

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 <sup>1</sup> :

**PROPOSED DECISION AND ORDER**

On August 10, 2007, Joan F. Smith (PERA-C-07-356-E), Gabriel H. Petorak (PERA-C-07-357-E), John F. Larkin (PERA-C-07-358-E) and Ellen E. Kozlosky (PERA-C-07-359-E) (Complainants), employees of the Lakeland School District (District) filed individual charges of unfair practices with the Pennsylvania Labor Relations Board (Board) against the District and its superintendent, Dr. Margaret Billings-Jones, alleging that they were not reappointed to their maintenance employee positions as an act of retaliation and discrimination for their activities on behalf of the Lakeland Education Support Professionals Association (Association) in violation of Sections 1201(a)(1), (3) and (4) of the Public Employee Relations Act (PERA).

On September 11, 2007, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matters were assigned to a conciliator for the purpose of seeking resolution of the matters in dispute through mutual agreement of the parties and October 10, in Scranton was assigned as the time and place of hearing, if necessary.

On September 27, 2007, Complainants Petorak and Larkin filed amended charges of unfair practices. On October 10, 2007, the Secretary of the Board issued an Amended Complaint and Notice of Hearing for those two complainants.

The hearing was necessary, and was held as scheduled. The Examiner consolidated the four unfair cases for hearing. A second day of hearing was held on November 8, 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 hearings, and from all other matters and documents of record, makes the following:

**FINDINGS OF FACT**

1. That the Lakeland School District is a public employer within the meaning of the Public Employee Relations Act.

2. That in 2005 the Lakeland School District support staff organized an employee organization under PERA known as the Lakeland Education Support Professionals, PSEA/NEA (Association). On May 27, 2005, the Board certified the Association as the exclusive representative of a subdivision of the employer unit comprised of all full-time and regular part-time nonprofessional employees including but not limited to secretaries, aides, custodial/maintenance employees, and monitors; and excluding management level employees, supervisors, first level supervisors, confidential employees and guards as defined in the Act. (PERA-R-05-85-E).

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<sup>1</sup> The caption reflects the consolidation of four unfair practice charges. Also, the caption has been amended on the District's Motion to remove the name of Superintendent Dr. Margaret Billings-Jones as a Respondent. Although the charges named Billings-Jones as a respondent, it is clear that all of the actions of Billings-Jones were taken in her official capacity as an officer of the Lakeland School District. Accordingly, only Lakeland School District may be found to have committed unfair practices. Crawford County Association of Retarded Citizens, 14 PPER ¶ 14111 (Proposed Decision and Order, 1983).

3. That on February 7, 2007, Rosalie Walton, an employe, filed a Petition for Decertification with the Board alleging that she represented a groups of employes of the District and requesting that the Board order a decertification election under Section 607 of PERA to determine whether or not the Association 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 by a vote of 24 for No Representative, 20 for the Association and one challenged ballot, the Board entered a Nisi Order of Decertification on May 22, 2007. (Board Exhibit 1, PERA-R-05-85-E)

4. That Joan Smith worked as a part-time maintenance employe at the District for six years. Smith worked four hours, five days a week for 180 days a year at the Lakeland Elementary School. The District failed to reappoint Smith to her position on June 29, 2007. (N.T. 110, Association Exhibit 3)

5. Smith served as the Secretary of the union from its inception in 2005. Smith's picture appeared in the Scranton Times the following day with the President of the union. (N.T. 111)

6. Ellen Kozlosky worked as a part-time maintenance employe with the District for 23 years. Kozlosky worked four hours, five days a week for 180 days a year at the Lakeland Elementary School. The District failed to reappoint Kozlosky to her position on June 29, 2007. (N.T.117, Association Exhibit 6)

7. Kozlosky served on the union's bargaining committee and attended bargaining meetings with the union and District representatives. Kozlosky also served as the union Vice-president starting in 2007. (N.T. 118.)

