COMMONWEALTH OF PENNSYLVANIA Pennsylvania Labor Relations Board

NORTHERN TIOGA EDUCATION ASSOCIATION PSEA/NEA :

:

v. : Case No. PERA-C-08-82-E

:

NORTHERN TIOGA SCHOOL DISTRICT

PROPOSED DECISION AND ORDER

On March 7, 2008, the Northern Tioga Education Association (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Northern Tioga School District (District) violated sections 1201(a)(1), 1201(a)(3) and 1201(a)(5) of the Public Employe Relations Act (PERA) by eliminating a vacant librarian position at Williamson High School and by using a nonprofessional aide to perform bargaining unit work there. On March 20, 2008, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on May 21, 2008, if conciliation did not resolve the charge by then. On April 16, 2008, the hearing examiner continued the hearing upon the request of the Association and without objection by the District. On June 19, 2008, the hearing was held. The hearing examiner afforded both parties a full opportunity to present evidence and to cross-examine witnesses. On August 4, 2008, the Association filed a brief by deposit in the U.S. Mail. On August 20, 2008, the District did the same.

The hearing examiner, on the basis of the evidence presented by the parties at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

- 1. On December 16, 1970, the Board certified the Association as the exclusive representative of a bargaining unit that includes librarians employed by the District. (Case No. PERA-R-381-C)
- 2. In April 2006, the president of the District's board of directors (Michael James Vayansky) asked the District's superintendent (Timothy S. Bowers) for information relating to cost-cutting options under consideration by the District for the 2006-2007 school year. (N.T. 28, 51, 79)
- 3. On May 1, 2006, Mr. Bowers informed the board of directors' budget committee that the District could save an estimated \$75,000.00 by eliminating a librarian position and assigning the remaining librarians on a K-12 basis. (N.T. 51-52, 79-80; District Exhibits 1-3)
- 4. For the 2006-2007 school year, the District raised taxes by 16% and funded all of its librarian positions. (N.T. 53-54, 80)
- 5. During the 2006-2007 school year, the District assigned a librarian to each of its high schools (Williamson, Elkland and Cowanesque Valley) on a full-time basis and a librarian to its three elementary schools on a rotating basis. (N.T. 10-11, 23, 38, 42-43)
- 6. By letter dated August 2, 2007, the librarian at Williamson High School (Bonnie J. Miller) informed Mr. Bowers and the board of directors that "I will not be returning for the 2007-2008 school year." (N.T. 11-12, 60, 81; District Exhibit 7)
- 7. On August 13, 2007, the board of directors accepted Ms. Miller's resignation. Afterwards, Mr. Vayansky asked Mr. Bowers to reexamine the elimination of a librarian position and the assignment of the remaining librarians on a K-12 basis. (N.T. 11-12, 61, 81; Association Exhibit 1)
- 8. In September 2007, Mr. Vayansky asked Mr. Bowers if he was looking into assigning the remaining librarians on a K-12 basis and willing to recommend the elimination of the

vacant librarian position. Mr. Bowers thought that Mr. Vayansky felt that assigning the remaining librarians on a K-12 basis was "the right move." Mr. Bowers also thought that Mr. Vayansky was "pushing" him to recommend the elimination of the vacant librarian position. Mr. Bowers did not have a recommendation at the time. (N.T. 62-63, 81-82)

