

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

WYOMING AREA EDUCATION :
ASSOCIATION, PSEA/NEA :
: :
v. : Case No. PERA-C-06-280-E
: :
WYOMING AREA SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On June 19, 2006, Wyoming Area Education Association, PSEA/NEA Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Wyoming Area School District (District) alleging that the District violated Sections 1201(a)(1), (3), (4) and (5) of the Public Employe Relations Act (PERA).

On August 18, 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 resolving the matters in dispute through the mutual agreement of the parties and November 16, 2006, in Wilkes-Barre was scheduled as the time and place of hearing if necessary.

On September 21, 2006, the Association filed an amended charge of unfair practices. On October 4, 2006, the Secretary of the Board issued an Amended Complaint and Notice of Hearing.

A hearing was necessary on the Complaint and the Amended Complaint, but was continued to February 28, 2007. Additional days of hearing were held on May 10 and June 13, 2007.

At the hearings, 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 the Wyoming Area School District is a public employer within the meaning of Section 301(1) of PERA. (N.T. 5)
2. That the Wyoming Area Education Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 5)
3. That the District and the Association are parties to a collective bargaining agreement (CBA) which is effective from September 1, 2004 to August 31, 2010. (N.T. 89, 215, Association Exhibit 3)
4. That the CBA was ratified on October 15, 2005, after lengthy negotiations. (N.T. 89, 215, Association Exhibit 3)
5. That the Association and the District participate in the Northeast Pennsylvania School Districts Health Trust (Trust). (N.T. 11, 80, 166, Association Exhibit 1)
6. That the Trust was started in 1999 when both the labor and management representatives from fourteen school districts agreed to form a consortium of school districts for the purpose of purchasing health insurance to attain savings through larger populations purchasing insurance in bulk. In 1999, the District was facing a 39% increase in rates from Blue Cross/Blue Shield. (N.T. 11)
7. That the Trust membership is comprised of a management representative and a labor representative from each of the fourteen districts. (N.T. 11, 13, 80, Association Exhibit 1)
8. That Philip Russo was a professional employe of the District until he retired in 2003. Mr. Russo was President of the Association from 1999 to his retirement. (N.T. 12-13)

9. That Russo is the District's labor representative to the Trust. He also serves as co-chair of the Trust. (N.T. 11, 13)
10. That Stephen Harmanos was a professional employe of the District for thirty-five years until he retired in June, 2006. Mr. Harmanos served as the Association Vice-President in 1999 and was the Association President from 2003 through his retirement in 2006. (N.T. 49-50)
11. That Deborah Madrack is employed by the District as an elementary teacher. Ms. Madrack has been employed by the District for thirty-four years. Ms. Madrack served as Association Secretary from 1997 through 2002, Treasurer from 2002 through 2003, and Vice-President from 2003 to the present. (N.T. 159-161)
12. That Ms. Madrack serves as the alternate labor representative to the Trust and has held this position since 1999. (N.T. 166)
13. That Lisa Barrett has been a professional employe of the District for eleven years. Ms. Barrett served as Secretary of the Association in 2001 and became President of the Association in 2006. (N.T. 85-86)
14. That the CBA between the parties provides for Association leave for the Association members. Association leave is generally used for members to attend local, regional and statewide PSEA conferences and for members to conduct Association business. (N.T. 63-65)
15. That in 1999, Mr. Russo was the Association President, Mr. Harmanos was the Association Vice-President and Ms. Madrack was the Association Secretary. The District Superintendent, at that time, was Joseph Casarella. Mr. Russo, Mr. Harmanos, Ms. Madrack and Mr. Casarella all participated in the meetings between the districts prior to the inception of the trust. (N.T. 11)
16. That Mr. Harmanos was involved in the organizational meetings for the Trust for the length of its existence, Mr. Harmanos regularly attended the Trust meetings with Mr. Russo and Ms. Madrack with the Superintendent's permission. After the first year, once the process was finalized, only Mr. Russo and Ms. Madrack attended as the Trustee and Alternate Trustee. Mr. Harmanos is the Second Alternate Trustee. (N.T. 51)
17. That Mr. Russo was elected labor co-chair of the Trust in 1999. Mr. Russo continues to hold that position even though he is retired from teaching. (N.T. 12)
18. That each participant district and labor association elects or appoints one person to act as a Trustee and one person to act as the Alternate Trustee. Mr. Russo was elected by the Association to act as a Trustee and Ms. Madrack as the Alternate Trustee. Both Mr. Russo and Ms. Madrack continue to fill these positions. In 1999, Mr. Casarella served as Trustee for the District and Ms. Jean Ragantesi served as the Alternate Trustee for the District. (N.T. 16)
19. That it has been the practice, in the Wyoming Area School District, for the Alternate Trustee to attend Trust meetings with the Trustee who served as labor co-chair. (N.T. 19)
20. That at the meetings of the Trust and its committees, the trustees decide matters of the scope and coverage of the health plans and the provision of health benefits. For example, on October 19, 1999, the very first year of the Health Trust, the Executive Committee of the Trust decided that it would extend to the Wyoming Area School District's part-time employes the opportunity to buy health insurance benefits if the District's Board of Directors approved. In another instance, on June 15, 2004, the Health Trust's Appeal Committee voted to deny a cochlear implant request. (N.T. 23, 80, Association Exhibit 2)
21. That the District and Association stipulated that the records which comprise Association Exhibit 2, reflect the dates of all Trust and Committee meetings and the attendance at those meetings. (N.T. 27, Association Exhibit 2)