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, Association Exhibit 1, p. 4)

9. Gabriel Petorak worked as a full-time maintenance employe with the District for 19 years. Petorak worked eight hours per day during the school year at the Lakeland Elementary School. The District failed to reappoint Petorak to his position on June 29, 2007. (N.T. 30, 261 Association Exhibit 5)

10. Petorak originally called PSEA in to organize the employes in 2005. Petorak recruited members for the union during his breaks. ( N.T. 135-6)

11. Petorak's former supervisor, Joe Clause, encountered Petorak and asked him, "What did we [employes] think we were going to get out of creating a union in the school." (N.T. 138)

12. That at the first meeting with the PSEA representative was held at the Holiday Inn, Dunmore. In attendance were Petorak, his sister Laura Perworaski, Donna Blank (who became Treasurer, but died in early 2007) and Mary Ann Phillips, secretary to Superintendent Margaret Billings-Jones. (N.T. 135)

13. Petorak recruited supporters for the Association, including his current supervisor, George Thomas. Also, Petorak tried recruiting John Larkin while Larkin was a guest in Thomas' home. (N.T. 135-6, 150)

14. John Larkin worked as a full-time maintenance employe with the District for 18 years. Larkin worked eight hours per day during the school year. He last worked at

Mayfield Elementary. His hours were 7 a.m to 3 p.m. The District failed to reappoint Larkin to his position on June 29, 2007. (N.T. 147, 401-404, Association Exhibit 4)

15. Larkin became President of the union in early 2007 and attended bargaining meetings in 2007. (N.T. 151)

16. Dr. Margaret Billings-Jones is the Superintendent of the District. Billings-Jones was appointed to the position of Superintendent in 2003 and was recently renewed for another five-year term to commence in July, 2008. (N.T. 459)

17. Billings-Jones attended negotiation meetings with District and union representatives. Billings-Jones was aware that Larkin attended the negotiation meetings on behalf of the union. Billings-Jones also knew that Kozlosky attended the majority of the negotiation meetings. (N.T. 21, 22-3)

18. Billings-Jones testified at trial in Lackawanna County Court of Common Pleas on the injunction hearing, that, if the newspaper published Smith was the Secretary of the union, she would have read it. (N.T. 13, 261, Association Exhibit 1, p. 155.)

19. Smith believed that she had a good work record and she was never informed to the contrary by the District. Smith was never informed that she had poor work performance, nor was she informed that she was not being renewed prior to June 29, 2007. Additionally, there was nothing regarding poor work performance in Smith's personnel file. Smith was never afforded the opportunity to defend herself. Smith only learned of the reasons for her non-renewal at the injunction hearing before the Court of Common Pleas of Lackawanna County. (N.T. 110-114)

20. There was an incident where Smith received a letter regarding her time sheets on February 10, 2006. Smith testified that she left 15 minutes early on a Friday to attend a funeral with three other employes. Smith discussed the incident with her supervisor who told her that it "was no big deal." Smith was renewed in her position following the incident. (N.T. 114-116, 502, District Exhibit 18)

21. In this unfair practice hearing, Billings-Jones admitted the February, 2006 time sheet was a falsification of information matter and was a "dismissible offense." (N.T. 502-3).

22. That prior to Kozlosky was never informed that her work was substandard, nor was she informed that she was not being renewed due to poor work performance. Kozlosky was never given the opportunity to defend herself. (N.T. 118)

23. Petorak did not receive notice as to why he was not being renewed. Petorak was not disciplined between the time of his reappointment in 2006 and the District's decision not to reappoint him in 2007. (N.T. 130.)

24. Petorak was disciplined once in 2001. The District did not follow up with additional discipline and Petorak was renewed to his position several times thereafter. (N.T. 131)

25. Petorak testified that 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. (N.T. 131-3)

26. Petorak testified that two documents appeared in his personnel file as to which he had no knowledge. The documents are a letter to all night cleaning staff dated by handwritten notation May 10, 2007 (District Exhibit 7) a memorandum dated June 25, 2007 regarding building maintenance at Mayfield Elementary School (District Exhibit 10.) Petorak testified that he had no notice that the documents were placed in his personnel file, nor was he given an opportunity to respond to the documents. Petorak testified that he never worked in the Mayfield Elementary School. (N.T. 130-138)

27. Larkin testified that he was originally opposed to the Association and joined later, in January or February of 2006. (N.T. 150)

28. Larkin testified that his previous supervisor, Joe Clause, asked Larkin "a few times," "Is Butch [Petorak] bothering you to join? Margaret [Billings-Jones] wants to know, is Butch pushing you?" (N.T. 150-151)

29. Larkin testified that his relationship with Billings-Jones changed after he became involved with the union. Larkin testified that, within a week after he attended his first bargaining meeting, Billings-Jones confronted him in the hallway and informed him that he might not be able to have his non-public transportation contract because he was a District employe. Larkin has transported non-public school students for the District for 16 years. (N.T. 153)

30. Larkin attended his first bargaining meeting on March 13, 2006, according to the District's notes. (N.T. 153, District Exhibit 13.)

