

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CENTRAL YORK EDUCATION ASSOCIATION, :
PSEA/NEA :
 :
v. : Case No. PERA-C-08-81-E
 :
CENTRAL YORK SCHOOL DISTRICT :

PROPOSED DECISION AND ORDER

On March 7 2008, the Central York Education Association (Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Central York School District (District) violated Section 1201(a)(1) & (3) of the Public Employe Relations Act (PERA). In its charge, the Union specifically alleges that the District's "actions in curtailing Mr. Wycko's services, demoting him, suspending him with and without pay, and ultimately terminating his employment is a retaliatory action against Mr. Wycko individually and his mother Jeanne Acri [who was involved in contract negotiations and is a former Union president] and the Association in general for having engaged in protected activity." (Specification of Charges ¶ 6). On March 25, 2008, the Secretary of the Board (Secretary) issued a complaint and notice of hearing directing that a hearing be held on Friday, May 9, 2008 in Harrisburg, Pennsylvania.

After several continuances at the request of the parties, the hearing was eventually held on September 19, 2008. During the hearing, both parties in interest were afforded a full and fair opportunity to present testimonial and documentary evidence and cross-examine witnesses. After a significant delay, due to the fact that neither the District nor the Union received the transcripts they ordered, both the District and the Union filed their post-hearing briefs on February 9, 2009. On February 23, 2009, the District filed a supplement to its post-hearing brief to address the Union's independent 1201(a) (1) claim. I have read and considered both parties' post-hearing briefs and the District's supplement.¹

The examiner, based upon all matters of record, makes the following findings of fact.

FINDINGS OF FACT²

1. The District is a public employer within the meaning of Section 301(1) of PERA. (PERA-R-433-C; PERA-U-07-344-E).

2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (PERA-R-433-C; PERA-U-07-344-E).

3. Jeanne Acri is an English teacher at the high school. She has been teaching for thirty one years at the District. (N.T. 17-18, 33-34).

4. Ms. Acri is currently the building representative at the high school. She has been a building representative for most of her thirty-one years at the District. Between 2002 or 2003 and 2007, Ms. Acri was the Union president. She was a negotiator for the Union during negotiations for the most recent collective bargaining agreement. (N.T. 18, 34).

5. Ms. Acri has been involved in contentious negotiations for most of her career at the District. (N.T. 34).

6. Ms. Acri is the mother of Julian Wycko. (N.T. 45-47).

¹ The Union did not object to the District's filing of a supplement to the post-hearing brief.

² Findings of Fact numbers 19, 28, 30, 33, 35, 37 & 38 are based on documents, and statements contained therein, that the District offered and upon which the examiner will rely for two limited purposes: discrediting Mr. Wycko's testimony; and the effect of those statements on the receiving persons. The hearsay statements are not relied on for the truth.

7. The District hired Mr. Wycko on August 9, 2004 into the entry-level, nine-month position of technology assistant for the 2004-2005 school year. At that time, Mr. Wycko's mother was the Union president. The District hired Mr. Wycko after the District administrators and labor counsel had spent many periods over the years enduring contentious negotiations with Mr. Wycko's mother. (N.T. 34, 39, 69, 97-100, 149; District Exhibit 1(A)(1)).

8. As technology assistant, Mr. Wycko was required to work at the Central York High School, under the building technology coordinator, and report directly to the high school principal, Mr. Jay Butterfield. His specific assignment was to be in the computer labs, when teachers brought classes into the labs, maintain the computer equipment and software and assist teachers and students in the labs when needed. (N.T. 102; District Exhibits 1(A)(1) & 1(A)(2)).

9. The District Superintendent is Dr. Linda Estep. Dr. Estep was aware that Mr. Wycko was the son of Ms. Acri at the time of his hire. The Superintendent has known Ms. Acri for many years in her capacity as both a teacher and a Union advocate. (N.T. 97-100).

10. Effective July 1, 2005, Dr. Estep transferred Mr. Wycko into the position of instructional technology specialist (ITS), which was a newly created twelve-month position, for the 2005-2006 school year. (N.T. 42, 103; District Exhibit 1(B)(1)).

11. The District moved from the old high school to the new high school during the summer of 2005. The new high school opened for classes for the 2005-2006 school year. (N.T. 99, 111).

12. Dr. Estep created the new ITS position because she wanted to move the students away from lab-based computer use and instruction to individual laptop computer use and instruction. To serve this purpose, the ITS position was initially created to serve students and teachers District-wide, kindergarten through 12th grade (K-12). (N.T. 102-103, 104-105; District Exhibit 1(B)(2)).

