

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

MONTROSE AREA EDUCATION ASSOCIATION :
 :
 v. : Case No. PERA-C-06-15-E
 :
 MONTROSE AREA SCHOOL DISTRICT :

FINAL ORDER

Montrose Area School District (District) filed timely exceptions and a supporting brief with the Pennsylvania Labor Relations Board (Board) on May 2, 2007, challenging a Proposed Decision and Order (PDO) issued on April 17, 2007. In the PDO, the Board's Hearing Examiner concluded that the District violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (PERA). The Montrose Area Education Association (Association) filed a brief in opposition to the exceptions on May 22, 2007.

The Hearing Examiner's Findings of Fact (FF) are summarized as follows. The Association is the exclusive representative of the District's professional employes and is affiliated with the Pennsylvania State Education Association (PSEA). (FF 2; Complainant's Exhibit 2). The District has historically employed three categories of substitute professional employes: 1) on-call or per diem substitutes, who are paid \$80.00 per day in the first year of employment and \$85.00 thereafter, 2) long-term substitutes, who are employed in a position for 45 days or longer and are paid \$145.00 per day and 3) permanent everyday substitutes, who are paid \$110.00 per day and no benefits. (FF 4). Due to the difficulty of securing substitute teachers, the District paid the permanent everyday substitutes a small premium so they would report to work every day. (FF 6). The District employed four permanent everyday substitute teachers. The substitutes were sought out by the principals of the schools where they worked and, in exchange for the premium, they agreed not to work in other school districts. (FF 8).

In November or December of 2005, Sheila Saidman, the PSEA UniServe Representative who is assigned to the District's professional employes, spoke to District Superintendent Michael Ognosky regarding her concerns about the pay and benefits of permanent everyday substitutes. During this conversation, Ognosky stated that if the District had to bargain with the Association regarding the pay and benefits of the permanent everyday substitutes, "we're going to have problems, because I'm going to have to fire them." (FF 7).

On December 20, 2005, the Association filed a grievance seeking to have the permanent everyday substitutes accorded all benefits provided in the collective bargaining agreement between the District and the Association. (FF 12). Thereafter, on December 29, 2005, Superintendent Ognosky informed the four permanent everyday substitutes that their positions were being eliminated and converted to per diem substitute positions. (FF 13). Two of the four teachers who were employed as permanent everyday substitutes (Lisa Bistocchi and Theresa Thorn) testified that they worked as per diem substitutes after being informed that they would no longer be employed as permanent everyday substitutes. (FF 20 and 23). Superintendent Ognosky testified that had the grievance never been filed, the position of permanent everyday substitute would have continued for the rest of the school year. (FF 29).

The Association's charge alleged that the District committed unfair practices under PERA by terminating the employment of permanent everyday substitute teachers in retaliation for the Association's filing of a grievance regarding their compensation. In the PDO, the Hearing Examiner found that the District eliminated the positions because of the Association's filing of the grievance and thereby violated Section 1201(a)(1) and (3) of PERA. In finding an unfair practice, the Hearing Examiner rejected the District's argument that it did not violate PERA because it completely and permanently ceased providing the services of permanent everyday substitute teachers. The Hearing Examiner also declined to credit the District's claim that it eliminated the positions for economic reasons.

In its exceptions, the District argues that a public employer may eliminate bargaining unit positions regardless of motivation provided that such elimination is complete and permanent. The District contends that because it ceased providing the services of permanent everyday substitutes, the Hearing Examiner erred by finding a violation of PERA. In the alternative, the District argues that the Hearing Examiner erred by finding that it eliminated the positions because of anti-union animus. The District instead claims that it eliminated the positions for economic reasons. Accordingly, the District contends that the Hearing Examiner erred by finding a violation of Section 1201(a)(1) and (3) of PERA.