22. That as Trust co-chair, Mr. Russo was required to run the Trust meetings. Mr. Russo testified that he attempted to not interject himself into the meetings as a Trustee, when he was acting as Trust co-chair; thus, he explained that, in his opinion, it was necessary to have Ms. Madrack attend the Trust meetings so that she could speak out on a subject when he could not and so that she would be able to step in if he was unable to attend a meeting. Mr. Russo testified that Superintendent Casarella was aware of this practice and agreed with it. (N.T. 16, 43)

23. That Mr. Russo testified that neither he nor Ms. Madrack were required to use personal leave or Association leave to attend the Trust meetings by either Mr. Casarella or his successor Ray Bernardi while Mr. Russo was employed with the District. (N.T. 17, 48)

24. That Mr. Russo retired from employment with the District in June, 2003, but remained a representative to the Trust as the labor trustee from Wyoming Area. (N.T. 11)

25. That Mr. Russo expressed the opinion that the CBA that was ratified in October, 2005 had terms favorable to the Association and that the relations with the District worsened from that point forward. (N.T. 70-71)

26. That Mr. Bernardi was appointed District Superintendent on April 6, 2001. (N.T. 17)

27. That from April 6, 2001 when Mr. Bernardi was appointed to the position of District Superintendent until Mr. Russo retired in 2003, both Mr. Russo and Ms. Madrack attended Trust meetings. (N.T. 18)

28. That Mr. Russo testified that Board of Trustees meetings were held during the school day. Mr. Russo testified that, when he and Ms. Madrack needed release time to attend the Trust meetings, he simply called Mr. Casarella, and later Mr. Bernardi, or sent a letter and he and Ms. Madrack were given release time. (N.T. 19)

29. That Mr. Russo testified that Mr. Bernardi never attempted to bargain a change to the practice of allowing both the Trustee and the Alternate Trustee attending Trust meetings while Mr. Russo was employed by the District. (N.T. 45)

30. Mr. Harmanos testified that he and Mr. Bernardi used to have a friendly, personal relationship. However, Mr. Harmanos testified that once Mr. Bernardi became Association president, the relationship became "less than cordial." Mr. Harmanos testified that Mr. Bernardi did not speak to him for seven months prior to his retirement from the District. (N.T. 52)

31. That Mr. Harmanos testified that, in the summer of 2004, he and District representatives, including Mr. Bernardi, had a conference regarding two issues that were moving to grievance, both of which were settled by the District on behalf of the Association. At the end of one of the meetings, Mr. Harmano extended his hand to Mr. Bernardi and asked him to understand "that this was purely business." Mr. Bernardi responded by jumping up from his desk, waving his finger in Mr. Harmanos' face and saying "that it would never be that way until [Mr. Harmanos] played on his team." (N.T. 67)

32. That Ms. Madrack has attended all of the Trust Meetings since she was elected Alternate Trustee. (These included monthly meetings of the Board and the Executive Committees and occasional meetings for committees on rates, staffing, accounting, the Trust Document and appeals of claims----Association Exhibit 2) Ms. Madrack testified that, while Mr. Casarella was the Superintendent, she was never docked for attending the Trust meetings nor did she have to use Association days to attend the meetings. Ms. Madrack testified that she simply informed Becky Rogan, the District employe responsible for attendance and scheduling substitute teacher coverage, that she would need a substitute to cover her class after 11:00 a.m. (N.T. 166-167)

33. That later Ms Madrack used the DISC system to report her absences. To use the DISC System by either telephone or computer, the day she needs to be off work (1/2 day or full day), and the reason for the absence. The DISC system does not accommodate employes who must leave school for less than a half day. (N.T. 97)

34. That Ms. Madrack continued to attend Trust meetings after Mr. Bernardi became Superintendent in 2001. Mr. Bernardi also attended the meetings as Management Trustee for the District. (N.T. 167)

