifflin School District. (N.T. 76-78, District Exhibit B)

21. Potts taught sixth grade technology education in Maryland for one year in the 1990's. This was in a middle school, which covered grades 6 through 8. This was the only time he taught 6th grade. (N.T. 26, 52, Association Exhibit B)

22. The other two counselors who were certified to teach elementary school had no classroom experience at all. In 2009-2010 Diane Bassetti was employed as a school nurse; Kristen Sell-Noecker was employed as a counselor. (N.T. 26, 52, Exhibit B)

23. Weiss chose Potts because she believed his appointment would be the best appointment for the educational programs for the students. (N.T. 66)

24. In Weiss' seven years as superintendent, the decision to transfer Potts was the first time anyone had ever been transferred to a position that they had never taught before. (N.T. 67)

25. Weiss testified that she did not look at every certification of the District's 310 teachers because she did not want to do any double moves of employes. Rather, she preferred to move one teacher from a position that was being eliminated or reduced. (N.T. 84)

26. In Potts' career at Governor Mifflin School District, he never taught elementary level. (N.T. 17)

27. That when Potts started at Gov. Mifflin District, he taught high school technology education for 13 years, then high school guidance counseling for five years. (N.T. 17)

28. While at Governor Mifflin, Potts earned two additional certifications: elementary education and school counseling. He obtained a master's degree in both areas. (N.T. 17)

29. In his career at the District, Potts was never disciplined and received the maximum points possible in his annual evaluation. (N.T. 20)

30. In his last year at the District, Potts applied for three positions in his certification and he received none of them. All three positions were Response to Intervention (RtI). One was in the intermediate school and two were in elementary school buildings. He was interviewed for two of the three positions. (N.T. 22-24, 71)

31. Potts was not selected for any of the positions because the principals at each school recommended another applicant. (N.T. 82)

32. Potts continued to teach in the District in the LTS position until November 2009, when he left due to the District's June 11, 2009 transfer decision. He saw the impending transfer to sixth grade as being unfavorable to him. His career in the District totaled 19 years. (N.T. 12-13)

33. When Potts left the District, he took a position at the Warwick School District. By transferring to Warwick, he suffered a $6,000 annual loss of pay and a less comprehensive medical insurance benefit package. (N.T. 35)

DISCUSSION

The Association's charge of unfair practices alleges that the District violated Sections 1201(a)(1),(3),(4) and (5) of PERA by transferring Association co-president Daniel Potts from a secondary education guidance counselor to a sixth grade elementary teaching position as an act of retaliation against him for his position as co-president and his advocacy on behalf of association members.

The Association requests the Board remedy these violations by the customary cease and desist order and also an order for the District to offer to return Potts to his former position.

The District contends that it did not retaliate or discriminate against Potts. It contends that its transfer decision was because Potts was the best available professional employe eligible for the transfer under a District strategy to deal with two significant restrictions in the District's budget. The school board had mandated that the superintendent develop a 2009-10 budget that kept expenditures flat. Meanwhile, the District also needed to deal with the costs of filling seven positions in a new elementary school building. The superintendent developed a strategy to meet these two challenges. The strategy had two parts: reconfigure elementary personnel in other District buildings and eliminate or reduce programs and transfer employes from these programs to elementary. Potts was one of the transferred employes.

The thrust of the charge is that the District transferred Potts in violation of Section 1201(a)(1) of PERA, which prohibits public employers from "interfering, restraining or coercingand employes in the exercise of their rights," 43 P.S. 1101.1201(a)(1) and in violation of Section 1201(a)(3) of PERA, which prohibits public employers from "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization. 43 P.S. 1101.1201(a)(3).

First, to prove a claim of discrimination in violation of Section 1201(a)(3) of PERA, the charging party must establish that the employe engaged in an activity protected by the PERA; that the employer was aware of that activity; and that the employer took adverse action against the employe because of anti-union reasons. St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977).

There is no dispute as to the first two elements of the St. Joseph's test. Potts engaged in protected activity. He was one of the Association's co-presidents. He filed grievances and sat in on teacher disciplinary meetings with the administration. He also organized a negotiation team for collective bargaining negotiations. The District was aware of his activity because the top official of the District was in his presence when he engaged in such activity.