An employer has no duty to bargain over its decision to completely and permanently cease providing a discretionary service for any reason, including anti-union animus, so long as the service is completely and permanently discontinued. Youngwood Borough Police Department v. PLRB, 539 A.2d 26 (Pa. Cmwlth. 1988), appeal denied, 522 Pa. 599, 562 A.2d 323 (1989), County of Bucks v. PLRB, 465 A.2d 731 (Pa. Cmwlth. 1983); Jefferson-Penn Police Commission, 21 PPER ¶ 21025 (Final Order, 1989); Millcreek Township School District, 7 PPER 91 (Nisi Decision and Order, 1976), relying on Textile Workers Union v. Darlington Manufacturing Company, 380 U.S. 263, 85 S.Ct. 994 (1965). In Millcreek, which involved a school district's cessation of the discretionary service of transporting students, the Board stated:

Prior to applying the Darlington rationale to the present case, this Board must first determine the applicability of a Federal private sector precedent to the public sector. One material distinction that must be made is that while a private employer may have an absolute right to cease its business operation, a public employer may be mandated by law to provide certain services (e.g. Respondent could not cease its operation of its schools)

It is clear that Respondent had the discretion to provide or not to provide bus transportation for its students . . . The School Code grants a Board of School Directors the right to stop its bus services

The Board emphasizes that the instant decision involves a complete and permanent termination of an operation that the public employer may perform at its discretion

7 PPER at 93.

Unlike Millcreek, this case involves a service that the District must provide (i.e., educating students).¹ Indeed, in Millcreek, the Board pointed out that while a school district may discontinue the discretionary service of transporting students, it may not discontinue the mandatory service of educating those students. Thus, the Hearing Examiner herein properly rejected the District's claim that it permanently and completely ceased providing the educational services performed by the permanent everyday substitute teachers. As the above-cited cases indicate, in assessing whether an employer has completely and permanently ceased providing a discretionary service, the Board must determine whether the employer continues to provide the service at issue through some other means, such as assigning the duties at issue to other members of the bargaining unit or assigning those duties to non-members of the unit such as employees of an outside contractor. Here the District simply converted the permanent everyday substitute positions to per diem substitute positions, and the District continues to provide educational services to its students as it is mandated to do under the law. Accordingly, the District did not permanently and completely discontinue providing the services performed by the employees at issue. Indeed, the District did not have the discretion to take such action.

Contrary to the District's argument, a position with a specific title and rate of pay, such as the permanent everyday substitute position, is not a "service". The service provided by the District in this case was education, which was being provided in some

¹ County of Bucks, supra, upon which the District places great reliance, similarly involved a discretionary service (police protection in its public parks) rather than a service that the public employer was obligated to provide. Therefore, that case also does not support the District's position.

instances by substitute teachers. After the Association filed a grievance over compensation for one category of substitutes, the District did not stop providing the services they rendered. Rather, the District merely moved the individual teachers providing these services into a lower-paying job classification, as evidenced by the testimony of Ms. Bistocchi and Ms. Thorn.

The District's alternative argument is that the Association failed to prove that the District was unlawfully motivated when it eliminated the permanent everyday substitute positions. In order to sustain a charge of discrimination under Section 1201(a)(1) and (3) of PERA, the complainant must prove 1) that employes engaged in protected activity; 2) that the employer was aware of the employes' protected activity; and 3) that the employer took adverse action against the employes because of a discriminatory motive or anti-union animus. St Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

The filing of grievances is an activity protected by PERA. Central Bucks Educational Support Personnel Association v. Central Bucks School District, 37 PPER ¶ 33 (Final Order, 2006). It is undisputed that the Association filed a grievance over the compensation of the permanent everyday substitute teachers, and that the District was aware of the filing of the grievance. It is also undisputed that just nine days after the grievance was filed, the District informed the permanent everyday substitutes that their positions would be eliminated and converted into lower-paying per diem substitute positions. Thus, the Association clearly met its burden of proving that the employes engaged in protected activity of which the District was aware, and that the District took adverse action against the employes.

With regard to the issue of whether the Association established a discriminatory motive for the District's adverse action, the Board's decision in Somerset Area Education Association v. Somerset Area School District, 37 PPER 1 (Final Order, 2005) is instructive. In Somerset, the school district eliminated three permanent substitute teacher positions after the union filed a successful grievance which resulted in an arbitration award declaring the positions to be in the bargaining unit. The district filed exceptions arguing that the hearing examiner erred by finding an unlawful motive for the elimination of these positions because it allegedly had a legitimate business reason for doing so. In affirming the PDO, the Board cited to the hearing examiner's specific finding that the superintendent stated that the permanent substitute positions would be eliminated if the union pursued a grievance and to the hearing examiner's rejection of the district's alleged non-discriminatory reason for eliminating the positions.