35. That Mr. Bernardi attended the Trust meetings sporadically until 2003 when he was appointed the District Trustee for management. Mr. Bernardi is currently management co-chair for the Trust. (N.T. 315, Association Exhibit 2)

36. That Mr. Bernardi attended at least 10 Trust meetings from September, 2003 to January, 2006. At each of these meetings, Ms. Madrack was also in attendance. They each initialed or checked-off the same Trust developed sign-in sheet. (N.T. 27, Association Exhibit 2)

37. That Ms. Madrack testified that, prior to 2003-2004, she would fill in for the Trust Secretary whenever the Secretary could not attend a Trust meeting. Thereafter, when the Trust Secretary retired, Ms. Madrack was given the job. Later, due to the Trust's solicitor's opinion that it was inappropriate to pay a stipend for the Secretary position to a Trustee, she stopped serving as Secretary. (N.T. 168)

38. Ms. Madrack testified that she was never informed that she needed to get permission from her building principal in order to attend the Trust meetings. Ms. Madrack testified that she asked to leave at 11:00 on Trust Meeting days in order to drive to the meeting location and to prepare for the meeting. Ms. Madrack's lunch was scheduled for 11:30. (N.T. 205)

39. That Ms. Madrack was never asked to complete a routing slip for days that she attended Trust meetings. (N.T. 289)

40. That Mr. Harmanos testified that Mr. Bernardi never attempted to bargain a change to the practice of sending Ms. Madrack to Trust meetings while he was Association President. (N.T. 70)

41. That Ms. Madrack has been employed by the District for thirty-four years. Prior to 2006, Ms. Madrack never received any discipline, nor had she had any problems with District administrators. (N.T. 160)

42. That Ms. Barrett testified that, in January of 2006, Mr. Bernardi informed her that Ms. Madrack would no longer be able to attend Trust meetings. When Mr. Bernardi was asked why, he simply said that it was "administrative prerogative." (N.T. 87-88)

43. That on January 13, 2006, Janet Serino, Ms. Madrack's building principal, brought her a letter, which stated:

Upon review of the employee activity sheets, I have noticed that you have taken 7 professional days in the 2005-2006 school year, including 5 full days for attendance at the Health Trust Meetings that were scheduled for 1:00 P.M. Please be advised that you will only be allowed ½ professional day(s) for attendance at Health Trust Meetings..

accordingly, the time that you have already taken will be deducted from the compensatory time you have accrued.

(N. T. 163, Association Exhibit 5)

44. That in response, Ms. Madrack made an appointment with Mr. Bernardi for January 20, 2006. Ms. Madrack asked Mr. Bernardi why she was being docked for the days that she attended the Trust meetings and he informed her that it was because she took off full days. She explained to him that, under the Disc system for reporting absences, she had no way of noting that she did not need a substitute until 11:00 a.m. (N.T. 164)

45. That Ms. Madrack testified that she felt that she had to defend herself at the meeting. At the hearing in this charge, Ms. Madrack explained that, on those days, the

substitute would work in a different capacity for other teachers until she was needed to cover Ms. Madrack's class at 11:00 (N.T. 170)

46. That Article XIV of the CBA provides:

TEACHER ADMINISTRATION LIAISON

Section 1. Liaison Committee. The Association representatives will meet with the Superintendent, at a mutually convenient time, and with any other member or members of the administration whom he chooses at least once a month during the school year to review and discuss current school problems and practices and the administration of this Agreement.

(N.T. 89, 215, Association Exhibit 3, page 15)

47. That Ms. Barrett testified that the Liaison Committee is an important section of the CBA and is part of the grievance process. Almost anything can be discussed at a Liaison Committee meeting. If a situation could not be handled by a building principal, the situation would be referred to the Liaison Committee. (N.T. 91)

48. That in March of 2006, at a Liaison meeting, Mr. Harmanos suggested that they discuss the District's docking Ms. Madrack for compensatory time. Mr. Bernardi raised his voice and said, "this is not the place to discuss it." Ms. Madrack testified that Liaison meetings were intended for that type of discussion. (N.T. 171)

49. The Grievance was subsequently resolved on March 23, 2006 and Ms. Madrack's days were restored. Mr. Bernardi stated, in his response, "Grievant's request to restore docked compensatory time is granted, subject to any due process proceedings which the District may elect to initiate. All remaining requests for relief are denied." (N.T. 131, 215, Association Exhibit 6)

50. On May 1, 2006, Mr. Bernardi sent Ms. Madrack another letter stating:

In accordance with the terms of the Northeast Healthcare Trust, you hold the position as alternate.

Accordingly, unless the designated Trustee is unable to attend the Trust Meetings and the District is provided with sufficient notice, you are no longer permitted to attend meetings of the Northeast Healthcare Trust.

