

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MT. LEBANON EDUCATION ASSOCIATION :
:
v. : Case No. PERA-C-03-386-W
:
MT. LEBANON SCHOOL DISTRICT :

FINAL ORDER

On May 5, 2004, the Mt. Lebanon School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) from the Proposed Decision and Order (PDO) of April 16, 2004. In the PDO, the hearing examiner concluded that the District had violated Section 1201(a)(1) and (3) of the Public Employee Relations Act (PERA) by declining to renew John Tupta's supplemental contract. Mt. Lebanon Education Association (Association) filed a responsive brief on May 25, 2004. After a thorough review of the record, the Board makes the following:

AMENDED AND ADDITIONAL FINDINGS OF FACT

6. On May 6, 2003, representatives of the Association, including Andrew Haberberger and Mr. Tupta, met with representatives of the District, including Dr. Smartschan and its director of technology (Jeffrey C. Sherman), to raise concerns that teachers had about the time involved in using the Dashboard.¹ Mr. Haberberger asked if use of the Dashboard by teachers would be mandatory during the next school year. Dr. Smartschan said that use of the Dashboard by teachers would be expected. Dr. Smartschan also said that he would get back to the Association. (N.T. 128-129, 133-134, 157-160, 168, 183, 204, 248, 262)

10. With the start of the 2003-2004 school year, the Association was advised that use of Dashboard would be mandatory. (Exhibits A2 and A3).

11. Mr. Tupta began using the Dashboard as required when it became operational on October 17, 2003. (N.T. 173).

DISCUSSION

The salient facts and circumstances are that since 1999 Mr. Tupta held the supplemental position as "technical resource teacher." (Finding of Fact 2). Since the pilot launching of the Dashboard in March 2003, the Association was discussing with the District whether use of Dashboard was mandatory or voluntary for the following school year. (Findings of Fact 4 and 6). At a May 6, 2003 meeting with the

¹ In March 2003, the District launched a software program known as "Dashboard" on a pilot basis. The Dashboard program allows teachers to post assignments and information on an internet site for access by students and parents. (Finding of Fact 3).

District, Association representatives, including Mr. Tupta discussed teachers' concerns regarding the use of the Dashboard. Jeffery C. Sherman, technology director, was present at the May 6, 2003 meeting. (Finding of Fact 6). In July 2003, Mr. Sherman asked Mr. Tupta whether he intended to use the Dashboard. Mr. Tupta noted the prior discussions by the Association with the District regarding the use of the Dashboard (the Association claimed that use of the Dashboard was negotiable) and indicated that he did not want to use the Dashboard until those issues were resolved between the Association and the District. (Finding of Fact 7). Mr. Sherman thereafter recommended that Mr. Tupta not be renewed as the technical resource teacher, and by email dated July 24, 2003 advised Mr. Tupta that his contract would not be renewed. (Finding of Fact 8). With the start of the school year, the Association was advised that use of Dashboard would be mandatory, even though it was not yet operational. (Finding of Fact 10). On September 10, 2003, the Association filed a Charge of Unfair Practices alleging that the District discriminated against Mr. Tupta in failing to renew his supplemental contract. When Dashboard became operational on October 17, 2003, Mr. Tupta began using it as required by the District. (Finding of Fact 11).

The Association's Charge of Unfair Practices alleges that the District violated Section 1201(a)(1) and (3) of PERA when it refused to renew Mr. Tupta as the "technology resource teacher" because he had voiced support for the Association's position regarding the use of the Dashboard. The District countered that Mr. Tupta refused to use the Dashboard, and that his refusal was personal and therefore not protected concerted activity. The District also contended that it had a nondiscriminatory basis for not renewing Mr. Tupta's supplemental position since use of the Dashboard was a necessary requirement for the "technology resource teacher".

To support a claim of discrimination the charging party must establish that the employe engaged in an activity protected by the act; that the employer was aware of that activity and took adverse action against the employe for anti-union reasons. St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 A.2d 1069 (1977). Because union animus is rarely overt, an employer's anti-union motives may be inferred from the totality of the circumstances, including the absence of a credible non-pretextual reason for its actions. Wilkes-Barre Police Benevolent Association v. City of Wilkes-Barre, 33 PPER ¶133087 (Final Order, 2002).

The District first excepts to the hearing examiner's finding that Mr. Tupta was engaged in protected activity. The hearing examiner found that by asserting his support of the Association's stance that use of Dashboard was voluntary, Mr. Tupta was engaged in protected activity. The District asserts, however, that because use of the Dashboard was voluntary at the time of his discussion with Mr. Sherman in July 2003, Mr. Tupta's views regarding the use of Dashboard were personal, and not concerted activity. The District characterization however confuses the protected activity. Mr. Tupta engaged in protected activity by voicing support for the Association's position regarding the use of the Dashboard, regardless of whether he personally chose to use Dashboard or not. Clearly, Mr. Tupta's stated agreement with the Association's stance is concerted protected activity.

