COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

PROPOSED DECISION AND ORDER

On May 5, 2006, the Montrose Education Association (Complainant or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Montrose Area School District (Respondent or District) alleging that the District committed unfair practices in violation of Sections 1201(a)(1) and 1201(a)(3) of the Public Employe Relations Act (Act).

On March 15, 2006, 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 seeking resolution of the matters in dispute through mutual agreement of the parties, and May 19, 2006, in Scranton was assigned as the time and place of hearing, if necessary.

The hearing was necessary, but was continued to July 12 and again, to August 31, 2006, at which time the hearing was held before Thomas P. Leonard, Esquire, a hearing examiner of the Board. 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. That Montrose Area School District is a public employer within the meaning of Section 301(1) of the Act. (N.T. 10-11)

2. That the Montrose Education Association is an employe organization within the meaning of Section 301(3) of the Act. (N.T. 10-11)

3. That the Association is the exclusive representative of “a subdivision of the employer unit comprised of teachers, school counselors, director of guidance, librarians, and school nurses.” (N.T. 10-11, Complainant’s Exhibit 2)

4. That over the years, the District has employed three categories of substitute professional employes: on-call or per diem substitutes, who receive $80 a day the first year of employment and $85 a day each year thereafter; long-term substitutes who are in a position for 45 days or longer, who are paid about $145 a day; and permanent everyday substitutes who are paid $110 per day and no benefits. (N.T. 26-27)

5. That Sheila Saidman is a UniServ Representative for the Pennsylvania State Education Association, responsible for the professional employes of the District. That in late 2005, Ms. Saidman became aware that the District was employing permanent everyday substitute professionals. (N.T. 5)

6. That in November or December of 2005, Ms. Saidman spoke with Michael Ognosky, Superintendent of the Montrose Area School District over her concerns about the pay and benefits for the permanent everyday substitute professionals. The Superintendent explained that, because of the District’s difficulty in securing substitute teachers, it was necessary to employ permanent everyday substitutes. The District paid them a small premium so they would report every day but did not pay them benefits. (N.T. 5, 7, 8, 27)

7. That during that telephone conversation, Superintendent Ognosky informed Ms. Saidman that if the District had to bargain with the Association concerning compensation and benefits for these substitute teachers, “we’re going to have problems, because I’m going to have to fire them.” (N.T. 8)

8. That Superintendent Ognosky testified that the District had four everyday substitute teachers who were sought out by only the principals and guaranteed the opportunity to work every day. In return, they would not work in other districts and would be paid $110 per day. The system worked well for the District. (N.T. 27, 28)

9. That for the 2004-2005 school year, there were four permanent everyday substitute teachers. They were located at the Lathrop School, the Choconut School, the Junior High School and the High School. (N.T. 27)

10. That the permanent everyday substitute teachers were required to have a professional certification. (N.T. 39-40)

11. The practice of employing the permanent everyday substitute teachers commenced with the 2002-2003 school year. (N.T. 27)

12. That on or about December 20, 2005, the Association filed a grievance seeking to have “the permanent everyday substitutes” accorded all benefits provided by the current collective bargaining agreement. (N.T. 9-10, Complainant’s Exhibit 1)

13. That on or about December 29, 2005, Superintendent Ognosky informed the four permanent everyday substitutes that their position was being eliminated and converted to per diem substitutes. (N.T. 10, 19-20, 32-34-35, Respondent’s Exhibit 1)

14. That Lisa Bistocchi is one of the four employes notified that she was being changed to a per diem substitute. She had been assigned to the Choconut School. Ms. Bistocchi is certified by the Pennsylvania Department of Education in the area of elementary education and has worked as a permanent substitute teacher for the District for three years. (N.T. 14)

15. That Ms. Bistocchi testified that she worked on a six-day cycle, four days teaching computers and four days substitute teaching as assigned. If there were no substitute work to do, she would go into other classrooms and do testing with younger children. (N.T. 14-15)

16. That Ms. Bistocchi works the same school year as regular members of the professional staff; has the same workday; has a mailbox in the office; and, while teaching computers, is the only person responsible for the students being instructed. She attended faculty meetings; and, when she was actually substitute teaching, she followed the regular teacher’s lesson plans. (N.T. 17)