(N.T. 133, 215, Association 7)

51. That in response, the Association filed a second grievance on Ms. Madrack's behalf. (N.T. 134, 215, Association 8)

52. That in May of 2006, Ms. Madrack asked the Association for an Association half-day to attend the Trust meeting. From that point on, Ms. Madrack began requesting Association days to attend Trust meetings. (N.T. 174)

53. That in August, 2006, the Association sponsored a Get Acquainted meeting for new teachers to meet the Association executive board and the administration. Ms. Madrack had just addressed the group and she asked Mr. Bernardi how she had done representing the District, and he responded "That's why you shouldn't be going Trust meetings," turned on Ms. Madrack and walked away. He did not answer Ms. Madrack when she called out to him to further discuss his statement. (N.T. 88-89, 174-175)

54. That the Liaison Committee met on September 7, 2006. Ms. Madrack attends Liaison meetings by virtue of her position as an Association officer and as a representative of her building. At that meeting, Ms. Madrack asked about an aide situation at the Tenth Street Elementary School. In response, Mr. Bernardi said, "We don't discuss those things in Liaison." (N.T. 91, 171)

55. That on September 11, 2006, there was a meeting of the Trust and an Executive Meeting. Ms. Madrack testified that Executive Board meetings were held at 3:00. However, Ms. Madrack's students are not dismissed until 3:10 and she does not finish work until 3:20. Ms. Madrack asked if she could leave at 2:50 to attend the meeting. Ms. Madrack arranged for the art teacher to provide coverage for the class from 2:50 to 3:10. Ms. Grimes, Ms. Madrack's building principal, informed her that she could not leave early to attend the meeting. (N.T. 177)

56. That on September 15, 2006, Ms. Madrack received a certified letter from Mr. Bernardi, stating that she had committed an "unauthorized expenditure of District funds" and requesting that she attend a meeting to explain the matter. The meeting was to be held on September 26. Ms. Madrack contacted Ms. Barrett immediately regarding the letter. (N.T. 178)

57. That Ms. Madrack received another letter via certified mail on October 30, 2006 rescheduling the September 26 meeting for November 1 at 4:00 p.m. The meeting was to explain her "unauthorized expenditure of District funds" and that she "engaged the services of substitute teachers at a substantial cost to the District without authorization in order that you might attend to your personal affairs." The letter stated that the meeting would constitute "due process" and that Ms. Madrack was entitled to have Union representation present." (N.T. 96, 215, Association Exhibit 4)

58. That the November 1 meeting was held. Ms. Madrack, Ms. Barrett, John Holland (PSEA Uniserve representative), Ms. Serino, Mr. Bernardi, and Attorney Hassey, the District Solicitor, were in attendance. At the meeting, Mr. Bernardi asked questions and Ms. Madrack, Ms. Barrett and Mr. Holland attempted to answer the questions posed. Ms. Madrack testified that she explained that the reason she asked for full day substitutes on days that she attended the Trust meetings was because there was no way to ask for a substitute to come in at 11:00 on the computerized DISC system. Ms. Madrack explained that, at first, Ms. Rogan overrode the system, but later Ms. Rogan told her to just put in for a full day substitute. Ms. Madrack testified that she taught until 11:00 on those days. (N.T. 178-180)

59. That Ms. Madrack requested compensatory time for the time she was required to meet with Mr. Bernardi and the other District representatives after school on November 1, 2006 from 4:00 to 5:10 p.m. The District denied the request because there was "no pre-approval." Ms. Madrack testified that she was never denied compensatory time before this when she was required to work after school hours. (N.T. 181)

60. That in March, 2006, Ms. Madrack was to become the Association president upon Mr. Harmanos' retirement, but she decided against it. Instead Lisa Barrett became president. Ms. Madrack decided against taking the position because of concern her health would be jeopardized by the "upsetting" way Mr. Bernardi treated her. She testified that his conduct gave her the feeling that she was "not being listened to" and that nothing she said "is fair." (N.T. 88, 172-173)

DISCUSSION

The charge and the amended charge will be discussed separately.

District's Order Forbidding Ms. Madrack to Attend Trust Meetings

The Association's charge of unfair practices alleges that on May 1, 2006, the District's Superintendent, Raymond Bernardi, committed an unfair practice when he took action directed at Deborah Madrack, the Association vice-president, by sending her a letter that "forbid Ms. Madrack to attend any further [Northeastern Pennsylvania School District Health] Trust meetings." The Association alleges that the Superintendent's action occurred "immediately upon resolution" of a grievance over Superintendent Bernardi's attempt to dock Madrack for time spent attending Trust meetings.

The Association alleges that the District violated several sections of PERA. The burden of proof in an unfair practice charge is on the complainant. St. Joseph's Hospital v. Pennsylvania Labor Relations Board, 473 Pa. 101, 373 a.2d 1069 (1977).

