COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JOAN F. SMITH,	:	
GABRIEL H. PETORAK,	:	
JOHN F. LARKIN,	:	Case No. PERA-C-07-356-E
And	:	Case No. PERA-C-07-357-E
ELLEN E. KOZLOSKY	:	Case No. PERA-C-07-358-E
	:	Case No. PERA-C-07-359-E
v.	:	
	:	
LAKELAND SCHOOL DISTRICT	:	

FINAL ORDER

The Lakeland School District (District) filed timely exceptions on June 10, 2008 with the Pennsylvania Labor Relations Board (Board) to a Proposed Decision and Order (PDO) issued on May 21, 2008. The District challenges the Board Hearing Examiner's determination that it violated Section 1201(a)(1), (3) and (4) of the Public Employe Relations Act (PERA) by not renewing the annual employment of employes holding leadership positions in the recently decertified Lakeland Education Support Professionals Association, PSEA/NEA (Union) -- Joan F. Smith, Secretary; Gabriel H. Petorak, Union organizer; John F. Larkin, President; and Ellen E. Kozlosky, Vice-President and bargaining representative (collectively Complainants). After obtaining an extension of time for its brief, the District timely filed a brief in support of its exceptions on July 10, 2008. The Complainants filed a timely brief in response to the exceptions on July 28, 2008. Upon review of the exceptions, response thereto, and all matters of record, the Board makes the following:

AMENDED AND ADDITIONAL FINDINGS OF FACT

5. Smith served as the Secretary of the Union from its inception in 2005. The day after her appointment as Secretary, Smith's picture appeared in the Scranton Times with the President of the Union. (N.T. 111).

8. Before the decertification of the Union, Kozlosky wrote the following letter to ten teachers:

> Dear Teachers:
>
> I never thought I would have to write this letter, but it seems the time has made it necessary. It seems our union representation is about to be taken away *and I know repercussions will soon follow.*

(emphasis added). The letter was placed in Kozlosky's personnel file. (N.T. 13, 261-262, Union Exhibit 1, p. 4, 46-48).

10. Petorak originally called PSEA in to organize the employes in 2005. Petorak recruited members for the Union during his breaks, during lunch, on weekends, and whenever he had a chance. (N.T. 135-136).

46. That the elimination of Smith and Kozlosky saved little if anything in wages. Billings-Jones authorized Thomas to bring people in for additional hours if needed, and testified that their hours could have been made up by remaining staff. (N.T. 63).

56. Petorak, Kozlosky and Smith came into work at Lakeland Elementary at 3:30 for the evening shift. (N.T. 359-360).

62. Thomas testified that he was not in the Lakeland Elementary School and did not see any of the employes. (N.T. 333).

63. Coggins testified that he received all complaints about the employes at Lakeland Elementary School, and took some of them to Thomas. (N.T. 361, 380).

66. Billings-Jones testified that her decision to recommend against renewing the Complainants' employment was based on the combination of both financial and poor performance reasons. She could not say that either reason separate and apart from the other, would have resulted in the same recommendation. (N.T. 53, 57, 58).

67. During the period of time between the presentation of the proposed budget on May 16, 2007 and the drafting of the final budget in mid-June 2007, Peregrim and Billings-Jones worked on the budget to reduce the $1.2 million deficit in the proposal. (N.T. 436, District Exhibit 11).

68. In the spring, Billings-Jones meets with administrators and supervisors to discuss staffing for the following year. (N.T. 56).

69. When asked by the Union's counsel at the hearing to explain the increase in complaints during his tenure as supervisor, Mr. Thomas testified "I think that maybe you people came in there and promised them the world and they just figured they didn't have to do anything anymore. … [T]heir attitudes changed." (N.T. 352).

DISCUSSION

The facts as set forth in the PDO and this order are summarized as follows. Dr. Margaret Billings-Jones has been the Superintendent of the District since 2003. (FF 16). Gabriel Petorak worked as a full-time maintenance employe with the District for 19 years. (FF 9). Petorak called the Pennsylvania State Education Association (PSEA) to organize the District's nonprofessional employes in 2005. The first meeting with the PSEA representative was held at the Holiday Inn, Dunmore, where Billings-Jones' current secretary was in attendance. (FF 10 and 12). Petorak recruited members for the Union during his breaks, during lunch, on weekends, and whenever he had a chance. (FF 10). Joe Clause, the maintenance supervisor at the time, asked John Larkin, a full-time maintenance employe, "a few times" : "Is Butch [Petorak] bothering you to join? Margaret [Billings-Jones] wants to know, is Butch pushing you?" (FF 28). Clause also asked Petorak "[w]hat did we [employes] think we were going to get out of creating a union in the school." (FF 11). Petorak recruited supporters for the Union, including George Thomas, who later became the maintenance supervisor. (FF 13).

On May 27, 2005, the Board certified the Union as the exclusive representative of a subdivision of the employer unit comprised of all full-time and regular part-time nonprofessional employes, including but not limited to secretaries, aides, custodial/ maintenance employes, and monitors; and excluding management level employes, supervisors, first level supervisors, confidential employes and guards as defined in PERA. (FF 2).