31. After attending another bargaining meeting in the summer of 2006, Larkin was transferred to the Mayfield Elementary School. (N.T. 154-5, 401-404)

32. Larkin testified that after attending another meeting on November 8, 2006, he was disciplined on November 16, 2006 because he took a vacation. Larkin testified that he filled out the leave slip as per normal procedure. Larkin turned the leave slip in at Mayfield Elementary School, but the District claimed that it did not receive the slip. At that time, Billings-Jones threatened to fire Larkin, but instead he was given a ten-day suspension. That incident is the subject of a separate unfair labor practice filed with the PLRB. (N.T. 148, 155, District Exhibit 13)

33. Larkin received no other discipline following that incident. Larkin was never told that his work performance was substandard. (N.T. 149-50.)

34. Larkin testified that he filled out a funeral leave request on July 24, 2006 as a joke because his wife had made him angry. Larkin testified that he threw the slip away and did not take the time off. Larkin testified that about one month later, he was called in to meet with Billings-Jones regarding the funeral leave request. Larkin testified that he was not disciplined over the incident. (N.T. 155-56)

35. Petorak and Larkin were returned to work in 2007 by order of the Court of Common Pleas of Lackawanna County enjoining the District from failing to reappoint them while this charge was pending. On April 18, 2008, the Injunction Order was reversed by the Commonwealth Court at No. 1948 C.D. 2007. (N.T. 164-165, Association Exhibit 2)

36. Larkin testified that, after he returned to work, Thomas removed the other maintenance employe from the building because Billings-Jones said that he could handle the duties himself. That during the 2006-07 school year Mayfield Elementary had two maintenance employes on the day shift and one full-time and one four hour employe at night. This was the staffing since 1979. In 2007-08, the staffing was reduced to one in the day and one full-time and one part-time at night. (N.T. 165, 416)

37. Larkin testified that, after returning to work, he made a vacation request and was told to take another day off instead (N.T. 165.)

38. Larkin testified that, after he returned to work, he was instructed not to wear a baseball cap in the building. Larkin testified that he had worn a hat while working for 18 years. Larkin testified that other employes are still permitted to wear hats while in District buildings and that there is no official District policy regarding hats. (N.T. 167)

39. Larkin also testified that, since he returned to work, Billings-Jones has been in his building more than usual. (N.T. 168.)

40. On April 2, 2007, the District hired a new business manager, Delana Michelle Peregrin. On May 8, 2007, she started working on the 2007-08 budget. It was the first time she had ever prepared a school district budget (N.T. 51, 424)

41. Billings-Jones and Peregrin expressed belief that the District was under great budgetary pressure due to a "very low fund balance" (N.T. 43, 443).

42. The 2007-08 budget provided for the District borrowing \$1.2 million on a tax anticipation note (TAN). (N.T. 423, District Exhibit 11)
43. The 2007-08 budget adopted by the school board of directors raised real estate taxes by 3 mills. (N.T. 423, District Exhibit 11)
44. By the District's estimate, reinstatement of the Complainants would cost \$90,179 (N.T. 423, District Exhibit 11, Tab. 7).
45. That supposed savings (or cost of reinstatement) amounts to slightly more than half a percent of the District's total expenses of over \$15.7 million. From another perspective, looking at actual audited financial data, PSEA Research Economist Dr. Harris Zwerling demonstrated that from FY 2001-02 to FY 2005-06, the District averaged \$718,757 annually in total extra funds (N.T. 73, 261, Association Exhibit 10, Tab 4, P. 7).
46. That the elimination of Smith and Kozlosky saved nothing in wages, given that Billings-Jones testified that their hours could have been made up by remaining staff. (N.T. 63)
47. That as part-time employes, Smith and Kozlosky received no benefits. The only cost savings would be in discontinuing the District's PSERS, Unemployment Insurance, Workers' Compensation and Social Security payments. The District estimated these savings would total \$2,257 for Kozlosky and Smith. (N.T. 423, District Exhibit 11, Tab 7)
48. That prior to the Board of Directors decision on June 29, 2007 not to reappoint Smith, Petorak, Larkin and Kozlosky, Superintendent Billings-Jones held a meeting with Maintenance Supervisor George Thomas to ask him if he could operate the building effectively "if we had less staff. And his belief was that we could." (N.T. 462)
49. That Thomas became acting maintenance supervisor in March, 2006, when Joe Clause left. Prior to that, Thomas worked as a maintenance employe in the Mayfield Elementary School for approximately four years and at the High School for approximately four years. (N.T. 276)
50. That the District's Board of Directors appointed Thomas as supervisor in December, 2006. (N.T. 61, 276)
51. That Billings-Jones testified that Thomas recommended people who were "poor performing" should not be brought back next year. He named five people: Smith, Petorak, Larkin, Kozlosky and David Price. Price is Thomas' son-in-law. (N.T. 462)
52. That Billings-Jones agreed with Thomas' list of "poor performers." (N.T. 482)
53. That Billings-Jones added a sixth position to the list of employes who would not be reappointed, a school crossing guard. (N.T. 483)
54. Billings-Jones did not investigate any of the employes' alleged poor performance or speak to any of the employes regarding the situation. Billings-Jones did not know whether the employes' supervisor had any additional documentation regarding the employes. (N.T. 54.)
55. Brian Coggins works as a custodian at the Lakeland Elementary School on the day shift until 3:30 p.m. He works along with Vicki Charney. (N.T. 355-358.)
56. Petorak, Kozlosky and Smith came into work at Lakeland Elementary at 3:30 for the evening shift. (N.T. 359.)
57. Coggins is not a supervisor under Section 301(6) of PERA. (N.T. 383.)
58. Coggins testified that he did not recommend to Thomas that Petorak, Smith, and Kozlosky be dismissed. (N.T. 393)
59. Thomas did not show Smith or Kozlosky any of the alleged complaints. (N.T. 333)

