COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

LEHIGHTON AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-09-450-E
LEHIGHTON AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On November 13, 2009, the Lehighton Area Educational Support Personnel Association PSEA/NEA (Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Lehighton Area School District (District)alleging that the District violated Section 1201(a)(1), and (5) of the Public Employe Relations Act (PERA).

On December 10, 2009, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was scheduled for hearing on March 24, 2010, in Allentown, Pennsylvania. The hearing took place on that date and 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 hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The District is a public employer.

2. The Association is an employe organization.

3. The teachers' professional bargaining unit informed the District, by letter dated June 5, 2009, that it intended to be "working the contract" for the upcoming school year. The letter went on to explain that the teachers would not be working any hours outside the contractually mandated school day. Getting special needs students to and from busses before and after contractual working hours was a task specifically mentioned as one the teachers would not be performing. (Association Exhibit 1).

4. In March of 2010 the Association was negotiating a successor collective bargaining agreement. (N.T. 11).

5. At the start of the 2009-2010 school year, August 26 and 27, 2009, were in-service days for bargaining unit members. On one of those two days, the District held a meeting with bargaining unit members, and asked them if they'd be willing to start their work-day early and leave early. The change was requested to fill the vacuum left by the teachers' refusal to work morning bus duty for special needs children. All but one of the bargaining unit members present volunteered. And, in point of fact, all arrived early on the first school day as requested. For at least the last thirteen years, the District had directly asked individual bargaining unit members if they would voluntarily come in early and leave early for bus duty.(N.T. 15, 17-18, 59-61, 65, 89-94, 96).

6. On August 27, 2009, the Association's president, Diane Koch, sent an e-mail addressed to "Dear Administrator and School Board President." In that e-mail Koch recites that "employees are being asked or requested to change their hours...." She goes on to conclude that such actions would "violate the status quo," and "would result in this association filing an Unfair Labor Practice against the district." (N.T. 19; Association Exhibit 3).

7. On August 31, 2009, the District Superintendant, James A. Kraky, summoned Koch to his office and handed her a letter concerning the possibility that bargaining unit members might not report early as they had agreed to. The letter made it abundantly clear that the District would consider it insubordination if bargaining unit members did not report early, as agreed. (N.T. 21-22, 64, 66).

8. On September 1, 2009, the principal of the middle school sent each member of the middle school bargaining unit a thank you note for their willingness to start earlier in the day. (N.T. 22-23; Association's Exhibit 5).

DISCUSSION

The Association charges the District with violating Section 1201(a)(1) and (5) of PERA because the District "engaged in direct bargaining with the members of the bargaining unit," and "chang[ed] the *status quo ante* without bargaining."

The Association also alleges that the District "alter[ed] the working rules and conditions of employment without bargaining," and engaged in "intimidation of the bargaining unit by threatening dismissal without any basis in fact that the bargaining unit [would] not comply with the employer directive." The District, of course, denies all these allegations.

Both parties made closing arguments at the close of the hearing and neither side cited any case law in support of its position. Reviewing the law, and then applying the facts, shows why this charge is dismissed in its entirety.

The Board will find an independent violation of Section 1201(a)(1) of PERA "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). Under this standard, the complainant does not have a burden 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). However, an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. Ringgold Educ. Ass'n v. Ringgold Sch. Dist., 26 PPER ¶ 26155 (Final Order, 1995).

The factual underpinnings of the Association's charge involve a meeting at the start of the 2009-2010 school year wherein bargaining unit members were asked to change the start time of their workday. In order to understand the Association's charge, this meeting needs to be viewed in the context of the contractual negotiations then ongoing.

At the start of the 2009-2010 school year, the District was aware that the Lehighton Area Education Association, *i.e.* the teachers' professional association, was "working the contract." As used by the teachers' association, that term indicated that teachers would not be working outside the contractually mandated work hours until a contract was agreed to. Part of the work teachers would not perform was getting special needs children to and from busses. In the past, both teachers and Association members did this work.

There is a past practice between the parties that the District regularly asks individual bargaining unit members to alter their starting and stopping times so they arrive early to assist special needs students to and from busses, before the school day starts.

Record evidence shows that the District had a meeting with the bargaining unit members from the middle school at the start of the school year, on August 26 or 27, 2009. At that meeting, the District asked all present to be at school early to assist those special needs students. All acquiesced, but one who refused the request.

The following day, Koch, the Association's president, sent an e-mail addressed to "Dear Administrator and School Board President," registering the Association's opposition to bargaining members' being asked to alter their schedules. According to Koch, such actions "would violate status quo and would result in this association filing an Unfair Labor Practice against the district." (Association Exhibit 3). Nevertheless, according to Koch , "I did not instruct my members not to volunteer." (N.T. 38). When asked by bargaining unit members about volunteering, Koch testified, "My response to them was if they were asked to volunteer, volunteering is a personal choice. They can choose to volunteer or choose not to volunteer." (N.T. 17).

The following Monday, August 31, 2009, Kraky, the superintendant, summoned Koch to his office where he handed her a letter. The letter was addressed not to Koch by name, but rather to "Dear Educational Support Personnel (ESP) Association President." While obviously heavy-handed, condescending and fastuous in tone, the letter essentially told the Association that the District expected bargaining unit members to keep their commitment for the schedule change discussed the previous week.

The letter is rebarbative, yet it threatens discipline only if bargaining unit members do not perform as they agreed to the week before. As such, it does not tend to coerce reasonable employes in the exercise of protected rights. The letter did not coerce employes to agree to start early. But, once those employes had committed themselves to that early start time, the District expected them to perform that task. Muddling up the works somewhat, the Superintendant cavalierly included terms of art in labor law that have nothing to do with the issue addressed in the letter, and which are incorrectly used.[1]

By way of example, he writes that the District "will continue in the future to exercise our management prerogatives in regard to scheduling of personnel." (Association exhibit 4). The historic practice of allowing the District to individually approach bargaining unit members for schedule changes is not a managerial prerogative, but rather the accepted way the parties have come to deal with a mandatory subject of bargaining, and is therefore an established past practice. International Association of Fire Fighters Local 1749 v. City of Butler, 33 PPER ¶ 33137 (Final Order, 2001). While the super-intendant's letter may be supercilious, it does not violate Section 1201(a)(1) of PERA.

And, since there existed a past practice between the parties concerning the District's negotiating individual starting times directly with bargaining unit members, there is no change in the *status quo ante*, or any unilateral change in the terms and conditions of employment. *See* City of Butler, 33 PPER ¶ 33137 (Order Directing Remand to Hearing Examiner for Further proceedings, 2001); PLRB v. South Butler County School District, 9 PPER ¶ 9023 (Nisi Decision and Order, 1978).

Consequently, there is no violation of Section 1201(a)(5) of PERA, and this charge is dismissed in its entirety.

CONCLUSION

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 within the meaning of Section 301(1) of PERA.

2. Association is an employe organization within the meaning of Section 301(3) of PERA.

3. The Board has jurisdiction over the parties.

4. The District has not committed unfair practices within the meaning of Section 1201(a)(1) and (5) of PERA.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the charge is dismissed and the complaint 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 decision and order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-fourth day of August, 2010.

PENNSYLVANIA LABOR RELATIONS BOARD

_____

TIMOTHY TIETZE, HEARING EXAMINER

[1] It appears that neither party is shy about loosely using legal terms of art. (Association Exhibit 3, 4).