

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CRAWFORD CENTRAL EDUCATIONAL SUPPORT PERSONNEL :
ASSOCIATION PSEA/NEA :
v. : Case No. PERA-C-07-126-W
CRAWFORD CENTRAL SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On March 20, 2007, the Crawford Central Educational Support Personnel Association/PSEA-NEA (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Crawford Central School District (District) violated sections 1201(a)(1), 1201(a)(3) and 1201(a)(5) of the Public Employee Relations Act (PERA)¹ by unilaterally "chang[ing] the job descriptions and duties of the majority, if not all, [of the] members of the bargaining unit"² and by retaliating against an employee (Roberta Schaffner) for having expressed a concern about an increase to her job duties.³ On April 20, 2007, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on July 17, 2007, if conciliation did not resolve the charge by then. The hearing examiner thereafter twice continued the hearing, first upon the request of the District and without objection by the Association and then upon the request of both parties to afford them additional time to settle the charge. On October 4, 2007, the District informed the hearing examiner that the parties had been unable to settle the charge and that they were requesting that the hearing be rescheduled. On October 9, 2007, the hearing examiner rescheduled the hearing to December 12, 2007. The hearing was held as rescheduled. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On February 15, 2008, each party filed a brief by deposit in the U.S. Mail.

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 June 26, 1981, the Board certified the Association as the exclusive representative of a bargaining unit that includes secretaries and aides employed by the District. (Case No. PERA-R-80-724-W)

2. In 2005, the District began administering a "performance based assessment" to test the clerical and technological skills of employees when they bid for a different position. (N.T. 36-38, 75-79)

¹ The Association also filed the charge under sections 1201(a)(2) and 1201(a)(4), but it subsequently withdrew those portions of the charge in its brief at 1, so they are no longer before the Board.

² It would appear that the Association also alleged that the District violated PERA by unilaterally paying stipends to two employees (Jim Shryock and Mary Lynn Mauri), but the Association does not so contend in its brief. A contention not presented to a hearing examiner is, of course, waived, SSHE, 32 PPER ¶ 32118 (Final Order 2001), so any allegation that the District violated PERA by paying those stipends is no longer before the Board.

³ The Association attached to the charge a grievance alleging that the District also violated the parties' collective bargaining agreement "by changing the job descriptions of the bargaining unit" (N.T. 14; Appendix A to the charge). As a matter of policy, a refusal to bargain charge is to be deferred pending the disposition of a pending grievance when the parties' dispute is rooted in their collective bargaining agreement and no enmity nor discrimination toward the exercise of employee rights under the Act has been alleged. Pine Grove Area School District, 10 PPER ¶ 10167 (Order deferring Unfair Practice Charge Until Further Order of the Board 1979). The record shows, however, that the District's board of directors denied the grievance in February 2007 (N.T. 39). Although the record also shows that by letter dated July 22, 2007, the Association indicated that it "has an active grievance and unfair labor practice charge on the matter of job descriptions" (Association Exhibit 10), the record further shows that as of the date of the hearing the grievance "ha[d] never gone to arbitration" (N.T. 38). Thus, it is apparent that the grievance is no longer pending. Accordingly, there is no basis for deferring the charge. See Hazleton Area School District, 29 PPER ¶ 29180 (Final Order 1998)(deferral was inappropriate where a grievance was no longer pending).

3. In 2006, the District revised the job descriptions for the positions of receptionist/switchboard operator, attendance/census secretary, administrative secretary to the director of special services and school psychologists, administrative secretary to the director of curriculum, secretary to the secondary school principal, secretary to the secondary assistant principal, secondary school guidance secretary, secretary to the Title I project director/reading supervisor and secretary to coordinator of technology by adding "Demonstrates 80% or above on District approved performance based assessment" to the list of qualifications for the positions. (N.T. 8, 14, 74; Association Exhibits 4-6)

4. In 2006, the District revised the job descriptions for the positions of learning support aide, attendance officer, secondary school guidance secretary and secretary to the Title I project director/reading supervisor by changing the titles to paraprofessional/504 aide, child information systems coordinator/child accounting, secretary to the secondary school counselors and administrative secretary to the elementary director of curriculum and instruction (K-6), Title I project director and supervisor of District-wide (K-6) reading program, respectively. (N.T. 8, 14, 74; Association Exhibits 1-2, 4)