- 9. On September 18, 2007, Mr. Bowers met with the Association's then president (Jeffrey H. Wilkinson) and vice president (Jack Martin Bates). Referencing Ms. Miller's retirement, Mr. Wilkinson told Mr. Bowers that "there's an available position and contractually available positions are to be filled." Mr. Bowers replied that he would like to meet with the remaining librarians and with the director of the library at Mansfield University (Cindy Keller) before deciding what to do about the vacant librarian position and that the board of directors "will simply absorb the position if pushed." (N.T. 10, 13-16, 21, 26, 38-39, 43-44, 63-64, 70)
- 10. In October 2007, Mr. Vayansky asked Mr. Bowers about his progress in looking into assigning the remaining librarians on a K-12 basis. Mr. Bowers thought that Mr. Vayansky was even more adamant that assigning the remaining librarians on a K-12 basis was "the right move." Mr. Bowers did not have a recommendation at the time. (N.T. 63, 82)
- 11. On October 16, 2007, Mr. Bowers met with Mr. Wilkinson and Mr. Bates. Mr. Wilkinson asked about the vacant librarian position. Mr. Bowers indicated that nothing had changed since their last meeting. He also reiterated that the board of directors would eliminate the position if pushed. (N.T. 13-14, 17, 27-28, 40, 65)
- 12. In late October or early November 2007, Mr. Bowers decided to recommend the elimination of the vacant librarian position because it was clear to him that the board of directors wanted a recommendation and that he was "out of time" to make one. (N.T. 67, 72, 77)
- 13. On November 2, 2007, Mr. Wilkinson filed with the principal at Williamson High School (Diana Barnes) a grievance alleging that the District violated the parties' collective bargaining agreement by not posting and filling the vacant librarian position. (N.T. 17-18, 33; Association Exhibit 2)
- 14. On November 5, 2007, Ms. Barnes denied the grievance. (N.T. 18, 33-34; Association Exhibit 3)
- 15. By letter dated November 9, 2007, Mr. Wilkinson appealed the grievance to Mr. Bowers. (N.T. 19, 34; Association Exhibit 4)
- 16. On November 12, 2007, Mr. Bowers recommended to the board of directors that the vacant librarian position be eliminated and that the remaining librarians be assigned on a K-12 basis effective immediately. The board of directors accepted his recommendation. (N.T. 19-20, 41-42, 67, 74, 83; District Exhibit 8)
- 17. For the rest of the 2007-2008 school year, the District assigned a librarian to the Williamson High School and to an elementary school. When the librarian was at the elementary school, an aide from another bargaining unit "came up" to the high school. (N.T. 21-25, 38-39)

DISCUSSION

The Association has charged that the District committed unfair practices under sections 1201(a)(1), 1201(a)(3) and 1201(a)(5) by eliminating a vacant librarian position at Williamson High School and by using a nonprofessional aide to perform bargaining unit work there. As set forth in paragraph 14 of the specification of charges, the Association alleges that the District eliminated the vacant librarian position "in direct retaliation for the Association's exercise of its rights to file a grievance" and that the District's use of the aide has "result[ed] in a diminution of bargaining unit work in that a nonprofessional employe is performing librarian duties previously performed by a professional bargaining unit individual."

The District contends that the charge should be dismissed for lack of proof that it eliminated the vacant librarian position because the Association exercised its right to file a grievance or that it is using the aide to perform bargaining unit work.

An employer commits an unfair practice under section 1201(a)(3) if it discriminates against employes for having engaged in an activity protected by the PERA. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). "The motive creates the offense." PLRB v. Stairways, Inc., 425 A.2d 1172, 1175 (Pa. Cmwlth. 1981), quoting PLRB v. Ficon, 434 Pa. 383, 388, 254 A.2d 3, 5 (1969). An employer also violates section 1201(a)(1) if it violates section 1201(a)(3). PLRB v. Mars Area School District, 480 Pa. 295, 389 A.2d 1073 (1978). An employer does not violate section 1201(a)(3), however, if it takes an employment action for a non-discriminatory reason. Indiana Area School District, 34 PPER 133 (Final Order 2003).

In order to prevail on a discrimination charge, the charging party must show by substantial evidence during its case-in-chief (1) that employes engaged in a protected activity, (2) that their employer knew that they had engaged in the protected activity and (3) that the employer discriminated against them for having engaged in the protected activity. Perry County, 634 A.2d 808 (Pa. Cmwlth. 1994). If the charging party presents a prima facie case during its case-in-chief, the charge is to be sustained unless the employer in rebuttal shows that it would have taken the same action even if the employes had not engaged in the protected activity. Id. If the charging party does not present a prima facie case during its case-in-chief, the charge is to be dismissed. Id. Evidence presented after the charging party rests its case-in-chief is not to be considered in deciding whether or not the charging party presented a prima facie case. Temple University, 23 PPER ¶ 23033 at n. 5 (Final Order 1992). Speculation is not substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974).