Joan Smith worked as a part-time maintenance employe at the District for six years. She worked at the Lakeland Elementary School, and served as the Secretary of the Union from its inception in 2005. (FF 4 and 5). The day after Smith was appointed as Secretary of the Union in 2005, her picture appeared in the Scranton Times with the President of the Union. (FF 5). Billings-Jones admitted that if the newspaper published the fact that Smith was the Secretary of the Union, she would have read it. (FF 18).

Larkin worked for the District for 18 years and last worked at the Mayfield Elementary School (FF 14). Larkin testified that he was originally opposed to the Union but joined later, in January or February of 2006. (FF 27). Larkin attended his first bargaining meeting on March 13, 2006, and within a week of his appearance at that meeting, Billings-Jones informed him that because he was a District employe, he might not be able to keep his non-public school transportation contract with the District that he had held for 16 years. (FF 29 and 30). After attending another bargaining meeting in the summer of 2006, Larkin was transferred to the Mayfield Elementary School. (FF 31). Larkin became President of the Union in early 2007. (FF 14).

Ellen Kozlosky worked as a part-time maintenance employe with the District for 23 years at the Lakeland Elementary School. (FF 6). Kozlosky served on the Union's bargaining committee and also served as the Union Vice-President starting in 2007. (FF 7). In her capacity as Superintendent with the District, Billings-Jones attended negotiation meetings with Union representatives Larkin and Kozlosky. (FF 17).

Thomas became acting supervisor of the maintenance and cleaning staff at Mayfield and Lakeland Elementary Schools in March 2006, when Joe Clause resigned, and Thomas was appointed as the maintenance supervisor in December 2006. (FF 49 – 50). Brian Coggins is the head custodian at the Lakeland Elementary School on the day shift, (FF 55), but is not a supervisor within the meaning of Section 301(6) of PERA. (FF 57).

On February 7, 2007, an employe filed a Petition for Decertification with the Board. The petition requested that the Board order a decertification election under Section 607 of PERA to determine whether or not the Union is supported by a majority of the employes in the bargaining unit certified by the Board at PERA-R-05-85-E. The Board conducted the election and the results were 24 votes for No Representative, 20 votes for the Union and one challenged ballot. Therefore, the Board Representative issued a Nisi Order of Decertification on May 22, 2007. (Board Exhibit 1, PERA-R-05-85-E) (FF 3).

While the Decertification Petition was pending with the Board, the District hired a new business manager, Delana Michelle Peregrim on April 2, 2007. On May 8, 2007, Peregrim started working on the 2007-08 budget. It was the first time she had ever prepared a school district budget. (FF 44). Peregrim expressed the belief that the District was under great budgetary pressure due to a "very low fund balance". (FF 41). During the period of time between the presentation of the proposed budget on May 16, 2007 and the drafting of the final budget in mid-June 2007, Peregrim and Billings-Jones worked on the budget to reduce the $1.2 million deficit in the proposal. (FF 67). In working to balance the budget, Peregrim's 2007-08 budget proposal provided for the District borrowing $1.2 million on a tax anticipation note (TAN), and raising real estate taxes by 3 mills. (FF 42 and 43).

In the spring, around the same time that she was working on the school budget, Billings-Jones met with administrators and supervisors to discuss staffing for the following year. (FF 68). Billings-Jones testified that around the end of the school year in 2007, Thomas recommended to her people under his supervision who were "poor performers" and should not be brought back next year. He named five people: Smith, Petorak, Larkin, Kozlosky and David Price. (FF 51). Billings-Jones held subsequent meetings with Thomas and asked him if he could operate the building effectively "if we had less staff. And his belief was that we could." (FF 48). Before bringing the issue of non-renewals before the School Board, Billings-Jones did not personally investigate any of the employes' alleged poor performance or speak to any of the employes directly regarding the situation. (FF 54). However, she did have discussions with Thomas and looked in the personnel files of the employes that she recommended not be reappointed. (FF 65).

Although Billings-Jones discussed the Complainants' performance with Thomas, Thomas was not in the Lakeland Elementary School and did not see any of the employes in that building. (FF 62). Instead, he relied on reports from Coggins. Coggins testified that he received all of the alleged complaints about the employes at Lakeland Elementary School. (FF 63). Thomas testified that because it was "Mr. Coggins' building," he assumed that Coggins would show the complaints to the employes. (FF 60). Thomas did not instruct Coggins to handle any of the alleged complaints. (FF 61). Nor did he show Smith or Kozlosky any complaints. (FF 59). Coggins testified that he did not recommend to Thomas that Petorak, Smith, or Kozlosky be dismissed. (FF 58). Nevertheless, Thomas recommended to Billings-Jones that Larkin, Petorak, Smith, and Kozlosky not be renewed for the 2007-2008 school year because they were poor performers. When asked by the Union's counsel at the hearing to explain the number of complaints during his tenure as supervisor, Mr. Thomas testified that "I think that maybe you people [the Union] came in there and promised them the world and they just figured they didn't have to do anything anymore. … [T]heir attitudes changed." Billings-Jones did not know whether Thomas had any additional documentation regarding the employes to support his recommendation for non-renewal. (FF 54).