5. In 2006, the District revised the job description for the position of learning support aide by adding "Meets the Highly qualified requirement when deemed necessary" to the list of qualifications for the position and "Continuing education in Behavior Management Techniques, Passive Restraints and other such classes offered at Intermediate Unit, etc." to the list of performance responsibilities for the position. (N.T. 8, 74; Association Exhibit 1)

6. In 2006, the District revised the job description for the position of secretary to the coordinator of technology by adding "Responsible for CPE tracker maintenance updates" and "Maintains E-mail accounts for all employees and staff" to the list of performance responsibilities for the position and by deleting "Responsible for scanning grades for elementary computerized report cards and "Maintains MECC software duplication program. Assists in maintaining MECC software for elementary computer labs" from the list of performance responsibilities for the position. (N.T. 8, 74; Association Exhibits 5-6)

7. In 2006, the District revised the job descriptions for the positions of payroll/computer operator, receptionist/switchboard operator and secretary to the coordinator of technology by deleting "Twelve month term" from the terms of employment for the first two positions and "Ten month term (200 days)" from the terms of employment for the third position. (N.T. 8, 14, 74; Association Exhibit 4-6)

8. In December 2006, the Association's president (Elaine Hoke) and vice president (Doris Byham) informed the District's assistant superintendent (Charles E. Heller, III) of the concerns they had over the revisions to the job descriptions and of the Association's intent to file a grievance. (N.T. 8, 16, 18, 73)

9. On January 8, 2007, the secretary to the coordinator of technology (Ms. Schaffner) asked the coordinator of technology (Richard L. Fraker) for help in prioritizing her work load because teachers had been complaining that she had not been timely reporting the hours they need to maintain their certifications under Act 48. He told her to keep a log of her daily activities to see if there was a problem with time management. He also told her that she had to stay at her desk except when taking a break or lunch. He did so consistent with a departmental-wide policy. He did not discipline her. (N.T. 19, 49, 56-58, 80-81, 85)

10. On January 8, 2007, the Association filed with Mr. Fraker a grievance (# 1-8-07-CCESPA-18) alleging that the District violated the parties' collective bargaining agreement as follows:

"The school district has changed the job descriptions of the bargaining unit. The changes have affected the hours, terms and conditions of employment of the bargaining unit. This was done without negotiations with the Association. The District is attempting to use this process to move some bargaining unit members out of the bargaining unit. The change in the duties also violates the collective

bargaining agreement because they are having bargaining unit members work out of their department without the extra compensation."

The grievance identified the grievant as "Roberta Schaffner and all other similarly affected (Class Action)." (N.T. 17-18, 28-29; Appendix A to the charge)

11. On January 11, 2007, the District's superintendent (Michael Dolecki) told Ms. Schaffer to stop keeping the log of her daily activities and to set aside two days to report the teachers' Act 48 hours. (N.T. 57-58)

12. After Ms. Hoke, Ms. Byham and Ms. Schaffner met with Mr. Heller "to try and work things" out, Mr. Fraker assigned Ms. Byham and Ms. Schaffner to substitute for absent telephone operators as he had in the past. (N.T. 17, 20-21, 52, 83-84)

13. In May 2007, Mr. Fraker met with the employees in Ms. Schaffner's department to tell them that they were accountable for their time. During the meeting, he did not mention Ms. Schaffner by name. (N.T. 53, 59, 82)

14. In the summer of 2007, Mr. Fraker rated Ms. Schaffer's performance for the 2006-2007 school year as satisfactory. (N.T. 44, 56, 83)

DISCUSSION

The Association has charged that the District committed unfair practices under sections 1201(a)(1), 1201(a)(3) and 1201(a)(5) of PERA by unilaterally "chang[ing] the job descriptions and duties of the majority, if not all, [of the] members of the bargaining unit" and by retaliating against an employe (Ms. Schaffner) because she expressed a concern about an increase to her job duties. As set forth in the specification of charges, the Association alleges that the retaliation occurred when the District informed her "that she must keep a minute-by-minute log of her duties," "restricted her to her desk [during] other than contracted time," "refused to prioritize which duties [she] should finish due to her increased work load" and told her to "quit playing games."

The District contends that the charge should be dismissed because it had the management prerogative to change the job descriptions and duties unilaterally and because it did not retaliate against Ms. Schaffner. According to the District, it asked her to keep a log of her duties for a legitimate business reason, properly restricted her to her desk, helped her prioritize her work load as she requested and did not tell her to quit playing games.