60. Thomas testified that because it was "Mr. Coggins' building," he assumed that Coggins would show the complaints to employees. (N.T. 331.)

61. Coggins testified that Thomas never instructed him to handle any of the alleged complaints. (N.T. 380.)

62. Thomas testified that he was not in the Lakeland Elementary School and did not see any of the employees. (N.T. 380)

63. Thomas testified that all of the alleged complaints he received about the employees came through Coggins. (N.T. 318, 380.)

64. Billings-Jones made the decision to not renew the employees. Billings-Jones did not reveal the names of the employees to the members of the District Board of Directors. (N.T. 204-5)

65. That before Billings-Jones brought the matter to the Board, she looked in the personnel files of the employees she was recommending not be reappointed. (N.T. 462, 503)

#### DISCUSSION

The Complainants' four charges of unfair practices allege that the District and its superintendent failed to reappoint them to their maintenance positions as an act of interference with their protected rights as public employees and as an act of anti-union discrimination in violation of the Public Employee Relations Act (PERA). The charges were consolidated for hearing because of the similar work setting of the employees, the similar timing of the District's decision not to reappoint them and the similar allegations that the decisions were made for reasons that violated the provisions of PERA.

The Complainants bear the burden of proving the elements of the alleged violations by substantial and legally credible evidence. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A. 2d 1069 (1977). Substantial evidence means evidence that does more than just create a suspicion of the existence of the fact necessary to establish each element of the unfair practice charge. Township of Upper Makefield, 10 PPER 10299 (Nisi Order of Dismissal, 1979).

The first cause of action to be considered is the allegation that the failure to reappoint the four custodial employees was motivated by anti-union animus aimed at the organizers, officers and negotiators of the short-lived Lakeland Education Support Professionals. This section of the Act requires the complainant's to prove illegal employer motivation. In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainants must prove that the employees engaged in protected activity, that the employer was aware of that protected activity, and that but for the protected activity the adverse action would not have been taken against the employee. Saint Joseph's Hospital, 473 Pa. 101, 373 A.2d 1069 (1977). The complainants must establish these three elements by substantial and legally credible evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). St. Joseph's Hospital, supra. In a charge of discrimination it is the employer's motivation which creates the offense. Perry County v. PLRB, 364 A.2d 898 (Pa. Cmwlth. 1994).

As for the first part of the test, the four complainants engaged in protected activity. In varying degrees, they took active leadership roles on behalf of the newly organized and certified Association that was trying to obtain an initial collective bargaining agreement for the District's nonprofessional employees. As leaders, they stood apart from their fellow employees.

Smith, stationed at Lakeland Elementary, was the Association secretary. Petorak, the employee who originally called on PSEA to help organize the nonprofessional employees, was the employees' liaison to PSEA at the first organizational meeting at the Holiday Inn in Dunmore. Larkin, stationed at the high school then transferred to Mayfield Elementary in the summer of 2006 after attending bargaining sessions, was a member of the bargaining team. Larkin was then elected President in 2007. Kozlosky, assigned to Lakeland Elementary, was the Association Vice-President.