Billings-Jones however did review the personnel files. One item in Kozlosky's personnel file was a letter that Kozlosky had written to the District's teachers before the decertification of the Union. That letter expressed her opinion that "[i]t seems our union representation is about to be taken away and I know repercussions will soon follow." (FF 8). In Smith's personnel file, there was a letter regarding an incident with her time sheets on February 10, 2006. (FF 20). However, there was nothing regarding poor work performance in her personnel file. (FF 19). Petorak was disciplined once in 2001, (FF 24),

but was not disciplined between the time of his reappointment in 2006 and the District's decision not to reappoint him in 2007. (FF 25). Also in Petorak's personnel file was a letter to all night cleaning staff dated by handwritten notation May 10, 2007, and a memorandum dated June 25, 2007 regarding building maintenance at Mayfield Elementary School. (FF 26). Larkin had received a ten-day suspension on November 16, 2006 for taking a vacation day because the District contends Larkin did not submit a leave slip. (FF 32).[1]

Billings-Jones agreed with Thomas' list of "poor performers," (FF 52), and made the decision not to renew the employes. (FF 64). Billings-Jones testified that her decision to recommend not renewing the Complainants' employment was based on a combination of both financial and poor performance reasons. Billings-Jones could not say that either reason, separate and apart from the other, would have resulted in the same recommendation. (FF 66). By the District's estimate, reinstatement of the four Complainants would cost $90,179. (FF 44). Despite the assertion of needed savings, Billings-Jones nevertheless authorized Thomas to bring people in for additional hours if needed, and testified that the part-timers' hours could have been made up by remaining staff. (FF 46). Without revealing the names of the employes, Billings-Jones made her recommendation not to reappoint Smith, Petorak, Larkin, Kozlosky and Price to the School Board of Directors on June 29, 2007.[2] (FF 64). On June 29, 2007, the District failed to reappoint Smith, Petorak, Larkin and Kozlosky to their positions for the 2007-2008 school year.

Smith, Petorak, Larkin and Kozlosky did not receive notice as to why they were not being renewed. (FF 19, 22, 23, 33). The Complainants were not afforded an opportunity to respond to the District's asserted reason prior to their non-renewal. Smith testified that she was never informed that she had poor work performance. (FF 19). Regarding the District's claim that she had falsified her time records when she left work 15 minutes early on a Friday to attend a funeral with three other employes, Smith testified that she discussed the incident with her supervisor who told her that it "was no big deal." (FF 20). Although Billings-Jones asserted at the hearing that this would have warranted immediate discharge, Smith was renewed in her position following that incident. (FF 20, 21). Kozlosky was never informed that her work was substandard, and could not explain how her letter to the teachers ended up in her personnel file. (FF 22). Petorak testified that he had no knowledge of the May 10, 2007 letter to the night cleaning staff or the June 25, 2007 memo regarding maintenance at Mayfield Elementary School that were in his personnel file. (FF 26). Petorak never worked in the Mayfield Elementary School. (FF 26). After he was told by supervisor George Thomas in May 2007 that he was not cleaning the Kindergarten bathroom properly, Petorak believed that he had improved and was never informed otherwise. (FF 25). Larkin was never told that his work performance was substandard. (FF 33). As regards his ten-day suspension on November 16, 2006, Larkin testified that he filled out the leave slip in accordance with normal procedure, and turned the slip in at Mayfield Elementary School. However, the District claimed that it did not receive it. (FF 32). Larkin acknowledged that he had filled out a funeral leave request on July 24, 2006, but credibly testified that he had done so as a joke and that he threw the slip away and did not take the time off. Larkin was not disciplined over the incident. (FF 33).

Based on the demeanor of the witnesses during their testimony, the Board Hearing Examiner accepted the Complainants' testimony as credible. The Hearing Examiner found that the Complainants established a prima facie case of discrimination, and rejected the District's alleged lack of knowledge of union activity and its proffer of independent, non-discriminatory, fiscal and performance reasons for its non-renewal of the Complainants' employment. In addition, the Hearing Examiner concluded that eliminating the Union leadership from employment would tend to coerce remaining employes from seeking to reinstitute a union. The Hearing Examiner also presumed that the Complainants filed documents with the PLRB, of which the District was aware before deciding not to renew the Complainants' employment. Accordingly, the Hearing Examiner concluded that the District violated Section 1201(a)(1), (3) and (4) of PERA.

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[1] This discipline is the subject of a separate unfair practice charge before the Board.

[2] Billings-Jones added a sixth position to the list of employes who would not be reappointed, a school crossing guard. (FF 53).

The District has filed fifty-two separately enumerated exceptions. For the most part, the District's exceptions assert that the Hearing Examiner erred in believing the Complainants' testimony, failing to credit the testimony of the District's witnesses, and failing to make findings of fact based on the District's assertion of the facts. Because the hearing examiner is able to view the witnesses' testimony first-hand, it is the function of the hearing examiner, and not the Board, to determine the credibility of the witnesses and weigh the probative value of the evidence presented at the hearing. Mt. Lebanon Education Association v. Mt. Lebanon School District, 35 PPER 98 (Final Order, 2004). The hearing examiner need not summarize all of the evidence presented, but makes findings of fact that are relevant to the determination of the unfair practice charge before the Board. Page's Department Store v. Velardi, 464 Pa. 276, 346 A.2d 556 (1975).