The remainder of the District's exceptions are in support of its claim that it held a nondiscriminatory reason not to renew Mr. Tupta's contract as the technical resource teacher. The District contends that the technical resource teacher position required familiarity with Dashboard, and therefore it needed someone who utilized the program to assist teachers having difficulty with the program. The District contends that because Mr. Tupta "refused" to use the Dashboard, and did not indicate that he would use it, the District was justified in declining to renew his contract as the technical resource teacher.

However, what the District seeks in its exception is a reversal of the hearing examiner's credibility findings. The Board recognizes that it is the function of the hearing examiner, not the Board, to resolve conflicts in evidence and decide issues of credibility. Crestwood School District v. Crestwood Education Association, 32 PPER ¶32050 (Final Order, 2001). Because the hearing examiner is present to observe the demeanor of the witnesses, the Board strictly adheres to its long-standing policy that it will not disturb the credibility determinations of its hearing examiners absent the most compelling of circumstances which would necessitate a reexamination of the issue of credibility. Hand v. Falls Township, 19 PPER ¶ 19012 (Final Order, 1987); AFSCME District Council 84 v. Department of Public Welfare, 18 PPER ¶ 18028 (Final Order, 1986).

There are no such compelling circumstances raised or presented here. The hearing examiner credited Mr. Tupta's testimony that he did not refuse to use the Dashboard, (Finding of Fact 7), and the record corroborates this finding. As revealed in the record, when the District declared that use of the Dashboard was mandatory, everyone, including Mr. Tupta began using the program as soon as it became available. (Finding of Fact 11).

Most important, however, the hearing examiner rejected the District's argument that Mr. Tupta was not renewed in his supplemental position for an alleged refusal to use the Dashboard. The record supports that the District's proffered reason, that Tupta "refused" to use the Dashboard, was discredited by Tupta's utilizing the Dashboard when required despite his prior support for the Association's bargaining position. In addition, the hearing examiner rejected any contention that Tupta's non-renewal as the "technology resource teacher" was for legitimate business reasons, including any asserted desire of the District for a "champion" of the Dashboard program. As explained by the hearing examiner:

Mr. Sherman's testimony has not been credited. Although he testified on direct examination that Mr. Tupta refused to use the dashboard unless directed by the Association to do so, his testimony on cross-examination was that Mr. Tupta said that he did not want to use the dashboard: "I speculated that given that he voiced an opinion that he didn't want to use it, that he was not going to use it" (N.T. 267). Given that Mr. Sherman admittedly jumped to the conclusion that Mr. Tupta refused to use the dashboard, it has been found as fact that Mr. Tupta never refused to use the dashboard, as he testified (N.T. 167). Moreover, Mr. Sherman allowed that when he decided not to renew Mr. Tupta's appointment as the technology resource teacher he

knew that Mr. Tupta "was capable of using the system" (N.T. 259-260) and had been trained on use of the dashboard (N.T. 272). Given that allowance and the fact that Mr. Tupta's appointment as the technology resource teacher included fixing hardware problems as well as operator and software problems and only required that he make an initial evaluation of a computer problem (see finding of fact 2), Mr. Sherman's testimony that his intent in not renewing Mr. Tupta's appointment was unrelated to the Association's stance that the mandatory use of the dashboard by teachers had to be bargained or to Mr. Tupta's support of the Association's stance strains credulity.

(PDO at 5).

Accordingly, there is substantial evidence in the record to support the hearing examiner's finding of discrimination. Mr. Tupta engaged in protected concerted activity by voicing his support for the Association's position regarding the use of the Dashboard. Mr. Sherman was aware of that activity. Finally, Mr. Sherman's reference to Mr. Tupta's support for the Association in recommending nonrenewal, supports the unlawful motive. Moreover, there is no basis in the record to disturb the hearing examiner's rejection of the District's proffered alleged nondiscriminatory reason for not renewing Mr. Tupta as the technical resource teacher.

After a thorough review of the exceptions and all matters of record, the hearing examiner did not err in concluding that the District violated Section 1201(a)(1) and (3) of PERA, and the District's exceptions are therefore dismissed.

ORDER

In view of the foregoing and in order to effectuate the policies of Public Employe Relations Act, the Board

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order of April 16, 2003 are dismissed, and the PDO, as amended herein, is hereby made absolute and final.

SEALED, DATED and MAILED pursuant to conference call meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, and Anne E. Covey, Member, this seventeenth day of August, 2004. The Board hereby authorizes the Secretary of the Board, pursuant to 34 Pa. Code 95.81(a), to issue and serve upon the parties hereto the within order.

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MT. LEBANON EDUCATION ASSOCIATION :
:
v. : Case No. PERA-C-03-386-W
:
MT. LEBANON SCHOOL DISTRICT :

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of section 1201(a)(1) and (3) of the Act, submitted to Mr. Tupta in writing an unconditional offer of reinstatement as the technology resource teacher at the Jefferson Middle School without prejudice to any rights or privileges enjoyed by him, made him whole for any losses in pay and benefits sustained by him as the result of his termination as the technology resource teacher at the Jefferson Middle School, paid him any backpay due with interest as directed, posted the final order and proposed decision and order as directed and served a copy of this affidavit on the Association.

Signature

Title

SWORN AND SUBSCRIBED TO before me

This _____ day of _____, 2004.

Signature of Notary Public