Similarly, in this case, the Hearing Examiner found that Superintendent Ognosky stated that the District would have to fire the permanent everyday substitutes if it had to bargain with the Association regarding their pay and benefits. Through its grievance filed after the Superintendent made this threat, the Association sought to compel the District to apply the collective bargaining agreement to the permanent everyday substitutes. Thereafter, the Superintendent, consistent with his previous threat, informed the permanent everyday substitutes that their positions would be eliminated. In addition, the Hearing Examiner found that the Superintendent admitted in his testimony that but for the filing of the grievance, the permanent substitute positions would have continued to exist. We find that the Superintendent's threat² to fire the permanent everyday substitutes if the Association sought to bargain on their behalf, together with the elimination of those positions shortly after the Association filed the grievance, and the Superintendent's admission that the positions would have continued but for the filing of the grievance, provide a sufficient basis for the Hearing Examiner's inference of a discriminatory motive for the District's action.

² The District's reliance upon New Castle Federation of Teachers v. New Castle Area School District, 21 PPER ¶ 21133 (Proposed Decision and Order, 1990) to characterize the Superintendent's statement as merely an honest appraisal or opinion of the reality of the situation is misplaced. In that case, the employer was already considering the disputed action before the superintendent made the statement that the filing of the grievance would "probably" result in the complained-of action. Here, there is no evidence that the District was previously considering eliminating the permanent everyday substitute position and it was only after the Association expressed interest in bargaining that the Superintendent stated that the employes would be fired.

Moreover, we find no merit to the District's economic motive argument. The Superintendent's threat to fire the permanent substitutes, made prior to the filing of the grievance, was in response to the possibility that the District might be obligated to bargain over the permanent everyday substitutes' pay and benefits. The Superintendent did not even claim to have considered the potential economic impact of the Association's representation of the permanent everyday substitutes until after he stated that the employees would be fired if the District was forced merely to bargain over their pay and benefits. At the time of the threat, the potential economic impact of the collective bargaining process was unknown. Further, until the Association's grievance ran its course, the economic impact, if any, of the grievance was similarly speculative. Finally, the Hearing Examiner did not credit the District's claimed economic motive for eliminating the positions, but instead found that the "Association has proven by a preponderance of the evidence that the District's actions were motivated by the exercise of protected activity." (PDO at 5). Absent compelling circumstances, the Board will not disturb the credibility determinations of its hearing examiners, who are able to observe the manner and demeanor of the witnesses during their testimony. Fraternal Order of Police, Lodge No. 85 v. Commonwealth of Pennsylvania, 18 PPER ¶ 18093 (Final Order, 1987). We find no compelling reason to reverse the Hearing Examiner's decision not to credit the District's claimed economic motive. The Hearing Examiner reasonably inferred from substantial evidence of record that the District eliminated the positions in retaliation for the Association's filing of the grievance.

After a thorough review of the exceptions, the briefs in support and in opposition to the exceptions and all matters of record, the Board shall dismiss the District's exceptions and affirm the Hearing Examiner's conclusion that the District committed unfair practices in violation of Section 1201(a)(1) and (3) of PERA.

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed by the District are hereby dismissed, and the April 17, 2007 Proposed Decision and Order be and hereby is made absolute and final.

SEALED, DATED and MAILED pursuant to Conference Call Meeting of the Pennsylvania Labor Relations Board, L. Dennis Martire, Chairman, Anne E. Covey, Member, and James M. Darby, Member, this eighteenth day of September, 2007. 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.

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AFFIDAVIT OF COMPLIANCE

Montrose Area School District hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and 1201(a)(3) of PERA; that it has restored the four permanent everyday substitute teacher positions; that it has offered the affected employes unconditional reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them; that it has made the affected employes whole for lost wages and benefits due to the District's elimination of the positions; that it has posted the Proposed Decision and Order and Final Order as directed therein; and that it has served a copy of this affidavit on the Association at its principal place of business.

Signature/Date

Title

SWORN AND SUBSCRIBED TO before me
the day and year first aforesaid.

Signature of Notary Public