The unfair practice charge presented to the Board was whether the District discriminated against the Complainants because of their protected activities. To support a claim of discrimination, the charging party must establish that the employe engaged in an activity protected by PERA; that the employer was aware of that activity; and that the employer 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). It is the employer's motive which creates the offense under Section 1201(a)(3) of PERA. PLRB v. Ficon, 434 Pa. 383, 254 A.2d 3 (1969). Because union animus is rarely overt, an employer's anti-union motives may be inferred from the totality of the circumstances. PLRB v. Child Development Council of Centre County, 9 PPER 9188 (Nisi Decision and Order, 1978); Dauphin County Peace Officers Association, Local 125 I.U.P.A. v. Dauphin County Court of Common Pleas, 27 PPER ¶27004 (Final Order, 1995).

Even where the charging party establishes a prima facie case of discrimination, the employer may prevail by demonstrating that it had a credible, non-discriminatory, legitimate business reason for its action. Teamsters Local 776 v. Perry County, 23 PPER ¶23201 (Final Order, 1992), *affirmed*, Perry County v. PLRB, 634 A.2d 808 (Pa. Cmwlth. 1993); Lehighton Area School District v. Pennsylvania Labor Relations Board, 682 A.2d 439 (Pa. Cmwlth. 1996). To sustain its burden, the employer must establish, by a preponderance of the credible evidence, that even in the absence of the discriminatory motive it would have taken the same action against the employe based exclusively on the asserted non-discriminatory reason. Hand v. Falls Township, 19 PPER ¶19012 (Final Order, 1987); Teamsters Local 312 v. Upland Borough, 25 PPER ¶25195 (Final Order, 1994). However, the absence of a credible non-discriminatory reason for its actions, may amount to a finding that the employer's alleged legitimate reasons are a mere pretext for an unlawful motive. Perry County, supra; Lehighton Area School District, supra; Sanders v. Philadelphia Housing Authority, 36 PPER 66 (Final Order, 2005), affirmed sub nom. Philadelphia Housing Authority v. PLRB, 37 PPER 21 (Philadelphia Court of Common Pleas, 2005); Falls Township, supra.

With this legal authority in mind, we delve into the District's exceptions. In doing so, where possible we will address each exception separately, because most of the District's exceptions raise a distinct issue.

Initially, we note that the District points out in Exceptions 30 and 31 that Findings of Fact 56, 62 and 63 do not accurately cite to testimony that supports the findings. The Findings have been amended above to reflect where the substantial evidence of record supporting each particular finding may be found.

In Exceptions 1, 3, 6, and 10, the District faults the Hearing Examiner for failing to note that the Complainants were appointed to their positions annually. Section 1201(a)(3) of PERA makes it an unfair practice for an employer to refuse to hire someone because of an anti-union motive. Thus, depending on the employer's motive, the refusal to re-hire an employe appointed on an annual basis may be unlawful under PERA. Accordingly, a finding that the Complainants were employed annually is irrelevant to the alleged unfair practice.

Similarly, the District asserts in Exception 38 that the Hearing Examiner erred in noting a "long time pattern of reappointments" but not allowing the District to present testimony about reappointments prior to Billings-Jones' tenure as Superintendent. Apparently realizing that it never attempted to introduce such evidence, the District alters its exception in its brief to assert that the Hearing Examiner failed to note that two other employes were not renewed by Billings-Jones in prior years. However, as noted by the Hearing

Examiner in the PDO, it is Billings-Jones' motive for not reappointing the Complainants for the 2007-2008 school year that is at issue. Likewise, the District's assertion in Exception 28 that a second crossing guard position was left vacant for the 2007-2008 school year after an employe retired is not pertinent to the question of Billings-Jones' motive in actively recommending non-renewal of the Complainants' annual employment.

The District also challenges the Hearing Examiner's discussion of the School Board policy of deferring to Billings-Jones regarding administrative matters. In Exception 32, the District notes that the Examiner made no specific Finding of Fact with regard to the alleged policy, and asserts that there is no such policy in place. Upon review of the record, the Hearing Examiner's discussion of the School Board's unwritten policy of deferring to the Superintendent will not be disturbed. There is ample testimony of record from members of the School Board supporting its policy of routinely deferring to the administration on personnel matters. (N.T. 200, 210, 217, 222-24, 228, 235-36).

The District argues in Exception 4 for a finding that the bargaining sessions between the Union and District "were handled in a professional, courteous, friendly fashion with an absence of any rancor or other negative atmosphere." That fact, true or not, is of no moment. Indeed, Billings-Jones' motives are at issue in this case, and the testimony of record indicates that while in attendance, she did not directly participate in those meetings. (N.T. 120). In any event, the concept of a "fist in a velvet glove" is well-recognized in labor relations. NLRB v. Exchange Parts Co., 375 U.S. 405 (1964).

Exception 52 is interrelated with Exceptions 20, 21, 22, and 23. In these exceptions, the District asserts that there should be no finding of guilt by the District based upon evidence that relates to Larkin's Amended Charge of Unfair Practices. Larkin's Amended Charge concerns his treatment following reinstatement pursuant to an injunction order issued in the court of common pleas. Notably, the Hearing Examiner made no finding of an unfair practice regarding any claims asserted by Larkin in the Amended Charge, and Larkin has not filed exceptions with the Board to the Hearing Examiner's PDO in this case.