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 changes a mandatory subject of bargaining, Appeal of Cumberland Valley School District, 483 Pa. 134, 394 A.2d 946 (1978), but not if it unilaterally changes a matter of inherent managerial policy. Joint Bargaining Committee of PSSU and PESEA v. PLRB, 503 Pa. 236, 469 A.2d 150 (1983). If an employer wishes to change a mandatory subject of bargaining, it must request bargaining and bargain with the exclusive representative of its employees before making the change. Snyder County Prison Board v. PLRB, 912 A.2d 356 (Pa. Cmwlth. 2006).

A testing requirement for promotion is a matter of inherent managerial policy over which an employer is not required to bargain. Commonwealth of Pennsylvania, Pennsylvania State Police, 34 PPER 29 (2003). "'Reclassification is a matter of inherent managerial authority As such, it is subject to meet and discuss rather than being a mandatory subject of bargaining.'" AFSCME, Council 13 v. Commonwealth of Pennsylvania (Dep't of Transportation), 16 PPER 16019, p. 51-52, n.5 (Final Order, 1984)(citing PLRB v. Commonwealth of Pennsylvania, 9 PPER ¶ 9061 (Nisi Decision and Order, 1978))." SSHE, 32 PPER ¶ 32138 at 341 (Final Order 2001). See also Public Utility Commission, 19 PPER ¶ 19072 (Final Order 1988)(same). The assignment of work to employees also is a matter of inherent managerial policy over which an employer is not required to bargain, SSHE, while the work load of employees generally is not a mandatory subject of bargaining. Joint

Bargaining Committee of PSSU and PESEA, supra. A reduction in the length of an employe's work year without an accompanying reduction in the level of services the employer provides is a mandatory subject of bargaining. Jersey Shore Area School District, 18 PPER ¶ 18117 (Final Order 1987); Mifflin/Juniata Area Agency on Aging, 29 PPER ¶ 29093 (Proposed Decision and Order 1998).

As set forth in more detail in findings of fact 2-7, the record shows that the District changed job descriptions to impose a testing requirement for some of them, to rename some of them, to add qualifications and duties for some of them and to delete references to the length of the employe work year for some of them.

Under the precedent cited above, the District was under no obligation to bargain over the changes to the job descriptions that imposed a testing requirement for promotion, renamed them and added qualifications and duties to them. The record does not show that the District actually changed the length of the work year for any employe when it changed the job descriptions. To the contrary, it only shows that the District deleted references to the length of the employe work year. Accordingly, the charge as filed under sections 1201(a)(1) and 1201(a)(5) must be dismissed as unsupported in the law or on the facts.

The Association contends that the District was under an obligation to bargain over the changes to the job descriptions because a testing requirement for promotion is a mandatory subject of bargaining. The Association cites Capitol Area Transit, 24 PPER ¶ 24113 (Final Order 1993), in support of its contention. In Capitol Area Transit, the Board found that a test an employer administered to determine who to promote was a mandatory subject of bargaining. Subsequently, however, in Commonwealth of Pennsylvania, Pennsylvania State Police, supra, the Board found that a testing requirement for promotion was not a mandatory subject of bargaining.⁴ As the Board explained:

"The Board has addressed the negotiability of various aspects of employe promotions on several occasions. Initially, it is noted that promotional opportunity is a condition of employment, Uniontown Area School District v. Pennsylvania Labor Relations Board, 557 Pa. 180, 732 A.2d 607 (1999), although hire and direction of employes, including decisions regarding which employes to promote, remain a matter of management prerogative. The Board and the courts have determined that promotional opportunity for bargaining unit employes includes such matters as notice to employes of the promotional opportunities (posting of job openings and opportunities) and the job bidding procedures and requirements for interested employes. See AFSCME v. Berks County, 29 PPER [¶] 29044 (Final Order, 1998), aff'd sub. nom. Troutman, et. al. v. Pennsylvania Labor Relations Board, 735 A.2d 192 (Pa. Cmwlth. 1999); See also, Pennsylvania Labor Relations Board v. East Allegheny School District, 13 PPER ¶13060 (Proposed Decision and Order 1982) (holding that posting requirements were a mandatory subject of bargaining).