The first allegation is that the employer violated Section 1201(a)(5) by failing to abide by a settlement of a grievance over Madrack's attendance at the Trust meetings. The Board will find an employer has violated its duty to bargain if it reneges on a settlement agreement. See AFSCME District Council 47, Local 2187 v. City of Philadelphia, 30 PPER ¶ 30003 (Final Order, 1998).

In the present case, the District and Association representatives met on March 23, 2006 and resolved a grievance over the docking of Ms. Madrack for five days compensatory leave for her attendance at Trust meetings. On the line marked "Disposition by Superintendent," Superintendent Bernardi wrote, "Grievant's request to restore docked compensatory time is granted, subject to any due process proceedings which District may elect to initiate. All remaining requests for relief are denied." (Association Exhibit 6)

The Association points out that despite this agreement, the Superintendent sent the letter of May 1, 2006 informing Ms. Madrack that she could not attend the future meetings.

The District's explanation of why Superintendent Bernardi sent the May 1, 2006 letter is that that he was merely following the Trust Document, which only allowed Ms. Madrack to attend as an alternate if the labor representative was unable to attend. Mr. Bernardi contended that because Wyoming Area's labor representative to the Trust was present at all meetings, Ms. Madrack's presence as an alternate was not necessary and her use of leave to attend such meetings would not be permitted.

The District's defense must be viewed in light of the law regarding mandatory subjects of bargaining and unilateral changes to such subjects. A matter is a mandatory subject of collective bargaining if it impacts more on employe wages, hours and working conditions under Section 701 than on matters of managerial prerogative as generally outlined in Section 702 of PERA. The Board will find an employer in violation of Section 1201(a)(5) of the Act if the employer unilaterally changes a mandatory subject of bargaining. Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978). In PLRB v. State College Area School District, 461 Pa. 494, 337 A.2d 262 (1975), the Supreme Court has held that "fringe benefits" including health care coverage are considered "wages" within the meaning of Section 301(14) of PERA and therefore a mandatory subject of collective bargaining.

In the present case, the Association does not contend that the District has changed health benefits. Instead, the Association contends that the District has changed the administration of the benefits. The Board has addressed the question of whether the administration of health benefits was a mandatory subject of bargaining. In Palmyra Area Education Association v. Palmyra Area School District, 26 PPER ¶ 26087 (Final Order, 1995) the Board was faced with the question of whether the employer committed an unfair practice by unilaterally changing insurance coverage from Blue Cross/Blue Shield to the self-funded insurance coverage administered by the National Claims Administration Service (NCAS). The Board held that even though the level of benefits may not have changed under the self insurance plan, the change in the administration of the plan from the state regulated Blue Cross/Blue Shield to a new non-regulated entity was "at least one significant change present from the outset" and thus constituted a change in the status quo to a mandatory subject of bargaining. 26 PPER at 201.

The association alleges the district's order preventing Ms. Madrack's attendance at the Health Trust meetings was in itself a unilateral change over the health care plan administration as significant as the change at issue in Palmyra Area School District, supra. The Association points to the unique nature of the Northeast Pennsylvania School Districts Health Trust as a self insurer of the employes in Wyoming Area School District and the role of Ms. Madrack as an alternate trustee to the Trust. The Trust came into being only after the respective districts obtained agreements with the employee organizations in each district to make the Trust the new plan for health care benefits. An examination of the minutes of the Trust meetings (Association Exhibit 2) makes it apparent that attendance of the trustees at Trust meetings is an integral part of the operation of the plan, the decisions over the scope of coverage and the administration of benefits.

For example, on October 19, 1999, the very first year of the Trust, the Executive Committee of the Trust decided that it would extend to the Wyoming Area School District's

part-time employees the opportunity to buy health insurance benefits if the District's Board of Directors approved. To cite another example, on June 15, 2004, the Trust's Appeal Committee voted to deny an employee's cochlear implant request.

In the present case, on these facts, it must be concluded that the subject of leave to attend the Northeast Pennsylvania School Districts Health Trust meetings is integral to the administration of the health care plan and is therefore a mandatory subject of bargaining.

Where the unfair practice charge alleges that a term or condition of employment arose through past practice, as here, the charging party has the burden of proving the existence of a binding past practice. Caln Township, supra. In determining whether the record supports the finding of a past practice, the Board utilizes the standard that was set forth in County of Allegheny v. Allegheny County Prison Employees Independent Union, 476 Pa. 27, 381 A.2d 849 (1977). Caln Township, supra; Jersey Shore, supra; Hazleton, supra. In County of Allegheny, the Supreme Court adopted the following standard for a past practice:

"A custom or practice is not something which arises simply because a given course of conduct has been pursued by Management or the employees on one or more occasions. A custom or a practice is a usage evolved by men as a normal reaction to a recurring type situation. It must be shown to be the *accepted* course of conduct characteristically repeated in response to the given set of underlying circumstances. This is not to say that the course of conduct must be *accepted* in the sense of both parties having agreed to it, but rather that it must be *accepted* in the sense of being regarded by the men involved as the *normal* and *proper* response to the underlying circumstances presented."