13. During the first year as ITS, Mr. Wycko reported directly to Dr. Estep. Mr. Wycko's initial job duties as ITS for the 2005-2006 school year included, inter alia, providing in-class support to teachers and students; assisting with managing security, imaging and data storage; providing teacher training and technical support to building technology assistants; and performing special projects and other duties. (N.T. 106, 111; District Exhibit 1(B)(2)).

14. Dr. Estep utilized Mr. Wycko mostly at the high school during the 2005-2006 school year to help teachers adjust to their new environment and new technology as well as to help install and initialize new equipment at the high school. (N.T. 111).

15. In January of 2006, the Union contacted the District to begin negotiations for a new collective bargaining agreement. Beginning in February of 2006, the parties held approximately one negotiation session per month and returned for the 2006-2007 school year without a new collective bargaining agreement. (N.T. 18-20).

16. On July 1, 2006, Richard Burd became the Assistant Superintendent of Administration and became Mr. Wycko's direct supervisor. Dr. Estep and Mr. Burd decided that the teachers had adjusted to the new high school and received notification that the District was receiving a new full-time technology position, called a "technology coach," at the high school from the "Classrooms for the Future Funding" grant program. As a result, Dr. Estep and Mr. Burd decided to return the ITS position to that which they originally intended, i.e., serving the teachers and students in the entire District and not only at the high school. (N.T. 111-112, 145, 151-152, 154, 168, 172).

17. The new technology coach was Sue Sheffer. With the knowledge that the District would have a full-time technology coach at the high school, Dr. Estep and Mr. Burd changed the duties of the ITS position to serving K-8 instead of K-12. Mr. Wycko started the 2006-2007 school-year at the high school because the technology coach would not start until the second semester. (N.T. 113, 168, 172, 200-201; District Exhibits 2(B)(1)).

18. In October, 2006, Mr. Wycko, at the behest of the Union and his mother, created a website for the Union. The purpose of the new website was to provide a platform for the Union to present and promote the Union's position on collective bargaining issues during negotiations with the District and encourage member input. (N.T. 22, 24, 31-32, 45-47).

19. School Center is the name of the company that manages the District's Website. On November 25, 2006, Mr. Wycko sent an e-mail to School Center and copied the Director of Communications (DOC) on that e-mail. Mr. Wycko begins his e-mail with the statement, "I'm sorry if this is rude, but this is the third situation where we email School Center about a problem and you tell us we are the problem." The e-mail proceeds to berate the people at School Center for its approach to a problem with the podcasts. Five months later, the DOC forwarded the e-mail to Dr. Estep informing Dr. Estep that School Center was very offended and that the DOC had to make peace with the School Center folks. (N.T. 142-143; District Exhibit 6(5)).

20. On January 19, 2007, during the second semester of the 2006-2007 school year, Mr. Wycko wrote a letter to Dr. Estep requesting a salary increase of \$10,000.00. (N.T. 115; District Exhibit 5(A)(2)). In that letter, Mr. Wycko stated the following:

I feel that what I have done for the district, and what I plan to do, towers over my "specialist" title. It is hard to set myself, and my job, apart from the other positions in the district that I help support, not one of them has the combined attentional [sic] to detail, work ethic, people skills and knowledge that I possess. In a sea of mediocrity, I could find a job at any school district in the state.

. . .

This letter is my formal request for a raise of no less than \$10,000.00 by the conclusion of the 2006-2007 school year. With the grant, and the implementation of one-to-one in any form, I expect my already undervalued position to become even more taxed. If you feel that this request is unwarranted, all I ask is that you communicate that to me so that I can appropriately plan the rest of my career.

(District Exhibit 5(A)(2)).

21. Dr. Estep informed Mr. Wycko that she could not give one person a \$10,000.00 raise in one year. (N.T. 115, 143-144).

22. In February 2007, Mr. Burd directed Mr. Wycko to be responsive to the needs of K-8 and to get the teachers throughout the District to become familiar with him. In April of 2007, Mr. Burd placed Mr. Wycko on the District's six-day school cycle where he was directed to work at certain buildings on designated cycle days. (N.T. 154-163, 195, 199; District Exhibit 4(B)(1)).

23. In April 2007, the Union held its biennial fundraiser known as the "Battle of the Buildings." The Battle of the Buildings is a series of games to provide two scholarships to graduating seniors who are going to major in education and become teachers. (N.T. 25-29, 45-46, 84-85).