However, 'the ultimate selection of candidates for positions including evaluation of qualifications and standards for promotion remain managerial prerogative within the employer's right to select, direct and discipline personnel.' Fraternal Order of Police State Conference of Liquor Law Enforcement Lodges v. Commonwealth of Pennsylvania, 32 PPER ¶ 32083 at 215 (Final Order, 2001); see also, Fraternal Order of Police, Rose of Sharon Lodge No. 3 v. City of Sharon, 29 PPER ¶ 29147 (Final Order, 1998), aff'd sub nom, Fraternal Order of Police, Rose of Sharon Lodge No. 3 v. Pennsylvania Labor Relations Board, 729 A.2d 1278 (Pa. Cmwlth. 1999). In this regard, the Commonwealth Court has recognized that '[i]t is within [an employer's] prerogative to establish and utilize a method to aid in selecting and directing its personnel and in measuring and evaluating their performance. The ability to formulate policies in these areas is essential for the proper and efficient functioning of a police force.' Delaware County Lodge No. 27, Fraternal Order of Police v. Pennsylvania Labor Relations Board, 722 A.2d 1118 (Pa. Cmwlth. 1998); City of Sharon v. Rose of Sharon Lodge, 315 A.2d 355 (Pa. Cmwlth.

⁴ Although decided under the Pennsylvania Labor Relations Act as read in pari materia with Act 111 of 1968 (Act 111), Commonwealth of Pennsylvania, Pennsylvania State Police, nevertheless is controlling. As the court observed in Teamsters Local 77 & 250 v. PLRB, 786 A.2d 299, 304 (Pa. Cmwlth. 2001), "if a matter is a managerial prerogative under Act 111, then it a fortiori is a managerial prerogative under PERA."

1973). Consistent with this precedent, the Board has recently noted that an employer's establishment of a means to measure and evaluate a candidate's qualification for a promotion is paramount to the selection and direction of personnel and therefore is not subject to bargaining. Pennsylvania State Troopers Association, 33 PPER at 118, aff'd 809 A.2d at 424."

34 PPER at 89. Citing Jersey City Board of Education, 8 NJPER ¶ 13144 (PERC 1982), the Board further explained that

"whether a written examination shall be given involves a managerial function relating to the establishment of criteria and that such a determination, together with the type, administration, and scoring of the examination, is a necessary extension of managerial decision making."

Id. at n. 2. Thus, although the Board did not expressly overrule Capitol Area Transit in Commonwealth of Pennsylvania, Pennsylvania State Police, it would appear that the Board did so sub silentio. The Association's reliance on Capitol Area Transit is, therefore, misplaced.

The Association also cites City of McKeesport, 34 PPER 4 (Proposed Decision and Order 2002), rev'd on other grounds, 34 PPER 28 (Final Order 2003), and Commonwealth of Pennsylvania, 32 PPER ¶ 32083 (Final Order 2001), in support of its contention. In City of McKeesport, the hearing examiner found that the imposition of an oral interview for promotion was a mandatory subject of bargaining, but the Board subsequently found otherwise in Commonwealth of Pennsylvania, Pennsylvania State Police. In Commonwealth of Pennsylvania, the Board stated that "the employer is obligated to bargain over matters such as . . . applicant testing," 32 PPER at 216, but again the Board subsequently found otherwise in Commonwealth of Pennsylvania, Pennsylvania State Police. The Association's reliance on City of McKeesport and Commonwealth of Pennsylvania is, therefore, misplaced as well.

The Association next contends that the District was under an obligation to bargain over the revisions to the job descriptions because the name and duties of positions are mandatory subjects of bargaining. The Association cites School District of the City of Erie v. Erie Education Association, PSEA/NEA, 873 A.2d 73 (Pa. Cmwlth. 2005), in support of its contention. In that case, however, the court only held that an arbitration award directing the employer to pay teachers for additional work that it assigned to them was rationally derived from the parties' collective bargaining agreement and therefore was enforceable. The court did not hold that the names and job duties of positions are mandatory subjects of bargaining. The Association's reliance on that case is, therefore, misplaced.

The Association also points out that the District has filed a petition for unit clarification to remove the newly-named position of student information systems coordinator/child accounting from the bargaining unit (Case No. PERA-U-07-414-W) and cites AFSCME, AFL-CIO, Local 1598 v. Bensalem Township, 498 A.2d 1014 (Pa. Cmwlth. 1985), Commonwealth of Pennsylvania, 16 PPER ¶ 16172 (Order Directing Remand to Secretary for Further Proceedings 1985), and Commonwealth of Pennsylvania, 9 PPER ¶ 9061 (Nisi Decision and Order 1978), 9 PPER ¶ 9065 (Final Order 1978), in support of its contention. In Bensalem Township, the court held that only the Board had jurisdiction to determine whether or not a position is within a bargaining unit. In the other two cases, the Board found that an employer commits an unfair practice if it unilaterally removes a position from a bargaining unit. Neither the court nor the Board found that an employer is under an obligation to bargain over the names and job duties of positions. The Association's reliance on those cases is, therefore, misplaced.⁵