In other cases the Board has found similar leadership activity to be protected. In City of Scranton, 15 PPER 15106 (Proposed Decision and Order, 1984), 15 PPER 15162, (Final Order, 1984), aff'd 16 PPER ¶ 16080 (Court of Common Pleas, Lackawanna County); 505 A.2d 1360 (Pa. Cmwlth. 1986) the Board found that the Union president, Vice-President and stewards who sat at negotiating table for a successor collective bargaining agreement were engaged in protected activity and thus met the first part of a successful unfair practice charge alleging anti-union discrimination. Accordingly, all four complainants proved the first element of a Section 1201(a)(3) charge.

The second element the Complainants must prove is employer knowledge of their protected activity. The Complainants must prove Billings-Jones knew of their protected activity because the school district board of directors delegated to Superintendent Billings-Jones the decisions of what nonprofessional employes would be reappointed. Under the School Code, the School Board of Directors have the authority to make the annual appointments at issue here. However, the seven school board members, who were called by the Association as adverse witnesses, testified credibly that they implicitly adopted a policy of deferring to Billings-Jones' recommendations as to what individual persons would be reappointed for the 2007-08 fiscal year.

As for Billings-Jones' knowledge of Smith's protected activity, the superintendent admitted that she probably read in the Scranton Times an account identifying Smith as the Association Secretary.

As for Petorak's protected activity, Billings-Jones denied knowledge of his involvement in the Association. However, this is hard to believe because the maintenance supervisors, Clause and then Thomas, knew of Petorak's activity. Larkin testified credibly that Clause knew Petorak was involved with the Association and that Billings-Jones wanted to know if Petorak was pushing the Association on him. Also, Petorak testified credibly that Thomas knew of his activity. Petorak had tried to recruit Thomas for the Association. The knowledge of Clause and Thomas of Petorak's protected activity can be imputed to their supervisor, Billings-Jones. See Valley Township Police Benevolent Association v. Valley Township, 22 PPER ¶ 22130 (Final Order, 1991)

As for Billings-Jones' knowledge of Larkin's protected activity, the superintendent admitted that she saw Larkin at a District-Association negotiation session.

As for Dr. Billings-Jones knowledge of Ms. Kozlosky's activity, the superintendent testified that Kozlosky attended the majority of bargaining meetings. Also, Billings-Jones admitted that she looked at Kozlosky's personnel file prior to making the recommendation to not reappoint her. Kozlosky's personnel file included Kozlosky's letter to ten teachers notifying them of her support for the Association and her fear for her future employment. It is reasonable to conclude that at sometime before Billings-Jones decided not to reappoint Kozlosky she saw the letter in her personnel file because she reviewed the records of each of the employes she was recommending not be reappointed.

Even if the Complainants had not proven that Billings-Jones knew of the four complainants' protected activity, the Board's small plant doctrine is applicable. As our Supreme Court recognized in St. Joseph's, supra, it is reasonable to assume "that any knowledgeable administrator would necessarily have known which of the people on a staff of this size were engaged in union organizing activity." 373 A. 2d at 1072. In the present case, the District only has three district buildings, with small maintenance staffs at each building. Five of the maintenance employes were not reappointed, including the four union activists. It is reasonable to infer from this small number of maintenance employes that George Thomas, their supervisor, and Billings-Jones, had knowledge of the employes who were involved in protected activity.

The third element the complainants must prove to support their discrimination charge is that Billings-Jones was motivated by discriminatory animus toward the Association in not reappointing the four custodians. In a charge of discrimination it is the employer's motivation which creates the offense. Perry County v. PLRB, 364 A.2d 808(Pa. Cmwlth. 1994). As the Board and the Commonwealth Court set forth in Perry County, supra, even if the school board of directors was unaware of Billings-Jones discriminatory motives, the District will be guilty of an unfair practice if the Complainant can prove the Superintendent had discriminatory motivation because motivation is imputed to the employer.

Since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. PLRB v. Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982); St. Joseph's Hospital, *supra*. However, an inference of anti-union animus must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." Shive supra at 313.

In 1978, after eight years of administering PERA and hearing numerous allegations of anti-union discrimination, the Board set forth a list of various factors it would look at in assessing the merits of an anti-union discrimination case based on inference. In Child Development Council of Centre County (Small World Day Care Center), 9 PPER ¶ 9188 (Final Order, 1978), the Board stated:

There are a number of factors the Board considers in determining whether anti-union animus was a factor in the layoff of the Complainant: The entire background of the case, including any anti-union activities by the employer; statements by the discharging supervisor tending to show the supervisor's state of mind; the failure of the employer to adequately explain the discharge, or layoff, of the adversely affected employee, the effect of the discharge on unionization efforts—for example, whether leading organizers have been eliminated; the extent to which the discharged or laid-off employee engaged in union activities; and whether the action complained of was "inherently destructive" of important employee rights.