17. That Ms. Bistocchi’s immediate supervisor was the building principal, the same person who supervised members of the regular professional staff. (N.T. 17-18)

18. That when the 2005-2006 school year began, no administrator from the School District expressed any possibility to Ms. Bistocchi that her position might be eliminated. (N.T. 19)

19. That four days after Christmas 2005, Ms. Bistocchi received a telephone call from the Superintendent. During that call, he told her, “We can longer afford the luxury of a permanent sub. So the position is done, and you’re back to a daily sub.” (N.T. 20)

20. That for the remainder of the 2005-2006 school year, Ms. Bistocchi worked as a per diem substitute teacher. (N.T. 20)

21. That Theresa Thorn was a permanent everyday substitute teacher assigned to the Lathrop Elementary School. Ms. Thorn is certified by the Pennsylvania Department of Education in elementary education with concentration in early childhood. Ms. Thorn was

employed as a long-term, everyday substitute teacher for the 2005-2006 school year. (N.T. 21-23)

22. That no one indicated to Ms. Thorn that the position of permanent everyday substitute teacher was in any jeopardy. (N.T. 23)

23. That on or about December 29, 2005, Ms. Thorn received a call from the Superintendent, who indicated that the Board of School Directors felt the permanent everyday substitute position was a luxury and then corrected himself and stated "I don't want to use that word—that the position was no longer required." She was told that she would be returned to per diem substitute teaching and did so for the remainder of the school year." (N.T. 23)

24. That Superintendent Ognosky admitted that he did receive the telephone call as testified to by Ms. Saidman. After the grievance was filed, which requested a variety of benefits to be provided to the everyday substitute teachers, he did an analysis to determine the economic impact on the district if the grievance were to be sustained. (N.T. 29)

25. That the Superintendent testified that, if the Association secured everything requested in the grievance, the cost in connection with the everyday substitute teachers would go from $60,000 to about $180,000. The Superintendent testified that the Board of School Directors concluded that the possibility of such an increase warranted discontinuance of the everyday substitute program. (N.T. 31)

26. That the grievance was filed December 20, 2005. The Superintendent testified that he learned of the filing of the grievance at or about that time. He made the telephone calls on or about December 29. During those nine days, there was no meeting of the Board of School Directors. (N.T. 34)

27. That the Board of School Directors has never taken any action to eliminate the permanent everyday substitute positions. (N.T. 35)

28. That the superintendent testified that the Board took action authorizing the Superintendent to authorize the principals to employ permanent everyday substitute teachers. There was School Board action authorizing payment of the premium but no Board action to eliminate the authority to employ the permanent substitutes and no Board action eliminating the premium. (N.T. 37)

29. That Superintendent Ognosky testified that, had the grievance never been filed, the position of permanent everyday substitute teacher would have continued for the rest of the school year. (N.T. 38)

DISCUSSION

The Association's charge of unfair practices alleges that the School District violated Sections 1201(a)(1) and 1201(a)(3) of the Act by terminating the positions of permanent everyday substitute teachers, held by four individuals, because the Association filed a grievance to advance the substitutes' rights under the collective bargaining agreement.

There are no serious factual disputes in this case. The District admits that it made the decision to eliminate the day to day substitute program in response to the grievance being filed but that its decision was permissible under the "complete and permanent cessation" of services doctrine adopted by the PLRB in Millcreek Township School District, 7 PPER 91 (Final Order, 1976).

It is black letter labor law that an employer commits an unfair practice if it retaliates against employes for their use of the grievance procedure. PLRB v. Richland School District, 11 PPER 11221 (1980); PLRB v Duquesne School District, 3 PPER 351 (1973). In Somerset Area School District, 37 PPER 1 (Final Order, 2006), the Board found that the employer committed an unfair practice by retaliating against employes who successfully pursued a grievance over the employer's failure to fill permanent substitute positions.