476 Pa. at 34 n. 12, 381 A.2d at 853 n. 12 (emphasis in original; citation omitted).

The Association offered substantial evidence to prove that the District allowed Ms. Madrack to attend the Trust meetings as an alternate to the District's labor representative who served as co-chair from its creation in 1999 to 2006. This pattern was observed by the parties despite the language of the Trust document allowing attendance only if the Trustee was unable to attend. In 2006, Superintendent Bernardi objected to her attending. Before his objection, she attended several meetings a year as an alternate for the labor co-chair without objection from the District, even though District officials were at those meetings and noted her attendance. Superintendent Casarella attended the meetings until his retirement in 2001. Ms. Jean Ragantesi then became the District's Management representative in 2001. Superintendent Bernardi began attending in 2003 and attended at least 10 of the Trust meetings from 2003 to January 2006, meetings at which Ms. Madrack was in attendance as an alternate trustee. This evidence demonstrates that her attendance at the Trust meetings using professional leave has been accepted by the District and the Association as a past practice as that term has been defined by the Board and the courts. Based on this record, the Association has met its burden of proving that there has been an established past practice of allowing Ms. Madrack to use professional leave to attend the health trust meetings as an alternate to Phil Russo, the labor co-chair, that this was a mandatory subject of bargaining and that the District unilaterally changed this practice without bargaining, in violation of Section 1201(a)(5) of PERA.

The May 1, 2006 letter also violates the duty to bargain because it is evidence that the District failed to abide by the terms of the March 23, 2006 settlement agreement. The claim that Ms. Madrack had no right to continue attending the Trust meetings as she had been doing is at variance with the underlying premise of the grievance settlement and therefore represents a repudiation of the settlement. City of Philadelphia, supra.

The next allegation to be addressed is the Association's charge that the District's change in leave procedures for Ms. Madrack also violated Section 1201(a)(3). To prove that the District violated this section, the Association must prove, by substantial and legally credible evidence, the following elements: (1) that the individual was engaged in protected activity under the Act; (2) that the employer was aware of the employee's protected activity; and (3) that the employer's decision to take action against the employee was motivated by the employee's protected activity. St. Joseph's Hospital v PLRB, 473 Pa. 101, 373 A.2d 1069 (1977).

The complainant has the burden of proving each of the three elements of the test. Suspicion is an insufficient basis upon which to find an employer has been motivated by anti-union animus. Shive v. Bellefonte Area School District, 317 A.2d 311 (Pa. Cmwlth. 1974).

The first two elements of the test are beyond dispute. As for the first element, Ms. Madrack participated in protected activity at a high level. Ms. Madrack was an Association officer for several years. Also she served as a member of the negotiating team and a building representative. At the time of this charge, she was the Association vice-president, in line to become the president. She also filed a grievance to assert rights for herself and the Association.

As for the second element, employer knowledge of Ms. Madrack's protected activity, the Association proved this element as well. Superintendent Bernardi knew of Ms. Madrack's protected activity. He sat across from her at the negotiating table during the last round of contract negotiations. He saw her address a gathering at a summer picnic when she spoke as the Association vice-president. He saw her at the Trust meetings, of which her attendance is the center of this controversy.

The deeply contested issue in this case is whether the Association has proven the third element of the test for a discriminatory action, whether Superintendent Bernardi was motivated by anti-union animus when he issued the May 1, 2006 letter to Ms. Madrack preventing her from attending future Trust meetings.

The District contends that Superintendent Bernardi's actions with respect to Ms. Madrack's attendance at Trust meetings were not motivated by anti-union animus but rather by his sincere desire to end Ms. Madrack's use of a full-day substitute when she attended Trust meetings and his belief that the Declaration of Trust permitted attendance by alternates only when the labor trustee is unable to attend.

The Board has recognized that anti-union animus is not always proven by direct evidence. Accordingly, the Board has long held that the complainant may prove this element through reasonable inferences drawn from factors on the record. See, Child Development Council of Centre County, 9 PPER ¶ 9188 (Final Order, 1978). Among the factors that may support an inference of anti-union animus are the timing of the adverse employer action in relation to union activity, anti-union statements by agents of the employer, disparate treatment of a union activist as compared with the similarly situated non-activist employe and the failure of the employer to adequately explain the reasons for the adverse employment action. See Child Development Council of Centre County, supra.