24. Mr. Wycko took photographs of the "Battle of Buildings" games and posted them on the Union's website in the form of a slideshow. He also participated in the promotion and preparation of the event. The DOC requested the pictures for the District from Mr. Wycko. Mr. Wycko forwarded the request to his mother to ask whether he should comply with the District's request. The Union declined, but offered to allow the District to place a link on its website to the Union's website to access the pictures. (N.T. 28, 45-46).

25. Joseph Lucia is the District's Network Administrator. Mr. Lucia has authority from the District, as part of his regular job duties, to perform security checks and monitor employe computer use. (N.T. 134-136, 208, 225, 228).

26. On April 3, 2007, Mr. Burd received an e-mail forward of an e-mail from Mr. Wycko to the DOC, also dated April 3, 2007. The DOC had sent an e-mail to all staff at the District via the "Allstaff mailing list." In that e-mail, the DOC informed staff that she was aware of a problem for new Intel Mac users with links allowing students to use the "safe surf" videos on the attorney general's website. She also instructed recipients that the problem was not with their computers but with the links and that the videos could be accessed by following certain links. (N.T. 122, 176; District Exhibit 6(2)).

27. On the same date, Mr. Wycko responded to the DOC as follows:

Hey, thanks for waiting for my permission. Oh wait. I didn't give it to you. . .

. . . .

Sending that email without my express permission is a violation of my copyright and it undermines my entire argument. Furthermore, this is just another example of other people taking credit for my work. Did you sit down this morning and research and test possible solutions? Did you dig through code and test all kinds of settings in every plug-in? did you email a small pool of people with this issue and make sure it worked before sending it to allstaff? No, you didn't. I did. I'm the one who figured it out. I'm the one who worked with these kids. I'm the one who traveled to Harrisburg to help them edit it. I'm the one everyone emailed when it wouldn't work. I'm the one who recognized the importance of this project and came in and solved it first thing this morning. I'm the one who persuaded people to email everyone they know about this. And when they win, which they will, who do you think will be standing around at the press conference with a huge grin on her face, basking in the glory of the good PR this brought the district? Who will list this this [sic] as a bullet on her action item list this year? Who will add this to her resume for all future employers to think she organized? Don't insult me by claiming you were doing me a favor. You want this project to be a success because it will make you look good, not me.

(District Exhibit 6(2)).

28. On April 9, 2007, the DOC wrote an e-mail to Mr. Wycko relaying a complaint from Linda Janosky about the size of the podcasts. Mr. Wycko's response to the DOC was abrupt and rude. The DOC forwarded Mr. Wycko's response to Mr. Burd. (District Exhibit 6(3)).

29. On April 23, 2007, the DOC e-mailed Mr. Wycko informing him that a staff member was having trouble after the DOC set up a document manager for the staff member. The DOC asked Mr. Wycko to help her. Mr. Wycko returned an abrupt and critical response which the DOC forwarded to Dr. Estep. On April 25, 2007, Dr. Estep wrote to Mr. Wycko the following: "[the DOC] is not the person to provide tech support to the staff. That is part of your position. Please stop sending such derogatory emails." Mr. Wycko then sent an angry and threatening message back to the DOC concluding as follows: "So the next time you think about putting me in my place, you'd better think twice. You know me, so I'm not going to bother telling you how serious I [am] about this."

(N.T. 122; District Exhibit 6(4)).

30. In May of 2007, Trish Pala was working on the yearbook, and she sought technical advice regarding photos for yearbook publication. The DOC referred Ms. Pala to Mr. Wycko for assistance. On May 7, 2007, Mr. Wycko sarcastically e-mailed Trish Pala as follows: "There's this crazy new invention called the 'Internet.' Have you heard of it? A 20 second Google search for "iPhoto batch black and white" returned this as the top hit." Ms. Pala forwarded Mr. Wycko's response to the DOC who in turn forwarded it to Mr. Burd and informed him that Ms. Pala was reportedly feeling belittled by Mr. Wycko's response. (N.T. 178; District Exhibit 6(6)).

31. On June 7, 2007, Dr. Estep and Mr. Burd decided that the District did not need Mr. Wycko to work during the summer months because the purpose of his ITS position is to help teachers who are not at the District during the summer. Also, the high school teachers had a new full-time technology coach. Dr. Estep and Mr. Burd rewrote the job description for the ITS position wherein they changed the position to a nine-month position and maintained the K-8 focus on services. On July 1, 2007, Dr. Estep officially notified Mr. Wycko that he would not be working that summer and his salary was decreased to reflect his nine-month status. (N.T. 115-117, 123, 145-147, 163-165, 168, 172 195; District Exhibits 5(B)(1) & (2)).