The factual findings that are challenged in Exceptions 20 through 23 (Findings of Fact 36, 37, 38 and 39) are supported by substantial, credible evidence of record and thus will not be disturbed. Page's Department Store, supra. The District's exceptions to those findings are simply an attack on the Hearing Examiner's rejection of its asserted reasons for its actions. Mt. Lebanon School District, supra. Post-charge conduct may be considered by the Board as part of the circumstances from which to infer motive. Pennsylvania State Troopers Association v. Pennsylvania State Police, 37 PPER 4 (Final Order, 2006). However, as is evident by the Board's omission of any discussion of Findings of Fact 36 through 39 in the factual summary set forth above, those findings are not dispositive of the finding of an unfair practice regarding the decision not to renew the Complainants' employment.

The District also raises a procedural issue in Exception 25, arguing that the Hearing Examiner erred by not sequestering Harris Zwerling. Mr. Zwerling was a witness for the Complainants. Mr. Zwerling was not offered as a fact witness, but as an expert employed by PSEA to analyze the District's financial data. The District's request to sequester Mr. Zwerling came during the presentation of the District's case in chief. In denying the request to sequester Mr. Zwerling, the Hearing Examiner aptly recognized that the "purpose of sequestering witnesses is so they're not tainted by what their own team, so to speak, is offering up. I don't want one witness after the other to say, amen, that's right. I would like to have fresh testimony." (N.T. 323). Because Mr. Zwerling was not offered as a witness to factual matters in dispute, the Hearing Examiner did not abuse his discretion in failing to sequester him.

Turning to the elements involved in a charge of discrimination under PERA, the District does not challenge the fact that each of the Complainants engaged in protected activity. The District does, however, contest the finding that it had knowledge of some of that activity. There is no dispute that the District was aware that Larkin and Koslosky engaged in protected activity, as Billings-Jones literally noted their presence as Union representatives at bargaining sessions. The District nevertheless excepts, in Exception 11, to the Hearing Examiner's failure to note that the District did not know when Larkin became

President of the Union, and that Larkin's signature appears on petitions given to the District in 2005 and 2006 opposing the Union. These facts are irrelevant because the District's knowledge of Larkin's protected activities in 2006 and 2007 was established through the admissions of Billings-Jones that she had seen him at bargaining sessions.

Exceptions 7, 9, 15 and 33 challenge the findings that establish that the District had knowledge of Petorak's union activities. The District argues that there is insubstantial evidence regarding its knowledge of Petorak's union organizing activities.[3] Specifically, the District asserts that Larkin's testimony, relied upon by the Hearing Examiner, that Clause asked him if Petorak was bothering him because Billings-Jones wanted to know, is inadmissible hearsay. However, we agree with the Hearing Examiner's assessment of this testimony as an admission of the District, which is admissible for the truth of the matter asserted under Pennsylvania Rule of Evidence 803 (25). Clause, the District's maintenance supervisor, asked Larkin about Petorak's organizational activity. His statement that Billings-Jones wanted to know if Petorak was bothering Larkin about the Union clearly establishes the District and Billings-Jones were aware of Petorak's protected activities. Furthermore, the District's argument that there is no evidence of when Petorak engaged in Union organizing is bluntly refuted by the record, as it had to have occurred after Billings-Jones became Superintendent in 2003 and while Clause was a supervisor prior to 2006.

The District also challenges the finding that Billings-Jones knew of Smith's involvement with the Union. In Exceptions 2, 12 and 34, the District asserts that there is not substantial record evidence that Billings-Jones had in fact seen the picture of Smith in the newspaper. As for the date that Smith's picture appeared in the paper, Finding of Fact 5 has been amended above to clarify the date as the day following her appointment as Secretary of the Union in 2005. Billings-Jones did not deny seeing the picture of Smith as Secretary of the Union in the newspaper. (N.T. 476). In fact, at the injunction hearing before the Court of Common Pleas, she admitted that if the Scranton Times had printed the picture, she had seen it. (FF 18). Moreover, at the unfair practice hearing, Billings-Jones admitted that Smith's picture, as Secretary of the Union, appeared August 3, 2005 in the Scranton Times. (N.T. 65). Whether or not Billings-Jones knew Smith personally is of no moment to the question of whether she knew of her involvement in the Union.

Accordingly, the Hearing Examiner's Finding that the District, and Billings-Jones, knew of the Complainants' protected activities and involvement with the Union is supported by substantial evidence of record, and is not in error. Although there is ample evidence to support the finding of the District's knowledge of the Complainants' protected activities, the District in Exception 35 also takes issue with the Hearing Examiner's alternative application of the "small plant doctrine" to infer the District's knowledge of union activities. "The small plant doctrine allows the Board to infer knowledge to a small employer when the facts establish that employes' protected activities were 'carried out in such a manner, or at such times that in the normal course of events, [the employer] must have noticed [the activity].'" Friendly Markets, Inc., 224 NLRB 967, 969, (1976). The general premise of the small plant doctrine is that where there are only a few employes and close supervision, little goes unnoticed. Here there are only a limited number of nonprofessional employes in the bargaining unit. Thomas, prior to his appointment as maintenance supervisor, was a member of the Union. Additionally, Billings-Jones' secretary, before her appointment to her confidential position as secretary to the Superintendent, attended a Union organizational meeting with Petorak. We have reviewed the record, and find no basis for reversing the Hearing Examiner's alternative application of the small plant doctrine in this case to infer the District's knowledge of the Complainants' union activity.