The Association's case for anti-union animus rests on inferences drawn from several factors: the close timing between the increased attention paid to Ms. Madrack's attendance at Trust meetings in January, 2006, and the Association's obtaining a favorable collective bargaining agreement in October, 2005; that the target of the District's actions, Ms. Madrack, was a leading Association officer and negotiator; that Mr. Bernardi made a vindictive and discriminatory statement to the Association president in 2004; that Mr. Bernardi made a hostile statement to Ms. Madrack following a new teacher dinner in August, 2006 and that the District failed to adequately explain its reasons for the decision to curtail Ms. Madrack's attendance.

Added together, and considered as a whole, the factors offered by the Association are a significant basis to infer anti-union animus. The last factor is particularly noteworthy. In Pennsylvania Labor Relations Board v Stairways Inc. 425 A.2d 1172 (Pa. Cmwlth. 1981), the Commonwealth Court reinstated the PLRB's Final Order finding that the employer failed to adequately explain that the reason for the discharge of a union activist was based on poor performance evaluations and therefore evidence of anti-union animus could be inferred as the true reason for the discharge.

Mr. Bernardi testified that it was his concern over the cost of substitutes that motivated him, not Ms. Madrack's union activities. He testified that it was in November, 2005 that he discovered that Ms. Madrack was using substitutes when he walked through the Tenth Street School and saw a substitute for Ms. Madrack. He testified that Ms. Madrack's union status had nothing to do with his decisions regarding her attendance at the Trust

meetings. However, the Association argues, persuasively, that this explanation is not adequate, given Ms. Madrack's long history of attendance at the Trust meetings, Mr. Bernardi's observance of her at those meetings and the District's failure to address the matter until immediately after a new collective bargaining agreement had been reached. Accordingly, the inferences argued by the Association will be accepted as the basis to conclude that anti-union motivation was behind Mr. Bernardi's action. The Section 1201(a)(3) charge will be sustained.

Next to be addressed is the allegation that the District violated Section 1201(a)(1) of PERA. Section 1201(a)(1) of PERA prohibits public employers from "[i]nterfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of [the PERA, Section 401, 43 P.S. §1101.401 (providing the right of public employees to organize and to join employee organizations and to engage in concerted activities for the purpose of collective bargaining or other mutual aid)].

"While an employer's motive makes the offense in a Section 1201(a)(3) violation, anti-union animus is not a necessary prerequisite to proving an independent violation of Section 1201(a)(1). "Purity of heart is no defense to a charge under Section 1201(a)(1) of the Act." Montgomery County Community College, 16 PPER 16156 (Court of Common Pleas of Montgomery County, 1985). In fact, even an inadvertent act may violate Section 1201(a)(1). Woodland Hills School District, 13 PPER 13298 (Final order, 1982). 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 this case, there is evidence that Mr. Bernardi's actions against Ms. Madrack in fact coerced her. Ms. Madrack decided not to take the position of Association president when Mr. Harmanos retired in 2006. She testified credibly that her reason for not taking the position when it opened was due to concern her health would be jeopardized by the "upsetting" way Mr. Bernardi treated her. She testified that his conduct gave her the feeling that she was "not being listened to" and that nothing she said "is fair." In addition to the evidence discussed above, Mr. Bernardi's refusal to discuss matters in the Liaison Committee meetings lends credence to Ms. Madrack's testimony that she was "not being listened to." Even if Ms. Madrack not testified that Mr. Bernardi's actions coerced her, a reasonable person could conclude that his actions had a "tendency to coerce." Northwestern School District, *supra*. On this record, the Association has made a persuasive case that the District has violated Section 1201(a)(1) of PERA.

Finally, the Association has also alleged the District violated Section 1201(a)(4) of PERA. The Board has held that Section 1201(a)(4) of PERA is limited to situations where an employe is discriminated against by his or her employer for filing affidavits, petitions or complaints with the Board or providing information or testimony in a Board proceeding. Luzerne County Community College Association of Higher Education v. Luzerne County Community College, 37 PPER 123 (Final Order, 2006). The Association did not prove that Ms. Madrack filed an affidavit, petition or complaint with the Board or gave information or testimony before the Board prior to the May 1 letter, or that the District took adverse action against Ms. Madrack because of such activity. Thus, the Complainant has failed to prove that the issuance of the May 1 letter violated Section 1201(a)(4) of PERA.