9 PPER 9188, at 380.

Later, the Board noted other factors that it would consider to infer anti-union animus, including the timing of the adverse action against the employees. PLRB v. Berks County (Berks Heim County Home), 13 PPER ¶ 13277 (Final Order, 1982).

Having reviewed the evidence of record in the present case, the Complainants have made a persuasive case based on three factors from which it can reasonably be inferred that anti-union animus motivated the District's decision to not reappoint the four complainants: the failure of the employer to adequately explain the reason for not reappointing the employees; the elimination of leading Association organizers and the close timing of the decision not to reappoint to the Association's losing a decertification vote.

The first factor, the failure of the employer to adequately explain the decision to not reappoint the four complainants, is the most compelling. The Board has held that the offer of an insubstantial explanation for an employee discharge is grounds to infer animus. Lehigh Area School District v. PLRB, 682 A. 2d 439, (Pa. Cmwlth. 1996) (School District's failure to follow its own procedures of progressive discipline and terminate custodian who was also shop steward shortly after union activities found to be an insubstantial explanation and therefore a reason to infer anti-union animus.)

The Complainants argue that both rationales offered by the District to not reappoint four individuals with service to the District from 6 to 23 years are insubstantial explanations. Billings-Jones' explanation to this Board and to the Court of Common Pleas in the injunction proceeding are that in May, 2007 the District was facing serious budget problems that forced her look at ways to cut employee expenses, which in turn led to the decision not to reappoint "poor performers," which included the four complainants.

The Complainants cast doubt on the cost savings basis of Billings-Jones' decision making. Through the presentation of PSEA's research economist, Dr. Harris Zwerling, the Complainants put in perspective the cost savings from not reappointing them. Zwerling demonstrated that the Superintendent's approach of cost cutting did not produce significant savings. By the District's estimate, reinstatement of the Complainants would cost \$90,179 (District Exhibit 11, Tab. 7). That supposed savings (or cost of reinstatement) should be viewed in the context of an annual budget that exceeds \$15.7 million. It amounts to slightly more than half a percent of the District's total expenses. From another

perspective, looking at actual audited financial data, Zwerling demonstrated that from FY 2001-02 to FY 2005-06, the District averaged \$718,757 annually in total extra funds (Association Exhibit 10, Tab 4, P. 7). Thus, the Complainants contend that if history is a guide, then it is more than likely that any shortfall the District was facing in June would be made up by the end of the year, not requiring such minor reductions in expenses.

Even more indicative of overstating the savings is that two of the activists not reappointed included two part-time maintenance employes, Smith and Kozlosky. The miniscule savings from not reappointing these employes puts the budgetary rationale into more doubt. Their salaries were not saved, since the District had to pay other part-timers to do the work. The employes who were not reappointed received no benefits. The only cost savings would be in the discontinuance of the District's PSERS, Unemployment Insurance, Workers Compensation and Social Security payments. Using Business Manager Peregrim's figures, the savings would total \$2,157 for Kozlosky and Smith for 2007-08 (District Exhibit 11, Tab 7).

As for the second basis for Billings-Jones' decision, that she was looking for "poor performers," there is reason to have doubts about the sincerity and justification of that approach to shaving expenses. The Complainants contend that the flaws are so serious that they reveal an employer that has failed to adequately explain the reason for its actions.

The most disturbing flaw is the sudden scrutiny the maintenance workers were subjected to, in which their alleged poor performance led them to face what was essentially a discharge. While the school code makes these employes subject to annual reappointments by the School Board of Directors, the long time pattern of the District, with very few exceptions for individual cases, was to recall all nonprofessional employes each year.

It does not appear that Billings-Jones looked seriously at any other employes to scrutinize for "poor performers." The impact of her approach to cutting personnel costs fell disproportionately on the maintenance employes in general and the Association organizers in particular. Billings-Jones testified about only one other area that was targeted for cuts, the school crossing guard program, in which one guard was not reappointed. No other nonprofessional or professional employes were touched by her version of the expense reduction.

Billings-Jones contended that Thomas' recommendations were the basis for her decision. However, Thomas, by all accounts a good worker himself, was a relatively new supervisor. This may account for his not applying traditional progressive discipline (warnings, minor suspensions, etc) and his not documenting poor performance until the eve of the decision not to reappoint the employes. When asked in this hearing to justify his approach to supervision, the deficiencies of the four complainants and his eventual decision to recommend these complainants be not called back, Thomas' testimony lacked conviction and confidence.

