

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

FRONTIER VIRTUAL CHARTER SCHOOL :  
EDUCATION ASSOCIATION PSEA/NEA :  
 :  
v. : CASE NO. PERA-C-12-80-E  
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FRONTIER VIRTUAL CHARTER SCHOOL :  
 :

**PROPOSED DECISION AND ORDER**

On March 16, 2012, the Frontier Virtual Charter School Education Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Frontier Virtual Charter School (Frontier) violated Section 1201(a)(1), (2), (3), (4), (5) and (7) of the Public Employe Relations Act (PERA).<sup>1</sup> The Union specifically alleged that Frontier discriminatorily retaliated against its employes, after receiving notice from the Board that its teachers were seeking Union representation, by furloughing all its teachers on March 8, 2012 and the next day advertising to rehire certified teachers for those same positions.

On March 21, 2012, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on April 12, 2012, in Harrisburg. On April 6, 2012, I granted Frontier's continuance request and rescheduled the matter for May 3, 2012. On April 11, 2012, I granted the Union's request for a continuance and rescheduled the hearing for June 14, 2012, in Harrisburg. During the hearing on that day, both parties in interest were afforded a full and fair opportunity to present evidence and cross-examine witnesses. Both parties timely filed post-hearing briefs.

The examiner, based upon all matters of record, makes the following findings of fact.

**FINDINGS OF FACT**

1. Frontier is a public employer within the meaning of Section 301(1) of PERA. (N.T. 39-41, 48-49; Union Exhibits 1-10).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 10-16).

3. Kelby Waltman is the Director of External Organizing at the Pennsylvania State Education Association (PSEA). He sent signature authorization cards to employes at Frontier. The employes returned the signed cards. (N.T. 10-13).

4. On February 29, 2012, Mr. Waltman filed a petition for election with the Board, with the signed authorization cards, alleging that thirty percent or more of the professional employes at Frontier sought Union representation. (N.T. 16; Union Exhibit 1).

5. On March 1, 2012, the Board issued an acknowledgement and notice of filing of petition to Dr. John B. Craig at Frontier and Mr. Waltman. The Board attached the petition to the acknowledgement. The acknowledgement required Frontier to post the petition and provide an alphabetical list of employes to the Board. (N.T. 16-17; Union Exhibit 2).

6. Dr. Craig is the founder and Chief Executive Officer (CEO) of Frontier. (N.T. 17, 40-41, 48; Union Exhibits 3-8).

7. By letter dated March 8, 2012, Dr. Craig furloughed six teachers. One letter was sent to each teacher. Each letter provided, in relevant part, as follows:

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<sup>1</sup> During the hearing the Union withdrew its claims under Section 1201(a)(2) and (5). (N.T. 77).

Please be advised that based on budgetary constraints and the recommendation of our fiscal managers, it has become necessary to eliminate our salaried teaching positions. Therefore, effective March 9, 2012, you will be laid-off from your position at Frontier Virtual Charter High School. Further, your paycheck of March 15, 2012 will be directly deposited to your listed account. Furthermore, your employee benefits will continue until March 31, 2012.

Writing further, in the coming weeks, you will be contacted by our Chief Officer of Operations to discuss and finalize any back pay and reimbursements due you.

We wish you the best of luck in your endeavors.

(N.T. 17-18, 39-40, 48, 59; Union Exhibits 3-8).

8. Also on March 8, 2012, Frontier eliminated two executive team members. (N.T. 54).

9. On March 12, 2012, Mr. Waltman received notification of a March 9, 2012 Craig's List posting from Frontier seeking part-time, certified teachers. (N.T. 22-24; Union Exhibits 9-10).

10. Frontier experienced financial difficulties from its beginning. Frontier opened for school on September 6, 2011, with twenty-six students. It expected three hundred. Frontier received its charter without start-up funds. Frontier informed all employees that the school districts would not forward their first payments to Frontier until October, 2011, and informed them of Frontier's economic hardships throughout the 2011-2012 school year. (N.T. 49-50, 56-57).