32. At some point in time, Mr. Wycko created his own blog. Mr. Burd directed Mr. Wycko to remove his blog from the District's server because he believed it to be an inappropriate presentation and advertisement for himself. In the blog, Mr. Wycko states that his "personal mission in life is to be awesome." He further states that "[a]s the saying in my head goes, there are two kinds of people in the world. People who know that I am awesome, and people who haven't met me yet!" (N.T. 188-189; District Exhibit 10(1) & (3)).

33. On June 24, 2007, Mr. Wycko wrote an e-mail to Matt McSherry as follows: "Personally, I'd like to see the district crash and burn because of their decision to cut my hours." (District Exhibit 11 (A)(16)).

34. On July 7, 2007, Mr. Wycko began selling, on eBay, computer discs containing the Macintosh Jaguar Operating System Version 10.2 which the District received from Macintosh for its computers. The face of each disc expressly prohibits the sale of the discs. (District Exhibit 7(A)(1) & 7(B)(1)).

35. On July 9, 2007, Mr. Wycko wrote an e-mail to Summer Hill and stated as follows: "[The DOC] is fucking lucky I'm not working at the ESC [education services center] this summer because I probably would have walked over and spit in her fucking disgusting face. . . What a back-stabbing, two-faced evil bitch. . . . What a conniving, under-handed, piece of shit she is." (District Exhibit 11(B)(3)).

36. Late at night, on Sunday, July 22, 2007, at 10:27 P.M., Mr. Wycko used his District issued security card to gain access to the education service center (ESC) building. Mr. Wycko was not working at the District at this time of the year in 2007. (N.T. 213-214; District Exhibit 7(F)(1)).

37. On July 25, 2007, Mr. Wycko wrote an e-mail to Dave Ehrhart stating that "[Dr. Estep] is just as dumb and incompetent as the rest of the ESC staff, only she is better at hiding it. She is one of the most two-faced people I have ever met." (District Exhibit 11(B)(1)).

38. On August 19, 2007, Summer Hill wrote Sue Sheffer asking for unused "airport base stations" for her apartment so she would not have to pay Verizon for a wireless modem. On August 20, 2007, Ms. Sheffer responded that the District planned on establishing a lottery system for unused equipment. Also, on August 20, 2007, Mr. Wycko responded to Ms. Hill that the translation of Ms. Sheffer's response was as follows:

Once Joe and Rick [Burd] give them to every jackass administrator that will probably never use it, you dumbass teacher peons can beg for their scraps.

I'm guessing that is a no. If I kissed Rick or Joe's ass, I'm sure they'd give me one, but is that really worth \$50? I don't think so. . . .

This is just a small taste of the dumbass lunacy that I've had to deal with since Rick came on board and Joe started kissing his ass. They make a stellar team. Ten to one odds, those base stations will never see the light of day. . . . Talk about a waste of money, both on the iPods and on Rick's salary.

(District Exhibit 11 A(17)).

39. At the beginning of the 2007-2008 school year, Dr. Estep and Mr. Burd learned that Mr. Wycko sold District computer discs on eBay. On October 2, 2007, Dr. Estep and Mr. Burd met with Mr. Wycko at the middle school principal's office where Mr. Wycko admitted to selling the discs on eBay. During that meeting, Dr. Estep and Mr. Burd confiscated Mr. Wycko's District issued laptop computer to conduct a further investigation of his computer files and placed Mr. Wycko on suspension with pay. (N.T. 124-127, 135-139, 198; District Exhibit 8(1)).

40. One of the District's technology persons discovered an encrypted file on Mr. Wycko's computer. On October 18, 2007, Dr. Estep called Mr. Wycko at his home to obtain the password for the encrypted file on his computer. The file name was "Get Bent." Mr. Wycko denied knowing the password to the "Get Bent" file and informed Dr. Estep that there was nothing in that file. (N.T. 127-128; District Exhibit 7(C)(1) & 7(D)(1)).

41. The technology person deciphered the password encryption and discovered that the "Get Bent" file was not empty. The Network Administrator, Mr. Lucia, determined that Mr. Wycko's password was a stylized version of the word "pyramid" except the letter "a" was replaced by the number "4" and the letter "i" was replaced by the number "1" (Pyr4mld). This password is the same password that Mr. Wycko uses to access the Union's website as webmaster. The "Get Bent" file contained another nine subfile folders and a document. One of the subfile folders was called "personal" and contained another thirteen subfile folders, one of which was labeled "eBay Auctions." (N.T. 128-130, 209-211; District Exhibit 7(D)(1) & (D)(2)).