Thomas developed a dragnet of broadly sweeping five maintenance employes into the designation of "poor performers." This collective guilt determination did not provide for the reasoned determination of individual employes' performance. Thomas' broad sweep approach, adopted without question by Billings-Jones, turned into unfair results. Just to use one example, there is the case of Kozlosky, a 23 year veteran of the District. Thomas admitted that he had no recommendation regarding Kozlosky, but rather he relied on Coggins' reports. Coggins is the head custodian at Lakeland Elementary, but he was not Kozlosky's supervisor. Coggins testified that at times Kozlosky's work was substandard. In any event, he testified that he did not recommend to Thomas that she be dismissed. Kozlosky still does not know what in particular she did to be let go.

Furthermore, there is doubt in the validity of the discipline by suddenly elevating poor cleaning of the building into what is essentially a dischargeable offense. Just a year before, Billings-Jones simply gave Smith a warning (District Exhibit 18) for falsifying a time slip, which she admitted in the hearing was a "dismissable" offense. The abrupt increase in penalty is indicative that the "poor performance" rationale for not reappointing the complainants was pretextual.

Given this record, it is hard to find that Billings-Jones' "poor performers" rationale presented substantial reasons for not reappointing the complainants, thus counting as a factor to infer that the decision was motivated by anti-union animus.

The second factor that stands out as a factor is the overwhelming majority of the employees the District decided not to reappoint were in the protected employees under PERA. As set forth in the findings of fact, the complaints were not only members of the newly formed Association; they were its founders, officers and bargaining representatives. Apart from a school crossing guard, the list was composed entirely of custodians (including a fifth custodian who is not a complainant before the PLRB). The disproportionate impact on the Association activists of the decision not to reappoint is noteworthy and is certainly a factor to infer animus.

It is necessary to address the fact that one of the persons not re-appointed was the son-in-law of George Thomas, the maintenance supervisor and the Superintendent's advisor on poor performers. The District argues that if a supervisor would recommend his own relative not be reappointed then the supervisor's motivation was sincere and all the employees on his list truly deserved to not be reappointed. This argument has a surface appeal. But having observed Thomas in the hearing when questioned on this point was to observe a witness who was uncomfortable with including his son-in-law on the list of employees.

The third factor that the complainants argue is grounds to infer animus is the timing of the decision not to reappoint the four maintenance employees, a little more than a month after the Association lost the decertification vote by a narrow margin. Close timing alone is insufficient to establish unlawful motive. AFSCME, Council 13 v. Commonwealth of Pennsylvania, Department of Labor and Industry, Office of Vocational Rehabilitation (OVR), 16 PPER 16020 (Final Order, 1984), but may be considered as a factor when combined with an insubstantial or pretextual reason. Lehigh Area School District, 682 A. 2d 439 (Pa. Cmwlth. 1996).

In the present case, the four complainants were not reappointed in June 29, 2007, after the Association was decertified on May 22, 2007. This short time between the loss of the protected status and the failure to reappoint the employees is a factor to infer animus. The District argues that the factor of timing deserves no credit here because the District, if anything, did not have to worry about the Association and therefore, would have no motivation to exercise illegitimate discipline to employees for anti-union reasons. This is a distinctly employer viewpoint. It is equally plausible and reasonable to judge the timing from the employees' point of view, that as economically dependent persons, they would now be even more susceptible to unfair discipline without the protection of the Association.

In summary, for the reasons set forth above, the complainants have made a case that Billings-Jones was motivated by anti-union animus against them when she compiled the recommendations not to reappoint them. The complainants have proven all three elements required to prove that the District violated Section 1201(a)(3) of PERA.

The next cause of action to be addressed is the allegation that the District violated Section 1201(a)(1), which prohibits public employers from "interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of the Act." 43 P.S. 1101.1201(a)(1). A violation of Section 1201(a)(1) may be independent or derivative. A derivative violation of Section 1201(a)(1) of PERA occurs with the violation of any more specific Sections 1201(a)(2) through (9). Teamsters Local No. 429 v. Lebanon County, 32 PPER ¶ 32006 (Final Order, 2006). Northwestern Education Association v. Northwestern School District, 24 PPER ¶ 24141 (Final Order, 1993). Having found the District violated Section 1201(a)(3), a derivative Section 1201(a)(1) violation will be found.