As for the District's motives, there is substantial evidence from which the Hearing Examiner could infer union animus and a prima facie case of discrimination under Section 1201(a)(3) of PERA. In Exception 8, the District asserts that Petorak's testimony that

[3] To the extent Exception 7 argues that Petorak's Union solicitations during non-work time would not be protected activity, that statement is simply wrong. Temple University Hospital Nurses Association v. Temple University Hospital, 33 PPER ¶33149 (Final Order, 2002) (citing Republic Aviation Corp v. NLRB, 324 U.S. 793 (1945)). Moreover, Finding of Fact 10 has been amended to reflect the complete testimony of Petorak regarding his solicitation activities.

Clause asked him what he expected to get from organizing a union is inadmissible hearsay. However, just as Clause's statement to Larkin is an admission of the District, so too is Clause's statement to Petorak. Both statements are admissible, substantial evidence reflecting the District's union animus. The District also takes issue with Finding of Fact 8, regarding Koslosky's letter found in her personnel file. In Exception 5, the District argues that the letter was never admitted into evidence, that it could have been written by anyone, and that it somehow suggests that Koslosky was not a good worker. However, at the injunction hearing, Koslosky testified to writing the letter to ten teachers regarding her fears that following a decertification, there may be reprisals because of her involvement with the Union. The District misses the point as to the import of this letter. It is not necessarily the fact of who wrote the letter, nor whether teachers responded. The fact that the letter was found in Koslosky's personnel file is the import itself. Indeed, what was a letter regarding Koslosky's fears of reprisals for union activity doing in her personnel file? Obviously, since Koslosky did not put the letter in her personnel file, the letter had to have been placed there by a manager or supervisor. Such circumstantial evidence is telling of the District's union animus.

In Exception 16, the District takes issue with the Hearing Examiner's word choice in stating that Billings-Jones "confronted" Larkin regarding Larkin's private transportation contract with the District. Larkin credibly testified that Billings-Jones approached him after a bargaining session and advised him that because he was an employe, there may be problems with his private contract with the District that he had held for sixteen years. Larkin testified that there was no mention of fiscal concerns made to him. This is a factual finding, premised on a credibility determination and supported by Larkin's testimony of record, and thus will not be overturned.

The District's statements to Petorak and Larkin, as well as the inclusion of Koslosky's letter in her personnel file, are substantial evidence supporting the Hearing Examiner's inference of union animus on the part of the District. Moreover, we note that an insinuation of the District's union animus was even expressed during the hearing. Thomas, when asked as to why he was receiving complaints about the Complainants' work, did not speak of specifics of work performance. Instead, he stated rather tellingly that "I think that maybe you people came in there and promised them the world and they just figured they didn't have to do anything anymore. … [T]heir attitudes changed." (FF 69). Accordingly, the Hearing Examiner did not err in finding that the Union established a prima facie case of discrimination in violation of Section 1201(a)(3). See St. Joseph Hospital, supra.

The District also excepts, in Exceptions 36 and 47, to reliance on the timing of the Complainants' non-renewal following the decertification of the Union as evidence of union animus. Timing is but one factor to be considered in the mix of circumstances in deciding whether to infer union animus. David Braymer, Mary Jane Braymer v. Beaver Valley Intermediate Unit, 21 PPER ¶21,006 (Final Order, 1989). The District argues that the timing of the Complainants' non-renewal was necessitated by the budget timetable, not the decertification of the Union. We acknowledge, as the District points out numerous times, that the Complainants were not renewed for the 2007-2008 school year, which could only have occurred with the start of the school year. However, the fact that the Complainants' non-renewal of employment occurred around the time that the District established its budget does not mean that the District's actions were taken without notice of the Union's decertification, or for nondiscriminatory reasons. Further, as noted above, the District's own anti-union statements provide substantial evidence, aside from timing, from which to infer the District's union animus.

The District argues in Exceptions 24, 37 and 51 that the Hearing Examiner erred in failing to accept the District's budget constraints. However, to the contrary, the Hearing Examiner found as fact that the District's final budget had a "very low fund balance", that the District secured a $1.2 million tax anticipation loan, that the District increased taxes by 3 mils, and that the District projected an anticipated savings of $90,179.00 by not renewing the Complainants' annual contracts. The District also excepts to the finding that the District saved little if anything on the wages for the part-time cleaning staff because their hours could have been made up by the remaining employes. As indicated above, Billings-Jones in fact authorized an increase in hours to make up for the part-time Complainants who were not renewed. The import of this finding is not, as the District suggests in Exceptions

26 and 27, whether or not the hours were in fact made up. Rather, this finding goes to the weight to be afforded the District's alleged budgetary reasons, when in the face of claiming that it needed to cut wages, the District authorized the expenditure of money for wages to make up for what would have been paid to the Complainants.

As regards the District's claim of a poor performance justification for not renewing the Complainants' employment for the 2007-2008 school year, Exceptions 13, 14, 17, 18, 19, 45 and 46 are simply attacks on the Hearing Examiner's credibility determinations. The District takes issue with Finding of Fact 20 because it fails to state that Smith was "written up for falsifying her time sheet". However, the Finding of Fact notes that Smith received a letter about her time sheets in February 2006. The Hearing Examiner accepted Smith's testimony that she had left fifteen minutes early with other employes to attend a funeral and was told by her supervisor that "it was no big deal." Although Billings-Jones testified at the hearing that Smith's leaving early, for which she wrote Smith up, warranted immediate termination, Smith's employment was renewed the following year, during Billings-Jones tenure as Superintendent.