11. Dr. Craig, the Chief Operations Officer (COO) and the Chief of Outreach and Development (COD) make up the executive team. The executive team members did not receive a full salary during the 2011-2012 school year, rather they receive a stipend. The board members also were not paid. Dr. Craig was approved for a salary of \$140,000 per year but received a stipend of approximately \$18,500 between November 2011 and April 2012. The stipends did not include PSERS retirement contributions or benefits. They were provided only when there was money after payroll. (N.T. 50-51, 61-62, 65-66).

12. Charter Choices is the name of the accounting and fiscal management firm for Frontier. Charter Choices produced financial reports to demonstrate financial compliance for the Pennsylvania Department of Education (PDE). It also billed school districts to receive funding. In October 2011, Charter Choices advised Frontier that, based on enrollment and projected payments from districts, it would have to make personnel cuts. In November 2011, Frontier furloughed its first employee. (N.T. 49-50, 52-54, 75).

13. Also in November 2011, Frontier decided to cut employees' salaries by fifty percent and informed all employees about those cuts. After the salary cuts, Frontier continued to provide full medical, dental and vision benefits for the employees. (N.T. 51, 55, 60-61).

14. In January 2012, Frontier requested emergency funds from PDE. PDE did not provide any relief funds to Frontier. At this time Frontier had a shortfall of \$3,700. Dr. Craig, the COO and a board member pooled their personal funds to make payroll. (N.T. 52, 67-68).

15. On March 2, 2012, Charter Choices notified Frontier that it would no longer provide fiscal services because Frontier had not effectuated the cuts recommended by Charter Choices to maintain fiscal viability. Frontier could not afford to lose the services provided by Charter Choices. (N.T. 52-54, 75).

16. On March 2, 2012, after receiving notification from Charter Choices of its intent to cease providing fiscal services, Dr. Craig and seven or eight board members held a meeting and decided to comply with Charter Choices' recommendation to lay off the teachers and eliminate the two other executive team members (i.e., the COO and the COD). They also tried to seek funds from colleagues and a charity to avoid the layoffs. Bishop James Robinson is a Frontier board member who was at that meeting. (N.T. 54, 71-74).

17. Immediately prior to the furlough, the teachers were earning fifty percent of salary and the executive team members were receiving a stipend. The layoffs saved the cost of teachers' half salaries, PSERS retirement contributions and full benefits and the stipends. (N.T. 60-62).

18. The Board's file records in the representation case (PERA-R-12-61-E) establish definitively that the acknowledgement and attached petition were delivered to Frontier at 4:27 p.m. on Monday, March 5, 2012. Frontier did not have knowledge of any employees' supporting the Union or of the Union's organizing campaign when it decided to layoff the teachers and the executive team. (N.T. 57-58, 64; Board Exhibits 1-2).<sup>2</sup>

19. Frontier sought part-time replacements to provide student instruction until the end of the 2011-2012 school year. (N.T. 55).

### DISCUSSION

In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employee engaged in activity protected by PERA; (2) that the employer knew that the employee engaged in protected activity; and (3) the employer engaged in conduct 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).

In **Teamsters, Local 776 v. Perry County**, 23 PPER ¶ 23201 (Final Order 1992), the Board stated that, under **Wright Line**, "once a **prima facie** showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity." **Perry County**, 23 PPER at 514. Upon the employer's offering of such evidence, "the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual." **Teamsters Local #429 v. Lebanon County**, 32 PPER ¶ 32006 at 23 (Final Order, 2000). "The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct." **Pennsylvania Federation of Teachers v. Temple University**, 23 PPER ¶ 23033 at 64 (Final Order, 1992).