The Association next contends that the District was under an obligation to bargain over the changes to the job descriptions because the length of the employe work year is a mandatory subject of bargaining. The Association cites Jersey Shore Area School District, supra, in support of its contention. In that case, the Board found that a reduction in

⁵ It is noted that in deciding whether or not a position should be excluded from a bargaining unit, the title of the position is not dispositive. West Perry School District v. PLRB, 752 A.2d 742 (Pa. Cmwlth. 2000), petition for allowance of appeal denied, 568 Pa. 675, 795 A.2d 984 (2000). It also is noted that the Association has not charged that the District violated PERA by unilaterally removing any position from the bargaining unit and that the record does not show that the District has done so in any event (N.T. 11-12, 22-23, 32-33).

the length of the employe work year was a mandatory subject of bargaining. As noted above, however, the record does not show that the District actually changed the work year for any employe when it changed the job descriptions. Thus, there is no basis for finding that the District was under an obligation to bargain at the time.

The Association next contends that the District violated the Act by refusing to impact bargain. The Association cites Lackawanna County Detectives Association v. PLRB, 762 A.2d 792 (Pa. Cmwlth. 2000), in support of its contention. In that case, the court held that following its implementation of a management prerogative an employer is under an obligation to bargain upon request over a demonstrable, non-severable impact the exercise of its managerial prerogative has had on employe terms and conditions of employment. The Association did not charge that the District refused to impact bargain, however. The Board, of course, only has jurisdiction to find the unfair practices alleged in a charge. Commonwealth of Pennsylvania (Liquor Control Board), 22 PPER ¶ 22009 (Final Order 1991), citing PHRC v. United States Steel Corporation, 458 Pa. 559, 325 A.2d 910 (1974); Iroquois School District, 37 PPER 167 (Final Order 2006). Moreover, under Lackawanna County Detectives Association, an employer is only under an obligation to impact bargain upon request. The record does not show that the Association ever requested impact bargaining, so there is no basis for finding that the District violated the Act by refusing to impact bargain in any event.

The charge as filed under sections 1201(a)(1) and 1201(a)(3)

An employer commits an unfair practice under section 1201(a)(3) if it discriminates against an employe for having engaged in an activity protected by 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). "[T]he isolated conduct of a single employe for her own benefit" is not a protected activity, Coatesville Area School District, 20 PPER ¶ 20186 (Final Order 1989), but the filing of a grievance is. Commonwealth of Pennsylvania, Department of Public Welfare, Somerset State Hospital, 27 PPER ¶ 27086 (Final Order 1996). Close timing between an employe's protected activity and an employer's action coupled with the employer's disparate treatment of similarly situated employes will support a finding that the employer was discriminatorily motivated. City of Reading v. PLRB, 568 A.2d 715 (Pa. Cmwlth. 1989). 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). An employer does not violate section 1201(a)(3) if it takes an employment action for a legitimate business 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 that the employe engaged in a protected activity, that the employer knew that the employe had done so and that the employer acted against the employe for having done so. 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 shows that it would have taken the same action even if the employe 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. In such a case, any defense the employer might have presented need not be addressed. Montour County, 35 PPER 147 (Final Order 2004). 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).

As noted above, the Association has charged that the District violated the Act by retaliating against Ms. Schaffner for having expressed a concern about an increase in her job duties. In Coatesville Area School District, supra, however, the Board found that an activity of that nature was not protected. Accordingly, the charge as filed under sections 1201(a)(1) and 1201(a)(3) must be dismissed for failure to state a cause of action.

In its brief, the Association contends that the District also violated PERA by retaliating against Ms. Schaffner because the Association filed a grievance on her behalf. The Association did not file a charge to that effect, however, so the Board has no jurisdiction to find any such violation. See Commonwealth of Pennsylvania (Liquor Control Board), supra; Iroquois School District, supra.

In any event, the Association did not present a prima facie case during its case-in-chief. Although the Association established that it filed a grievance identifying Ms. Schaffner by name as a grievant on January 8, 2007, and that the District's director of technology (Mr. Fraker) received the grievance the same day (finding of fact 10), it did not establish that the District retaliated against her because the Association filed the grievance.