The dispute is over the third element of the St. Joseph's test, the District's motive in transferring Potts. Motive creates the offense under Section 1201(a)(3) of PERA. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969). As for the third element of the St. Joseph's test, the Association contends that when several factors are considered it is clear that an inference can be drawn to conclude that anti-union animus motivated the decision to transfer Potts.

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 v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974)

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."

9 PPER 9188, at 380.

The Association contends that the District's anti-union animus can be inferred from three factors: an Association leader was affected by Weiss' transfer decision; Weiss' statement to Potts that she did not want to meet with him and that she preferred to meet with co-president Yenser, and this was the first time in Weiss' seven year tenure that a secondary education teacher was ever involuntarily transferred to an elementary position.

However, even where the charging party offers evidence that could support a finding of a discriminatory motive, the employer may nevertheless prevail by demonstrating that it had a credible, non-discriminatory, legitimate business reason for its action.

Teamsters Local 776 v. Perry County, 23 PPER ¶23201 (Final Order, 1992), *affirmed*, Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993); Wattsburg Education Association v. Wattsburg Area School District, 35 PPER 54 (Final Order, 2004); Wright Line, Inc., 251 NLRB 150, 105 LRRM 1169 (1980).

Superintendent Weiss testified credibly that she was motivated by budgetary and educational reasons and not by Potts' exercise of protected activity in her decision to transfer him. Weiss testified without contradiction that she was faced with a mandate to keep expenditures flat in the new budget and also the need to staff a new school building. Weiss also testified without contradiction that she was motivated by a desire to avoid layoffs and to avoid double transfers of employes. Therefore, she came up with the strategy described above of closing or reducing four programs and then transferring employes with prior elementary experience to the elementary openings.

Potts was on the District's chart of the employes from the eliminated or reduced programs who also had elementary certifications. He also had the appropriate elementary experience, in the District's opinion. Potts had sixth grade experience in Maryland. Even though this sixth grade experience was in a middle school setting in Maryland, it was still sixth grade. He was transferred to a sixth grade classroom in the Governor Mifflin Intermediate School for a position that was deemed to begin at the end of the 2009-2010 school year. The District's reasoning for its explanation of Potts' transfer is credible.

The District's credible explanation of its decision making in the transferring of Potts is convincing that it had a non-discriminatory and legitimate motivation for its decision. Accordingly, the Association has not proven the third part of the St. Joseph's test necessary to find a violation of Section 1201(a)(3).

Next, in deciding whether an employer violates Section 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).

Having looked at the totality of the circumstances in this case, it is difficult to conclude that a reasonable employe would be coerced from exercising their protected rights by the District's decision in this case. However, even if this decision was seen

as coercive, the District's explanation for its transferring Potts was based on budgetary and education reasons, as discussed above. It cannot be said that the decision had no legitimate basis. Accordingly, no violation of Section 1201(a)(1) will be found.

Next, the Association alleges that the District's decision violated Section 1201(a)(4) of PERA, which prohibits a public employer from "discriminating against a public employe because he has signed or filed an affidavit, petition or complaint or given any information under this act." 43 P.S. 1201)(a)(4). There is no evidence of record that would prove that would implicate the District in violating this section of PERA. Accordingly, no violation of this section will be found.

Finally, the Association's charge alleges that the District's decision violated its duty to bargain under Section 1201(a)(5) of PERA, 43 P.S. 1101.201(a)(5). The Association argues that Potts should not have been transferred because he was the most senior of the employes with elementary certification, making someone else a better candidate for transfer. Potts also had a good employment history with no discipline. However, the collective bargaining agreement, at Article XIV, uses seniority as a criteria in the event of a reduction in the work force, but not for transfer decisions. Accordingly there will be no finding that the District unilaterally abrograted a term of the collective bargaining agreement that would lead to finding of a violation of Section 1201(a)(5) of PERA.

CONCLUSIONS

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

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

2. That the Governor Mifflin 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 not committed unfair practices in violation of Section 1201(a)(1),(3),(4) and (5) 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 charge of unfair practices is dismissed and the complaint rescinded.

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 thirteenth day of January, 2011.

PENNSYLVANIA LABOR RELATIONS BOARD

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Thomas P. Leonard, Hearing Examiner