The District argues that Petorak's personnel file contained complaints about performance and therefore Findings of Fact 23 and 24 are in error. However, the finding regarding complaints in Petorak's personnel file is Finding of Fact 26. The Hearing Examiner found that one letter was addressed to the entire night cleaning staff, and that the other letter involved a concern at the Mayfield Elementary School where Petorak did not work. The Hearing Examiner noted that Petorak did not know that any complaints were in his personnel file, and that with regard to a complaint about the cleanliness of the kindergarten bathroom, Petorak credibly testified that he corrected the problem and was never told otherwise. Although Petorak's personnel file reflected that he was disciplined in 2001, his employment was repeatedly renewed for years thereafter.

The District challenges Finding of Fact 31 because the Hearing Examiner failed to credit the District's alleged reasons for moving Larkin's job assignment to the Lakeland Elementary School. However, where a Hearing Examiner rejects an employer's excuse for taking a particular action, the Hearing Examiner need not, nor should, find that alleged reason as fact. Here, the Hearing Examiner found that the District transferred Larkin shortly after he had attended a bargaining session, and rejected the District's proffered reason for the transfer. No reversal of the Hearing Examiner's credibility determinations is warranted.

Findings of Fact 32 through 34, regarding Larkin's suspension for an alleged undocumented vacation day[4] and separate funeral leave request, are supported by the credited testimony of Larkin. The Hearing Examiner found that Larkin had submitted the vacation leave request in the same manner as had been accepted in the past. The funeral leave request slip was not submitted to the District by Larkin, who had thrown it in the trash. The District's rendition of the facts was flatly rejected by the Hearing Examiner.

The District also takes exception to the Hearing Examiner's assessment of Thomas's demeanor while testifying. However, first-hand credibility determinations such these are fundamentally reserved for the hearing examiner. Mt. Lebanon School District, supra. Moreover, review of the record and Thomas's testimony, including his expression of anti-union sentiment while testifying, supports the Hearing Examiner's determination that Thomas' testimony lacked credibility. Similarly, District Exceptions 40 and 41 take issue with the Hearing Examiner's discussion and characterization of Thomas's conduct in recommending the Complainants for non-renewal. The Hearing Examiner's discussion regarding Thomas's motives however is inexplicably tied to credibility, or lack thereof. Absent compelling reasons to overturn the Hearing Examiner's credibility determination, and here there is none, the Board will not reverse the Hearing Examiner's decision concerning the District's motives.

Exceptions 29 and 31 seek additional findings which are unnecessary. The District claims that Finding of Fact 54 is wrong because Billings-Jones conducted an "investigation" by discussing the Complainants' work performance with Thomas. However, this is the substance of Findings of Fact 50 and 51. That Billings-Jones did not perform

[4] This discipline is the subject of a separate unfair practice charge pending before the Board.

a direct investigation of the Complainants' work performance is well supported by the record. The District also asserts that the Hearing Examiner failed to find that Thomas personally investigated the complaints concerning the Complainants' performance. However, this finding is subsumed within Finding of Fact 25, which indicates that Thomas discussed the complaint concerning the kindergarten bathroom with Petorak.

As regards the conclusion that the District's failure to renew the Complainants' employment was based on an unlawful discriminatory motive, the District in Exceptions 42 and 49 generally challenges the Hearing Examiner's determination to reject its proffered non-discriminatory reason as pretextual. More specifically, Exceptions 43 and 44 assert that pretext cannot be found where the District renewed the employment of other union supporters. The fact that the District retained some supporters of the union does not preclude the finding that it is really because of union animus that the District decided to eliminate the Union leadership and organizers. PLRB v. Northwestern Educational Intermediate unit, 18 PPER ¶18203 (Final Order, 1987); Kohv v. PLRB, Pa. D & C 2d 250 (Montgomery County Court of Common Pleas, 1955).

Pretext for union animus may be inferred from disparate treatment. Remarkably, the District argues in Exception 39 that the Hearing Examiner erred in finding that the District targeted the Union leadership in the maintenance department because there was no evidence that Billings-Jones looked to other departments, or that she had to.[5] However, because the Complainants proved a prima facie case of discrimination, it was the District's burden to establish that it would not have renewed the Complainants' employment even in the absence of protected activity. Perry County, supra; Lehighton Area School District, supra; Philadelphia Housing Authority, supra; Falls Township, supra. Here, Billings-Jones testified that it was a combination of the District's fiscal condition and the discovery of poor performers which led to the Complainants' non-renewal in the 2007-2008 school year. Indeed, as reflected by the facts, when Billings-Jones decided not to renew the Complainants' employment, she was seeking to reduce a nearly $600,000 deficit in the District's budget. Around that time she was meeting with supervisors concerning their staffing needs and received a recommendation from Thomas not to renew five employes at a projected estimated savings of approximately $123,000.00 to the District. Billings-Jones testified that it was simply a waste of taxpayer dollars to retain poor performing employes. However, Billings-Jones never claimed that she even attempted to ask other supervisors if they too had poor performing employes to achieve similar cost savings. It strains credulity to suggest that every other employe of the District is beyond reproach. Her failure to look for additional poor performers for further cost savings speaks volumes as to Billings-Jones' intended target and purpose – *i.e.* the unlawful elimination of the Union leadership and organizers.