42. As a result of investigating Mr. Wycko's District issued laptop computer, the District determined that, between July 7, 2007 and September 8, 2007, Mr. Wycko sold approximately 18 computer discs containing the Jaguar Operating System. Mr. Wycko lied to Mr. Burd and Dr. Estep when he represented to them that the "Get Bent" file was empty and that he did not know the password to open the file. (N.T. 126-128; District Exhibit 7(A)(1) & 7(B)(1)).

43. On November 13, 2007, the District converted Mr. Wycko's suspension with pay to a suspension without pay. The District issued to Mr. Wycko a Notice of Right to Hearing and Statement of Charges. On January 21, 2008, the school board approved the termination of Mr. Wycko. (District Exhibit 8(3), (4) & (6)).

DISCUSSION

The Union claims that the District independently interfered with and coerced employees in the exercise of their protected rights and discriminated against Mr. Wycko for his and his mother's protected activity when it did the following: (1) placed Mr. Wycko on a set schedule to work with K-8 teachers thereby restricting his high school time to one day per week; (2) reduced his work year from 12 months to nine months and effectuated a concomitant pay decrease of \$10,000.00; and (3) suspended and eventually terminated Mr. Wycko.

Discrimination

In a discrimination claim, the complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employee engaged in activity protected by PERA; (2) that the employer knew that the employee engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employee's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). An employer commits an unfair practice when it retaliates against an employee for the protected activity of a relative. Ronald Pofi v. Allegheny County, 28 PPER ¶128043 (Proposed Decision and Order, 1997)(citing NLRB v. Advertisers Manufacturing Company, 823 F.2d 1086, 125 LRRM 3024 (7th Cir. 1987)(holding that an employer committed unfair labor practice by firing management level employee in retaliation for her son's union activity)).

Because direct evidence of anti-union animus is rarely presented or admitted by the employer, the Board and its examiners may infer animus from the evidence of record. Borough of Geistown v. PLRB, 679 A.2d 1330 (Pa. Cmwlth. 1996); York City Employees Union v. City of York, 29 PPER ¶ 29235 (Final order, 1998). An employer's lack of adequate reason for the adverse action taken may be part of the employe's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994).

The Board will give weight to several factors upon which an inference of unlawful motive may be drawn. In PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether anti-union animus was a factor in the [adverse action against] the Complainant." Id. at 380. These factors include the entire background of the case, including any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employe, the effect of the employer's adverse action on other employes and protected activities, and whether the action complained of was "inherently destructive" of important employe rights. Centre County, 9 PPER at 380.

The close timing of an employer's adverse action alone is not enough to infer animus, but when combined with other factors can give rise to the inference of anti-union animus. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984). Adverse employer action closely following an employer display of union animus, further combined with an employer's failure to adequately explain its adverse actions or its shifting reasons for an adverse action, can support an inference of anti-union animus and may be part of the union's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Mere suspicion or conjecture is insufficient to sustain a discrimination charge. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311, 314 (Pa. Cmwlth. 1974).

For Section 1201(a)(3) cases, the Board has adopted the analysis of Wright Line, Inc., 251 N.L.R.B. No. 150, 105 L.R.R.M. 1169 (1980). Teamsters, Local 776 v. Perry County, 23 PPER ¶ 23201 (Final Order 1992); Washington Township Municipal Authority, 20 PPER ¶ 20128 (Final Order, 1989); Township of Springfield, 12 PPER ¶ 12354 (Final Order, 1981). In Perry County, the Board stated that, under Wright Line, "once a prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity." Perry County, 23 PPER at 514. Upon the employer's offering of such evidence, "the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual." Teamsters Local #429 v. Lebanon County, 32 PPER ¶ 32006 at 23 (Final Order, 2000). "The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct." Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 at 64 (Final Order, 1992). The parties, however, may elicit and offer evidence in support of their primary burdens of proof or their rebuttal case at any time during the proceeding.

More importantly, however, the burden only shifts to the employer if the Union establishes a prima facie case of discrimination. Id. In Teamsters, Local No. 764 v. Montour County, 35 PPER 147 (Final Order, 2004), the Board opined that "Wright Line requires the complainants to establish a prima facie case that protected activity was the motivating factor in the employer's decision. Then and only then must the employer counter that prima facie case.'" Id. at 452 (emphasis added)(quoting Temple 23 PPER at 64). "The burden, therefore, is first on the complainant to affirmatively establish every element required in a discrimination claim regardless of whether the employer specifically challenges any or all element(s)." Montour County, 35 PPER at 452.