As for whether the employer has committed an independent violation of Section 1201(a)(1), the Board has applied the "tendency to coerce" test of NLRB v. Brookwood Furniture Division of the United States Industries, 701 F. 2d 452 (5<sup>th</sup> Cir. 1983). 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 employees have been shown to, in fact, have been coerced. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985). Fink v. Clarion County,

32 PPER ¶ 32165 (Final Order, 2001). In assessing such an allegation, the employer's motivation is not relevant. But the legitimacy of the employer's action is relevant.

In Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order 2004), the Board reiterated the law with respect to coercion as follows:

"An independent violation of Section 1201(a)(1) occurs where, based on the totality of the circumstances, the employer's actions would have the tendency to coerce or interfere with the protected activities of a reasonable employee, regardless of whether anyone was actually coerced. Fink v. Clarion County, 32 PPER ¶ 32165 (Final Order, 2001). The employer's motive for its actions is irrelevant. Northwestern Education Association v. Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)."

35 PPER at 303. Of course, if the employer's conduct was not coercive, then no violation of section 1201(a)(1) may be found. Id. Nor may a violation of section 1201(a)(1) be found if the employer presents a legitimate basis for its conduct that outweighs any coercive effect the conduct may have. Temple University, 23 PPER ¶ 23118 (Proposed Decision and Order 1992), affirmed on another ground, 25 PPER ¶ 25121 (Final Order 1994); Philadelphia Community College, 20 PPER ¶ 20194 (Proposed Decision and Order 1989). But if the employer presents no legitimate basis for its conduct that otherwise is coercive, then a violation of section 1201(a)(1) must be found. Ringgold School District, 26 PPER ¶ 26155 (Final Order 1995).

The District's decision not to reappoint the four complainants lacked a legitimate basis, as set forth in the Section 1201(a)(3) discussion. With that as a background, not reappointing these four union activists, long term employees, with experience from 6 to 23 years of largely free of discipline, would, to a reasonable observer, have a tendency to coerce employees from exercising their rights. The decision sends a message that the District, for insubstantial reasons, will discharge workers who seek to organize and seek to collectively bargain for improved wages and working conditions.

The final cause of action alleged is the allegation that the District violated Section 1201(a)(4), which prohibits public employers from "discharging or otherwise discriminating against an employee because he has signed or filed an affidavit, petition or complaint or given any testimony under this act." 42 P.S. 1101.1201(a)(4). As founders, officers and negotiators for the Association, they have been deemed to have signed the representation petition that brought the Association into being certified by the PLRB. The Complainants will prevail on this allegation as well for the same reasons as set forth in the Section 1201(a)(3) analysis.

#### CONCLUSIONS

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

1. That Lakeland School District is a public employer within the meaning of Section 301(1) of PERA.
2. That Joan F. Smith, Gabriel H. Petorak, John F. Larkin and Ellen E. Kozlosky are public employees within the meaning of Section 301(2) of the PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the District has committed unfair practices within the meaning of Sections 1201 (a)(1),(3) and (4) of the Act.

#### ORDER

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

HEREBY ORDERS AND DIRECTS

that the District shall:

1. Cease and desist from interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of the Act;

2. Cease and desist from discriminating against employes to encourage or discourage membership in an employe organization.

3. Cease and desist from discriminating against employes for signing, or filing an affidavit, petition or complaint or given any testimony under this act.

4. Take the following affirmative action that the hearing examiner finds necessary to effectuate the policies of the Act:

(a) Offer Joan F. Smith, Gabriel H. Petorak, John F. Larkin and Ellen E. Kozlosky (Complainants) unconditional reinstatement to their former positions without prejudice to any right or privilege enjoyed by them and pay them a sum equal to the amount they would have earned as wages had they been retained as employes, along with interest.

(b) The backpay shall be computed on the basis of each separate calendar quarter or portion thereof during the period from the date the complainants were not re-appointed until the date of the proper offer of reinstatement. The quarterly periods shall begin the first day of January, April, July and October. Loss of pay shall be determined by deducting from a sum equal to that which the complainants would normally have earned each quarter or a portion thereof, their net earnings actually earned or which would have been earned with the exercise of due diligence during that period, earnings which would have been lost through sickness and any unemployment compensation received by the complainants. Earnings in any particular quarter shall have no effect on the backpay liability for any other quarter.

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

(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 with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-first day of May, 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

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THOMAS P. LEONARD, Hearing Examiner

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),(3) and (4) of the Public Employee 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 decision and order as directed and that it has served a copy of this affidavit on the Complainants.

\_\_\_\_\_  
Signature/Date

\_\_\_\_\_  
Title