The District's Accusation of Ms. Madrack's Unauthorized Expenditure of Funds

The Association's amended charge moves the focus of this discussion four months beyond the May 1, 2006 letter to September 15, 2006, when Ms. Madrack's attendance at the Trust meetings was again made a point of contention by Mr. Bernardi. On September 15, 2006, Mr. Bernardi sent Ms. Madrack a letter ordering her to appear before him on September 26, 2006 at 5:30 p.m. for alleged "unauthorized expenditures of District funds." The letter went on to state, "In particular, you engage the services of substitute teachers at a substantial cost to the District without authorization in order that you might attend to

your personal affairs." The meeting could not be held as scheduled. The letter was mailed again on October 30, for a meeting on November 1, 2006 at 4:00 p.m.

The Association contends that Mr. Bernardi sent these letters knowing that Ms. Madrack's attendance at the meetings was allowed, that she was now using Association days to attend and that the meetings were for the Trust and not for "personal affairs."

The Association contends that these subsequent actions by Mr. Bernardi constituted a continuation of the unilateral change in terms and conditions of employment in violation of Section 1201(a)(5), retaliation against Ms. Madrack for her union activity in violation of Section 1201(a)(3) and an independent Section 1201(a)(1) violation for its chilling effect on union activity.

The Association's allegations regarding the September and October letters, and the resulting November 1 meeting, must be judged under the same analysis utilized in the first part of this order. The letters and the resulting meeting are evidence that the District continued to press Ms. Madrack individually over an issue that was a mandatory subject of bargaining in violation of its duty to bargain with her exclusive representative, the Association. Accordingly, this will constitute a Section 1201(a)(5) violation.

The Association's allegations that these actions are coercive in violation of Section 1201(a)(1) also have merit. An employer's legitimate business purpose can be a defense to a Section 1201(a)(1) charge. Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989). However, the District's defense that it was only acting to bring Ms. Madrack into conformity with District leave policies lacks plausibility. It appears that the District was not following its own leave procedures and policies. Ms. Serino, the building principal, admitted that the District's policies on leave as set forth in the handbook were not being followed. The District purportedly has a routing slip system for leave so the building principal is aware of the leave request. Ms. Serino, the building principal at the time, was not directed by Mr. Bernardi to require a routing slip for leave for Ms. Madrack or other employees. Additionally, the District was not able to rebut Ms. Madrack's testimony that her attendance was done in conformity with the office procedures established by Becky Rogan, the administrative assistant who is responsible for the DISC system. Furthermore, the tone of the letter and the meeting were coercive, given that Mr. Bernardi knew that Ms. Madrack was not attending to "personal affairs" but that she was attending a Trust meeting as the alternate labor representative.

Following the meeting, the District denied compensatory time for the November 1, 2006 meeting. Ms. Madrack made a convincing case that this denial violated Section 1201(a)(1) of PERA. This meeting was called by Mr. Bernardi to discuss her attendance at the Trust meetings. Denying compensatory time never happened before to Ms. Madrack. The District failed to offer a plausible explanation why it would not pay her compensatory pay for this meeting.

This singling out of Ms. Madrack is direct evidence of disparate treatment. Lackawanna Area Vo-Tech School, 21 PPER ¶ 21055 (Final Order, 1990). It will support a finding of anti-union animus, the third element of proving discriminatory treatment to discourage membership in an employe organization. The first and second elements, as discussed above, have been proven. Therefore, a Section 1201(a)(3) violation will also be found.

Also, the denial of compensatory leave violated Section 1201(a)(4). The elements necessary to establish a Section 1201(a)(4) violation are subsumed by the elements of Section 1201(a)(3). Teamsters Local #429 v. Lebanon County and Lebanon County Sheriff, 32 PPER ¶ 32006 (Final Order, 2000). The close sequence of events between filing a petition or a charge and the alleged retaliation can form a basis for finding a Section 1201(a)(4) charge. Id. Here, the District sent the September 15, 2006 letter shortly after the Association's June 19, 2006 charge was filed with the Board. The District offered no plausible explanation why it treated Ms. Madrack differently regarding compensatory leave for the November 1 meeting.

CONCLUSIONS

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

1. That the District is a public employer within the meaning of Section 301(1) of PERA.
2. That the 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 committed unfair practices in violation of Sections 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 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 against employes to encourage or discourage membership in an employe organization.

3. Cease and desist from discharging or discriminating against an employe because he has signed or filed an affidavit, petition or complaint or given any information or testimony under PERA.

4. Cease and desist from refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative.

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

(a) Make Deborah Madrack whole for any losses caused by the District's unilateral change in the practice of her attendance at Northeast Pennsylvania School Districts Health Trust meetings;

(b) Make Deborah Madrack whole for the District's failure to credit her with compensatory time for her November 1, 2006 meeting with Superintendent Raymond Bernardi;

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

(d) 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 become and be absolute and final.

SIGNED, DATED AND MAILED from Harrisburg, Pennsylvania this thirtieth day of December, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

THOMAS P. LEONARD, Hearing Examiner