As an initial matter, I reject most of Mr. Wycko's testimony. I base this determination on Mr. Wycko's appearance, general bearing, conduct on the stand, demeanor, manner of testifying, candor, frankness and the contradictions between his testimony and other record evidence. Mid Valley Education Association v. Mid Valley School District, 25

PPER ¶ 25138 (Final Order, 1994); Keystone Education Center Charter School Education Association v. Keystone Education Center, Inc., 30 PPER ¶ 30167 (Final Order, 1999)(opining that the hearing examiner is free to accept or reject the testimony of any witness, in whole or in part, based on the witness's credibility).

For instance, I do not believe that Mr. Wycko discovered the Jaguar Operating System discs in the District's dumpster in the summer of 2005 and held on to them for two years before selling them. (N.T. 66-67). The timing of the disc sales coincides with the timing of his work-year and salary reduction as well as his unexplained late-night summer entry into the ESC building. Although Mr. Wycko testified that he did not dislike fellow employes and administrators (N.T. 76-77), his degrading and vulgar e-mails support a contrary conclusion. Illustratively, he wrote that the DOC "is fucking lucky I'm not working at the ESC this summer because I probably would have walked over and spit in her fucking disgusting face." (F.F. 35) (emphasis added). He further wrote that Dr. Estep "is just as dumb and incompetent as the rest of the ESC staff, only she is better at hiding it. She is one of the most two-faced people I have ever met." (F.F. 37). And he wrote that "[t]his is just a small taste of the dumbass lunacy that I've had to deal with since Rick came on board and Joe started kissing his ass." (F.F. 38).³

Although Mr. Wycko testified that he welcomed summers off and did not mind the work-year and salary reduction, (N.T. 73-74), his e-mails again demonstrate that he was not truthful. Indeed, after the District built a new high school and its administrators enthusiastically dedicated financial and human resources to developing a state of the art computer-based and technology-based educational environment, Mr. Wycko wrote that he would "like to see the district crash and burn because of their decision to cut my hours." (F.F. 33). Although he testified that he loved his job at the District, (N.T. 51), the weight of the contrary evidence of record shows that he despised the administrators and looked for jobs at other districts during his employment at the District. Moreover, the record supports the inference that Mr. Wycko lied to the District about his password to open the "Get Bent" file on his laptop computer and about the existence of stored information in that file, especially since he refused to offer the District his commonly used password as a possibility for opening the file.

Unable to rely on Mr. Wycko's testimony, the Union has failed to establish a prima facie case of discrimination. The Union argues that the District's attitude toward Mr. Wycko changed after Mr. Wycko provided a significant amount of assistance to the Union by creating the Union's website and e-mail system and promoting and preparing for the "Battle of the Buildings" fundraiser in April, 2007. (District Brief at 7). The District, contends the Union, became upset with Mr. Wycko's mother, Ms. Acri, who was the Union president at the time, for refusing to permit the District to have access to the photos that Mr. Wycko had taken of the "Battle of the Buildings." The Union further maintains that changing Mr. Wycko's position from a twelve-month to a nine-month position was an attempt to force Mr. Wycko to resign his employment, as allegedly evidenced by the fact that Mr. Wycko was asked if he really wanted to work for the District. (Union Brief at 8).

The Union also argues that the District intentionally decided to build a case against Mr. Wycko, after he did not resign, and asked Mr. Lucia to monitor Mr. Wycko's computer activities. It was then that the District discovered that Mr. Wycko sold discs on eBay. (Union Brief at 8-9). The Union further alleges that, the District was so upset with the negotiations for a new collective bargaining agreement and with Mr. Wycko's mother, it retaliated against the Union by taking adverse action against the Union President's son, Mr. Wycko. (Union Brief at 9). The record, however, does not support the Union's position.

The record shows that the District knew that Mr. Wycko supported his mother and the Union. He created a Union website and e-mail accounts as a vehicle for presenting and exchanging ideas regarding the Union's bargaining position during the negotiations for a new collective bargaining agreement. He also supported the Union's fundraiser. However,

³ Clearly these statements are not relied upon or offered for the truth of the matters asserted. Dr. Estep clearly is not "dumb" or "incompetent" and certainly the District did not offer these statements to establish that. The pejorative descriptions of Mr. Burd and Mr. Lucia are offered and relied upon to show that the frame of mind of Mr. Wycko as contrary to his testimony.

the Union's case fails to establish that any of the District's actions regarding Mr. Wycko were motivated by these Union activities.