In this case, the Union did not establish a **prima facie** case of discrimination because it did not satisfy the second necessary element of **St. Joseph's**, i.e., knowledge. Bishop Robinson and Dr. Craig credibly testified that the Frontier board and Dr. Craig decided to furlough all the teachers and replace them with part-time, certified teachers, in compliance with the recommendations of Charter Choices, on March 2, 2012. The Board mailed the petition and acknowledgment to Frontier on March 1, 2012. I have taken administrative notice of the Board's records in Case No. PERA-R-12-61-E. The Board's records establish that the acknowledgment and petition were delivered to Frontier at 4:27 p.m. on Monday, March 5, 2012. Dr. Craig and the Frontier board, therefore, decided to furlough all the teachers three days before it received notice of any protected activity.

The Union attempted to show that mail from Harrisburg to Philadelphia takes between one and five days. However, the demonstration does not rebut the evidence that the

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<sup>2</sup> Board Exhibit 1 is a printed document containing the tracking information from the United States Postal Service for the number contained on the certified mailing label and included on the Board's copy of the acknowledgment and notice of filing petition. Board Exhibit 2 is the Board's copy of the acknowledgment and notice of filing of petition containing the certified mail tracking number for delivery to Dr. Craig. I have provided copies of both exhibits with this Order because they were not produced at the hearing.

acknowledgment and petition were delivered on March 5, 2012. Even absent evidence of the actual delivery date and time, the Union's demonstration at best shows only that it was **possible** that Frontier received the acknowledgement and the petition as early as March 2, 2012. It does not establish, as a matter of fact, that Frontier received the Board's March 1, 2012 mailing of the petition for election and acknowledgment before the Frontier board met on March 2, 2012. Moreover, Dr. Craig credibly and categorically denied having any knowledge of any employee's supporting the Union or of the Union's organizing campaign when he and the board decided to layoff the teachers and the executive team.

Having not established a **prima facie** case of discrimination, the burden did not shift to Frontier to establish a legitimate business reason for furloughing all six of its teachers. However, in the interest of expediency, should the Board review and disagree with the above decision, I will evaluate Frontier's case.

Frontier credibly established that their motivation for furloughing six teachers and two executive team members was economic. Frontier was underfunded. It experienced financial difficulties from its very beginning, in September 2011, and Dr. Craig informed the teachers of those difficulties. One employee was furloughed in October 2011, and the teachers' salaries were cut by fifty percent in November 2011. All this occurred before the teachers organized and may have motivated the teachers to seek Union protection. Although they received a small stipend, the executive team did not receive any salary, retirement contributions or benefits the entire 2011-2012 school year. In January 2012, Dr. Craig, the COO and a board member infused their own personal money into Frontier to make payroll, after being denied a request for emergency funding from PDE, a charity and colleagues.

The record paints a vivid picture of the desperate economic condition that threatened Frontier's viability throughout the 2011-2012 school year. Although the timing of the furlough is unfortunate, the record is clear that Frontier did not know of the protected activity and it was clearly not motivated to furlough employees because of that activity. The record demonstrates with substantial, competent evidence that Dr. Craig and the board members were motivated by the dire financial reality and the desire to cut executive team members and full-time teachers to comply with the directives of Charter Choices. The Frontier board did not want to lose the essential services of its fiscal manager, which is responsible for maintaining Frontier's fiscal accountability and obtaining funds from school districts. The layoff was an attempt to control a fiscal crisis that was consuming the personal funds of Dr. Craig and the COO, neither of whom received a salary. In this regard, the teachers were not the only victims of Frontier's poor financial condition. Dr. Craig and the other executive team members lost pay throughout the 2011-2012 school year, and the COO and the COD eventually lost their jobs along with the teachers.

Accordingly, with no knowledge of any protected activity or the petition for election and a financial inability to pay salaries, benefits and retirement contributions for six teachers with only twenty-six students enrolled, Frontier did not engage in unfair practices in violation of either 1201(a)(1), (3), (4) or (7).

#### CONCLUSIONS

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

1. Frontier 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. Frontier has **not** committed unfair practices within the meaning of Section 1201(a)(1), (3), (4) or (7).

**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 final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-ninth day of August, 2012.

PENNSYLVANIA LABOR RELATIONS BOARD

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Jack E. Marino, Hearing Examiner