The filing of a grievance is a protected activity. Montrose School District, 38 PPER 127 (Final Order 2007). A threat to eliminate positions upon the filing of a grievance will support a finding of a discriminatory intent on the part of an employer. Id. The timing of events alone, however, will not. Pennsylvania State Park Officers Association v. PLRB, 854 A.2d 674 (Pa. Cmwlth. 2004), petition for allowance of appeal denied, 582 Pa. 704, 871 A.2d 194 (2005).

During its case-in-chief, the Association presented evidence that on August 13, 2007, the District's board of directors accepted a resignation by the librarian at Williamson High School (N.T. 11-12; Association Exhibit 1), that on September 18, 2007, the Association's then president (Mr. Wilkinson) told the District's superintendent (Mr. Bowers) that "there's an available position and contractually available positions are to be filled" (N.T. 15-16), that Mr. Bowers told Mr. Wilkinson that he would like to meet with the remaining librarians before deciding what to do about the vacant librarian position and that the board of directors "will simply absorb the position if pushed" (N.T. 16), that Mr. Wilkinson was unaware of anything other than the Association's filing of a grievance that may have been pushing the District (N.T. 20-21), that on November 2, 2007, Mr. Wilkinson filed a grievance alleging that the District violated the parties' collective bargaining by not posting and filling the position (N.T. 17-18; Association Exhibit 2) and that on November 13, 2007, the board of directors eliminated the position upon the recommendation of Mr. Bowers (N.T. 19-20, 41-42). The Association also presented testimony by its vice-president (Mr. Bates) that on October 16, 2007, Mr. Bowers told him and Mr. Wilkinson that the board of directors would eliminate the position if the Association filed a grievance (N.T. 40). The Association presented additional evidence that eliminating the position was not on the agenda for the meeting at which the board of directors eliminated the position (Association Exhibit 6).

A close review of the record does not show that the Association presented a prima facie case during its case-in-chief. Although the Association established that it engaged in a protected activity by filing a grievance and that the District knew that it filed the grievance, the Association did not establish that the District eliminated the vacant librarian position because the Association filed the grievance. Accordingly, under the analysis set forth in Perry County, Supra, the charge must be dismissed.

In its brief, the Association contends that support for a finding that the District eliminated the vacant librarian position because the Association filed the grievance may

be found in Mr. Bowers' statement that the board of directors would eliminate the position if pushed and in Mr. Wilkinson's testimony that he was unaware of anything that was pushing the board of directors other than the grievance that the Association filed. According to the Association, it should be apparent under the circumstances that Mr. Bowers was referencing the Association's filing of a grievance when he said that the board of directors would eliminate the position if pushed. Notably, however, Mr. Bowers made the statement on September 18, 2007, yet Mr. Wilkinson did not file the grievance until November 2, 2007. Moreover, Mr. Wilkinson also testified that he did not even tell Mr. Bowers that he was thinking about filing a grievance until they met on October 16, 2007 (N.T. 28). Thus, the timing of events militates against a finding that Mr. Bowers was referencing the Association's filing of the grievance when he said that the board of directors would eliminate the position if pushed, and any such finding would be based on speculation. Speculation, of course, is not substantial evidence. Shive, supra. Accordingly, the Association's contention is without merit.

The Association next contends that support for a finding that the District eliminated the vacant librarian position because the Association filed the grievance may be found in Mr. Bates' testimony that Mr. Bowers said that the District would eliminate the position if the Association filed a grievance. If credited, Mr. Bates' testimony would support such a finding. See Montrose School District, supra (employer's threat to eliminate positions if the exclusive representative of its employes filed a grievance supported a finding that it eliminated the positions because the exclusive representative filed a grievance). Mr. Bates testified, however, that Mr. Wilkinson was with him when Mr. Bowers said that the District would eliminate the vacant librarian position if the Association filed a grievance (N.T. 40), yet in his own testimony Mr. Wilkinson made no mention of Mr. Bowers having said any such thing. Rather, Mr. Wilkinson testified that Mr. Bowers repeated his earlier comment that the board of directors would eliminate the position if pushed (N.T. 27). Moreover, Mr. Wilkinson admitted that his notes from the meeting make no mention of the word "grievance" (N.T. 28). The conflicting testimony of Mr. Bates and Mr. Wilkinson casts doubt on Mr. Bates' credibility, so Mr. Bates' testimony has not been credited. Montrose School District, supra, is, therefore, distinguishable on the facts, and the Association's contention is without merit.