Timing of adverse employment action alone is insufficient to substantiate a discrimination claim. Montour, supra. The only evidence presented in support of the Union's discrimination claim is the timing of the District's actions regarding Mr. Wycko. The Union presented evidence that, in January of 2006, the Union and the District began negotiating a new collective bargaining agreement. In October of 2006, Mr. Wycko created the Union's website and e-mail accounts. Prior to the April, 2007 "Battle of the Buildings" fundraiser, Mr. Wycko made preparations for the event and promoted it. At the fundraiser, Mr. Wycko took photos that he posted in slideshow form on the Union's website. Ms. Acri refused to provide the District with independent access to those photos. Several months later, in June of 2007, Dr. Estep and Mr. Burd changed Mr. Wycko's position from a twelve-month to a nine-month position and thereby reduced his salary. After spending the majority of his time at the high school, the District scheduled Mr. Wycko to support K-8 on a set schedule. There is no evidence to support a nexus between Union activity and District action. Nor is there sufficient evidence to support an inference of animus against Mr. Wycko for being the Union president's son, creating a Union webpage or supporting the Union fundraiser.

The record shows that there were many exciting new and drastic changes at the District between the summer of 2005 and Mr. Wycko's suspension in the fall of 2007. The District was constantly in a state of flux to adjust to these changes. The new high school and the newly purchased technology combined with "Classrooms for the Future Funding" provided opportunities as well as challenges for the District. Mr. Burd and Dr. Estep did a magnificent job in restructuring the District and allocating resources for the benefit of the student body at the District. These adjustments required the District to redirect Mr. Wycko and adjust his job duties for the benefit of the District. Mr. Wycko's ITS position was initially created when the District moved to a new high school and provided teachers and students with laptops rather than using the old computer lab system. The District legitimately required Mr. Wycko's services at the high school for the 2005-2006 school year. The following year, the teachers were better adjusted to the new high school's physical and technological changes. The other grades had not received Mr. Wycko's attention. Some teachers in K-8 were unaware of Mr. Wycko's position and his charge to help teachers with projects. Therefore, the District legitimately directed Mr. Wycko to spend much more time getting to know teachers in K-8. Through "Classrooms for the Future Funding," the District received funding for a technology coach to teach technology at the high school. As a result, the District no longer needed Mr. Wycko at the high school and thereby directed him to focus only on K-8. Moreover, as a result of these changes, i.e., funding for a high school technology coach, the District legitimately decided, in June 2007, not to utilize Mr. Wycko during the summer because his job duties required him to help teachers (and/or students), who were not present during the summer months and because the non-District paid for technology coach was available.

Additionally, the District discovered through routine surveillance that Mr. Wycko had sold what the administrators believed to be District property on eBay.⁴ The District offered credible substantial evidence that constitutes legitimate business reasons for every decision. Notwithstanding whether or not Mr. Wycko stole computer discs from the District or retrieved them from the District's dumpster, the District believed that he sold District property and believed that Mr. Wycko lied to District administrators during their investigation of the incident. The District's reasons do not have to be correct, they just have to be devoid of union animus as is the case here. Moreover, the Union did not establish that the reasons for the District's actions toward Mr. Wycko were pretextual. The Union's case inadequately depends on timing alone and mere conjecture, Shive, supra, without any other evidence of union animus or shifting, inadequate employer explanation, as required by Stairways, supra.

The Union did not credibly establish the other factors the Board considers relevant to establishing a discrimination claim. Indeed, consideration of those factors contradict

⁴ The Union did not present credible substantial evidence to support a finding that the District initiated surveillance on Mr. Wycko because of his Union activities. The credible evidence of record shows that the District routinely monitors all employees.

the Union's position. Considering the entire background of the case, there is no evidence of any anti-union activities or statements by District administrators that could tend to demonstrate an unlawful state of mind. There is no evidence of disparate treatment as compared to similarly situated employees. Moreover, the District adequately explained the reasonable and independent basis for all of the complained of actions against Mr. Wycko. There is no evidence that any of the action taken had a negative effect on other employees and their protected activities or that the actions complained of were "inherently destructive" of important employee rights. Centre County, 9 PPER at 380.