In order to sustain a charge alleging a retaliatory job action motivated by anti-union discrimination, the complainant must prove the affected employe was engaged in protected activity, that the employer knew of the protected activity, and that the employer made the job decision because of the employe's exercise of the protected activity. Saint Joseph's Hospital, 473 Pa. 101, 373 A.2d 1069 (1977). The complainants 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. 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)

The Association has proven by a preponderance of the evidence that the District's actions were motivated by the exercise of protected activity. The Association specifically proved that the District's action in terminating the permanent everyday substitute arrangement was motivated by the Association's filing of a grievance on behalf of the permanent everyday substitutes. The Association's proof was aided by the Superintendent's admission that this was his motivation. Accordingly, the Association has sustained its charge alleging a violation of Section 1201(a)(1) and (3) of the Act.

As stated above, the District defends its action by reliance on Millcreek Township School District, supra, where the Board adopted the federal labor law precedent of Textile Workers Union v. Darlington Manufacturing Co. 380 U.S. 263, 58 LRRM 2657 (1965), that an employer, even if motivated by anti-union animus, can, if it is statutorily permissible, cease one of its operations as long as the cessation is complete and permanent. In Millcreek, the employer went out of the business of providing bus service to transport students. The Board found that bus service was a discretionary service under the School Code and accordingly, the district's decision to permanently cease operation of a bus service was not an unfair practice. The Board's adoption of this federal policy was cited with approval by the Commonwealth Court in County of Bucks v. PLRB, 465 A.2d 731 (Pa. Cmwlth. 1983), in which the Court concluded that the employer had completely eliminated the park police services but remanded the case for the PLRB to determine if the elimination was permanent. 465 A.2d at 734.

After consideration of the "complete and permanent cessation" cases relied on by the District, they will not provide a defense in the present dispute. Unlike those cases, the District has not gone out of the business of teaching in general or substitute teaching in particular. The District must provide professional employes in the classroom for the students. For those days when a substitute teacher is required, the District has, over the years, developed three separate categories of substitute teachers. In the face of the Association grievance over the pay and benefits for the category of permanent everyday substitutes, the District simply terminated that category of substitutes and turned those employes into per diem substitutes.

CONCLUSIONS

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

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

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

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

4. That the District has committed unfair practices within the meaning of Sections 1201(a)(1) and 1201(a)(3) of the Act.

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 PERA.

2. Cease and desist from discriminating in regard to hire or tenure of employment to encourage or discourage membership in any employe organization.

3. Take the following affirmative action which the examiner finds necessary to effectuate the policies of PERA:

(a) Restore the four permanent everyday substitute teacher positions that existed prior to December 29, 2005;

(b) Offer the four affected employes unconditional reinstatement to their former positions without prejudice to any rights or privileges enjoyed by them;

(c) Make the affected employes whole for lost wages and benefits due to the District's failure to fill the positions;

(d) The backpay due the employes shall be computed on the basis of each separate calendar quarter or portion thereof during the period stated above. The quarterly period shall begin with the first day of January, April, July and October. The pay shall be determined by deducting from a sum equal to that which the employes normally would have earned for each quarter or portion thereof earnings which they actually earned or with the exercise of due diligence would have earned in other employment during that period; earnings which they would have lost through sickness; and any unemployment compensation received by them. Earnings in one particular quarter shall have no effect on the liability for any other quarter. If the Respondents claim lack of due diligence, they shall be obligated to establish that there was substantially equivalent employment reasonably available and that due diligence was not exercised to find interim employment;

(e) Post a copy of this decision and order within five (5) days from the date hereof in a conspicuous place readily accessible to their employes and have the same remain so posted for a period of ten (10) consecutive days; and

(f) 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.

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 be and become absolute and final.

SIGNED, DATED and MAILED at Harrisburg, Pennsylvania this seventeenth day of April, 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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THOMAS P. LEONARD, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

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

AFFIDAVIT OF COMPLIANCE

The 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 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

DIRECT DIAL (717) 783-6021

April 17, 2007

William A. Hebe, Esquire
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Wellsboro, PA 16901

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P.O. Box 5069
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MONTROSE AREA SCHOOL DISTRICT
Case No. PERA-C-06-15-E

Enclosed is a copy of the proposed decision and order issued in the above-captioned matter.

Sincerely,

THOMAS P. LEONARD
Hearing Examiner

Enclosure

cc: Montrose Area School District