Upon review of the PDO and record, we agree with the Hearing Examiner's conclusions that the District's proffered reason for the non-renewal of the Complainants' employment, due to the alleged combination of fiscal and performance reasons, was a mere pretext for an unlawful union animus, and that the District would not have taken the same action against the Complainants in the absence of their protected activities. The record supports the Hearing Examiner's determination that the District did not renew the Complainants' employment for the 2007-2008 school year because of a discriminatory motive in violation of Section 1201(a)(1) and (3) of PERA.

This pretextual disparate treatment of the Complainants, brings us to Exception 48, wherein the District challenges the Hearing Examiner's conclusion that it violated section 1201(a)(1) of PERA. An independent Section 1201(a)(1) violation occurs where the totality of the circumstances of the employer's actions would have a tendency to coerce employes in the exercise of protected rights. Northwestern Education Association v. Northwestern School District, 24 PPER ¶ 24,141 (Final Order, 1993); Transport Workers' Union of Philadelphia, Local 234 v. Southeastern Pennsylvania Transportation Authority, 17 PPER ¶17,038 (Final Order, 1986). Here, after prevailing on a decertification vote by a narrow margin of four votes, the District widened the margin by eliminating the four most prominent union supporters. Clearly, it is beyond cavil that a reasonable employe would be coerced from taking a leadership role with an employe organization or organizing

[5] Although, Billings-Jones added a school crossing guard for non-renewal, there is no testimony that that was done because of alleged poor performance of the school crossing guard.

a union, where the employer has previously terminated the employment of the Union leadership and organizers. Moreover, we believe that the wholesale elimination of union leadership from the workforce would be inherently destructive of employe rights within the holding of Great Dane Trailers, Inc, 388 U.S. 26, 87 S.Ct. 1792 (1967); Teamsters Local 764 v. Lycoming County, 37 PPER 12 (Final Order 2006), affirmed sub nom., Lycoming County v. PLRB, 943 A.2d 333 (Pa. Cmwlth. 2007); Chester Upland Deputy Sheriffs Association v. Chester County, 28 PPER ¶ 28045 (Final Order, 1997). Accordingly, the Hearing Examiner did not err in finding a violation of Section 1201(a)(1) of PERA.

We find merit in District Exception 50, which challenges the Hearing Examiner's conclusion that the District violated Section 1201(a)(4) of PERA. Section 1201(a)(4) provides that it is an unfair practice for an employer to discriminate against an employe because the employe "has signed or filed an affidavit, petition or complaint or given any information or testimony under [PERA]." Section 1201(a)(4) protects employes from retaliation for participation in Board proceedings. See PLRB v. Beaver County, 7 PPER ¶ 307 (Nisi Order, 1976). The Complainants bear the burden of proving their statutorily protected activity under Section 1201(a)(4). In the PDO, the Hearing Examiner presumed that as the Union leadership, the Complainants signed the representation petition. The Board has taken administrative notice of the proceeding on the representation petition at Case No. PERA-R-05-85-E, and notes that the signatures of the Complainants do not appear of record on the Petition or any subsequent filing. Accordingly, the District is correct that no violation of Section 1201(a)(4) can be found.

After a thorough review of the exceptions and all matters of record, we find that the Hearing Examiner did not err in concluding that the District violated Section 1201(a)(1) and (3) of PERA in not renewing the Complainants' employment for the 2007-2008 school year. However, on this record, the District cannot be found to have violated Section 1201(a)(4) of PERA. Accordingly, for the foregoing reasons, the District's Exceptions shall be dismissed in part and sustained in part, and the PDO of May 21, 2008 shall be sustained as amended herein.

CONCLUSIONS OF LAW

CONCLUSIONS number 1 through 3, as set forth in the Proposed Decision and Order, are affirmed and incorporated herein by reference, Conclusion number 4 is vacated, and the following additional Conclusions are made:

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

6. That the District has not committed an unfair practice within the meaning of Section 1201(a)(4) of the Act.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the exceptions filed to the Proposed Decision and Order of May 21, 2008 are hereby sustained in part, and dismissed in part, and the Proposed Decision and Order, as amended herein, is hereby made absolute and final.

SEALED, DATED and MAILED at Harrisburg, Pennsylvania, 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 twenty-first day of October, 2008. 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

JOAN F. SMITH,	:	
GABRIEL H. PETORAK,	:	
JOHN F. LARKIN	:	Case No. PERA-C-07-356-E
And	:	Case No. PERA-C-07-357-E
ELLEN E. KOZLOSKY	:	Case No. PERA-C-07-358-E
	:	Case No. PERA-C-07-359-E
v.	:	
	:	
LAKELAND SCHOOL DISTRICT	:	

AFFIDAVIT OF COMPLIANCE

Lakeland School District (District) hereby certifies that it has ceased and desisted from its violation of Sections 1201(a)(1) and (3) of the Public Employe Relations Act; that it has offered to reinstate and make whole Joan F. Smith, Gabriel H. Petorak, John F. Larkin and Ellen E. Kozlosky to their former positions as directed in the Proposed Decision and Order; that it has posted a copy of the Final Order and Proposed Decision and Order as directed; and that it has served a copy of this affidavit on the Complainants.

_____
Signature/Date

_____
Title