Also, the Union did not present evidence to establish an inference that the District's administrators or its attorney held any feelings of animus toward Ms. Acri for her conduct during negotiations. The Union did not present evidence to establish or support an inference that the District's administrators held feelings of animus toward Mr. Wycko because of his mother's Union advocacy. Indeed, the entire background of the case supports the inference that the District respects and admires Ms. Acri. The District hired Mr. Wycko when his mother was the Union President and after the District administrators and labor counsel had spent many years enduring contentious negotiations with Ms. Acri. The District did not suddenly develop a dislike of Ms. Acri, because of negotiations in 2006, after negotiating with her for the past 30 years, and then also decide to effectuate that alleged animosity through Ms. Acri's son, who they just recently hired.

Because the Union did not establish a prima facie case of discrimination or retaliation, the burden never shifted to the District to establish that it would have taken the action complained of independent of the Union activity. Montour County, supra. However, as an alternative basis for purposes of Board and appellate review, I conclude that the District also met its burden of proving that it would have taken all of the complained of actions with respect to Mr. Wycko with or without any Union or protected activity for the reasons stated above.

Also, the Union's claim that the District demonstrated that it wanted Mr. Wycko to resign when Dr. Estep asked Mr. Wycko if he really wanted to continue working at the District is equally without merit. The substantial evidence of record supports the District's legitimate understanding that Mr. Wycko was indeed unhappy with his employment at the District and was seeking other employment. This understanding gave Dr. Estep good reason to inquire of Mr. Wycko if he liked his job and wanted to stay. The record shows a poor job performance by way of Mr. Wycko's attitude. Mr. Wycko's e-mails to coworkers were derogatory, sarcastic, humiliating and threatening. The District hired Mr. Wycko as a service provider. But he treated the District's customers for those services, i.e., teachers and administrators, with contempt, which negatively impacted those teachers' and administrators' desires to seek the help he was hired to give them. (F.F. 30, 27, 29, 30). Indeed, the degree of his animosity towards administrators and coworkers is evidenced by his profanity and vulgarity of expression. Also, Mr. Wycko's letter requesting a raise of \$10,000.00 by the end of the 2006-2007 school year indicates that he was deeply dissatisfied with his salary and that he lacked respect for coworkers. Rather than showing an intent to force Mr. Wycko to resign, Dr. Estep's inquiry legitimately exposed and sought to correct a poor attitude that resulted in a chilling affect on coworkers seeking his expertise and thereby resulted in a poor job performance.

Accordingly, the District did not engage in conduct that violated Section 1201(a)(3) of PERA when it either cumulatively or independently did the following: placed Mr. Wycko on a set schedule to work with K-8 teachers, thereby restricting his high school time to one day per week; when it reduced his work year from twelve months to nine months and effectuated a concomitant pay decrease of \$10,000.00; and/or when it suspended and eventually terminated Mr. Wycko.

Independent 1201(a)(1): Interference, restraint, Coercion

The Union also claims that the same actions complained of above also constitute an independent violation of Section 1201(a)(1) of PERA because the District's conduct regarding Mr. Wycko allegedly interferes with, restrains or coerces employees in the exercise of their protected rights. (Union Brief at 6-9). An independent violation of

Section 1201(a)(1) occurs, "where in light of the totality of the circumstances, the employer's actions have a tendency to coerce a reasonable employe in the exercise of protected rights." Fink v. Clarion County, 32 PPER ¶ 32165 at 404 (Final Order, 2001). See also, Lakeland Sch. Dist., *supra*. Under this standard, the complainant does not have to show improper motive or that any employes have in fact been coerced. Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI, 35 PPER 97 (Final Order, 2004).

A review of the entire record as a whole and the totality of the circumstances reveals that the District's actions regarding Mr. Wycko do not have a tendency to coerce a reasonable employe in the exercise of protected rights or supporting the Union and its programs. The District's actions regarding Mr. Wycko simply have no nexus to any of the Union or protected activities in which he engaged. There is no nexus, no motive and no activity that is inherently destructive of employe rights.

Accordingly, the Union did not meet its burden of proving the necessary elements of its causes of action under Section 1201(a) (1) & (3), and the charge of unfair practices is dismissed in its entirety.

CONCLUSIONS

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

1. The District is a public employer under PERA.
2. The Union is an employe organization under PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District has not committed unfair practices within the meaning of Section 1201(a)(1) either independently or derivatively.
5. The District has not committed unfair practices within the meaning of Section 1201(a)(3).

ORDER

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

HEREBY ORDERS AND DIRECTS

That the charge is dismissed and the complaint is rescinded.

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 seventeenth day of March, 2009.

PENNSYLVANIA LABOR RELATIONS BOARD

Jack E. Marino, Hearing Examiner