The Association next contends that support for a finding that the District eliminated the vacant librarian position because the Association filed the grievance may be found in the fact that eliminating the position was not on the agenda for meeting at which the board of directors eliminated the position. In and of itself, however, that fact is unexceptional. As such, it provides no basis for finding that the District eliminated the position because the Association filed the grievance. Thus, the Association's contention is without merit.

In further support of the charge, the Association points out that despite having testified that he would like to meet with the remaining librarians and with the director of the library at Mansfield University (Ms. Keller) before deciding what to do about the vacant librarian position Mr. Bowers admitted that he did not meet with all the librarians or with Ms. Keller before he recommending the elimination of the position (N.T. 70, 72). The Association also points out that Mr. Bowers testified that he did not think to tell Mr. Wilkinson or Mr. Bates about his recommendation before he made it (N.T. 75) and that he was not able to state how much money the District actually saved by eliminating the position (N.T. 76). Mr. Bowers' testimony was presented after the Association rested its case-in-chief, however, so under the analysis set forth in Temple University, supra, it may not be considered in deciding whether or not the Association presented a prima facie case during its case-in-chief.

Even if the Association had presented a prima facie case during its case-in-chief, the result would be the same. In rebuttal to the Association's case-in-chief, the District presented credible testimony by Mr. Bowers that he recommended the elimination of the vacant librarian position because he was being pushed by the president of the board of directors (Mr. Vayansky) to do so consistent with discussions they had relative to the budget in April and May 2006. See findings of fact 2-3, 7-8, 10 and 12. No discriminatory intent on the part of the District is apparent on that record. See Delaware County, 28 PPER 28005 (Final Order 1996)(no discriminatory intent found where the genesis of the employer's course of conduct predated protected activity on the part of employes).

The charge as filed under sections 1201(a)(1) and 1201(a)(5)

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(5) if it unilaterally transfers bargaining unit work to a non-member of the bargaining unit. PLRB v. Mars Area School District, supra. If the employer does not act unilaterally, however, then no violation of the PERA may be found. City of Philadelphia, 23 PPER ¶ 23152 (Final Order 1992). Nor may any violation of the PERA be found if the record does not show that bargaining unit work has been performed by nonmembers of the bargaining unit. Iroquois School District, 37 PPER 167 (Final Order 2006); Commonwealth of Pennsylvania, 26 PPER ¶ 26045 (Final Order 1995).

The record shows that after the District eliminated the vacant librarian position at Williamson High School an aide from another bargaining unit "came up" to the high school when a librarian was not there. See findings of fact 16-17.

Notably absent from the record is any evidence that the District acted unilaterally when the aide "came up" to the high school. Under the analysis set forth in <u>City of Philadelphia</u>, <u>supra</u>, then, the charge must be dismissed for that reason alone. <u>See also Reynolds School District</u>, 37 PPER 111 (Proposed Decision and Order 2006)(transfer of bargaining unit work charge dismissed where the record did not show that the employer acted unilaterally).

Likewise absent from the record is any evidence that the aide is performing work that had been performed by a librarian. Indeed, the record does not show what the former librarian at Williamson High School did, what the current librarian there does or what the aide does. No transfer of bargaining unit work is apparent on that record. See Iroquois School District, supra (transfer of bargaining unit work charge dismissed where there was no showing that bargaining unit work had been performed by nonmembers of the bargaining unit; Commonwealth of Pennsylvania, supra (Final Order 1995)(same).

CONCLUSIONS

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

- 1. The District is a public employer under section 301(1) of the PERA.
- 2. The Association is an employe organization under section 301(3) of the PERA.
- 3. The Board has jurisdiction over the parties.
- 4. The District has not committed unfair practices under sections 1201(a)(1), 1201(a)(3) and 1201(a)(5) of the PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the PERA, the hearing examiner

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this third day of September 2008.

PENNSYLVANIA LABOR RELATIONS BOARD