The Association presented testimony by its vice president (Ms. Byham) that on the day it filed the grievance Mr. Fraker told Ms. Schaffner and only Ms. Schaffner to be at her desk except for a ten-minute break and her lunch time, to stop playing games, that he was tired of her attitude and to do as she was told (N.T. 19). Ms. Byham also testified that "[t]hings were just extremely stressful" after the Association filed the grievance (N.T. 20) and that the District subsequently required her and Ms. Schaffner to substitute for absent telephone operators even though it often brought in substitutes on those occasions prior to the filing of the grievance (N.T. 20-21).

The Association also presented testimony by Ms. Schaffner that at the meeting with Mr. Fraker on the day it filed the grievance he told her to keep track of everything she did every minute of the day and to stop playing games (N.T. 49). Ms. Schaffner further testified that after the Association filed the grievance the District assigned her additional work involving a strategic plan (N.T. 50-51), that to her "understanding" the District approved hiring a part-time employe at extra pay to work on the strategic plan (N.T. 51) and that for the first time ever she had to cover the phones when no one was available (N.T. 52). Ms. Schaffner additionally testified that Mr. Fraker "was looking directly at" her in May 2007 when he met with a group of clerical employes about accounting for their time (N.T. 53-54). Ms. Schaffner also testified, however, that Mr. Fraker never disciplined her (N.T. 56), that he rated her performance for the 2006-2007 school year as satisfactory (N.T. 56), that he only told her to keep a log of her daily activities after she asked him to help her prioritize her work load because teachers were complaining that she was not reporting their credit hours under Act 48 in a timely fashion (N.T. 57-58) and that he did not mention her by name at the May 2007 meeting (N.T. 59).

Notably, the Association did not establish that it filed the grievance with Mr. Fraker before he met with Ms. Schaffner. Indeed, the record only shows that he met with her on the same day that the Association filed the grievance, leaving it to speculation that she engaged in a protected activity before he met with her. Speculation, of course, is not substantial evidence. Shive, supra. Of course, if the Association filed the grievance after he met with her, there would be no basis for finding that he did anything at the meeting because she had engaged in a protected activity. Thus, whatever happened at the meeting provides an insufficient basis for finding that the District was discriminatorily motivated. Moreover, the testimony of Ms. Byham and Ms. Schaffner was conflicting as to what occurred at the meeting and as to whether or not they had ever substituted for absent telephone operators before. Their credibility suffered under the circumstances, again providing an insubstantial basis for finding that the District was discriminatorily motivated. Apart from the fact that the Association established no foundation for Ms. Schaffner's "understanding" with respect to her testimony about the part-time employe, the record does not show that she and the part-time employe were similarly situated, so there is no basis for finding that the District subjected her to disparate treatment. See Montour County, supra (employes must be similarly situated in order for an inference of a discriminatory intent based on disparate treatment to be drawn). Beyond that, Ms. Schaffner's testimony that Mr. Fraker directed her to keep a log of her daily activities after she asked him to help her prioritize her work load because teachers were complaining that she was not reporting their Act 48 hours in a timely fashion militates against a finding that he did so for a discriminatory reason. Furthermore, although evidence of post-charge conduct may be relied upon to shed light on the true character of the events set forth in a charge, PLRB v. General Braddock Area

School District, 380 A.2d 946 (Pa. Cmwlth. 1977), Ms. Schaffner's testimony that Mr. Byham looked at her during the meeting in May 2007 is hardly substantial evidence that the District retaliated against her in January 2007.

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. Fraker that he did not retaliate against Ms. Schaffner because the Association filed the grievance on her behalf (N.T. 81-83). Consistent with Ms. Schaffner's testimony, he testified that he directed her to keep a log of her activities to help her prioritize her work load after she asked him to do so (N.T. 80-81). He also denied that he told her to stop playing games (N.T. 82). Given the conflicts in the testimony of Ms. Byham and Ms. Schaffner, his testimony has been credited over theirs. Although he could not recall whether or not he looked at her during the May 2007 meeting, he further testified that she was a good employe (N.T. 83). He also testified that he restricted Ms. Schaffner to her desk consistent with a department-wide policy (N.T. 81) and that he did not change how employes were to cover for absent telephone operators (N.T. 83-84). No discriminatory intent on the part of the District is apparent on that record.

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 PERA.
2. The Association is an employe organization under section 301(3) of 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 PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, 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 fourteenth day of March 2008.

PENNSYLVANIA LABOR RELATIONS BOARD

Donald A. Wallace, Hearing Examiner