COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

GREATER NANTICOKE AREA EDUCATIONAL SUPPORT PERSONNEL ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-19-110-E
GREATER NANTICOKE AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On May 7, 2019, the Greater Nanticoke Area Educational Support Personnel Association, PSEA/NEA (Association or Union) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against the Greater Nanticoke Area School District (District or Employer), alleging that the District violated Section 1201(a)(1),(3), and (5) of the Public Employe Relations Act (PERA or Act) by terminating Pamela Aftewicz on January 10, 2019 in retaliation for her protected activity.

On May 24, 2019, the Secretary of the Board issued a Complaint and Notice of Hearing, assigning the charge to conciliation, and directing a hearing on July 9, 2019, if necessary. After several continuances at the request of both parties, the hearing eventually ensued on January 6, 2022, at which time the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence.[1] The parties each filed separate post-hearing briefs in support of their respective positions on March 16, 2022.

The Hearing 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 within the meaning of Section 301(1) of PERA. (N.T. 7)

2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7)

3. The Association is the exclusive bargaining representative for a unit of nonprofessional employes working at the District. (Exhibit A-2)

4. The Association and the District were parties to a Collective Bargaining Agreement (CBA) effective July 1, 2016 through June 30, 2020. (Exhibit A-2)

5. Pamela Aftewicz began working for the District in 2016 as a Teacher's Aide until she was fired on January 10, 2019. (N.T. 22-25; Exhibit A-11)

6. On December 20, 2017, Aftewicz submitted a request for an unpaid leave of absence from March 21 through March 28, 2018, which was approved by

[1] The hearing was held virtually by the agreement of the parties in light of the ongoing Covid-19 pandemic.

the Superintendent, Ronald Grevera. However, the trip was cancelled, and Aftewicz remained at work for the requested days. (N.T. 29-30; Exhibit A-11)

7. On October 23, 2018, Aftewicz submitted another request for unpaid leave for the days of December 6, 7, 10, 11, and 12, 2018. She testified that she did not think it would be a problem since her previous request was approved, but she never went on that vacation. She bought an airline ticket in advance, thinking her request would not be denied. (N.T. 29-30; Exhibit A-11)

8. At some point after Aftewicz bought her airline ticket, Grevera denied her request for unpaid leave. (N.T. 30, 58-59, 63-64; Exhibit A-11)

9. Aftewicz tried to get a refund for the ticket, but she was not successful. She met with Grevera and advised him that she could not get her money back. Grevera did not change his mind regarding the leave request and informed her that if she went, he would recommend her termination to the School Board for insubordination and job abandonment. (N.T. 58-59, 63-64; Exhibit A-11)

10. Aftewicz went on the trip and missed five days of work, after which Grevera suspended her without pay on December 12, 2018 and recommended dismissal to the School Board. (N.T. 30-31; 63-64; Exhibit A-11)

11. On December 16, 2018, the Association filed a grievance on behalf of Aftewicz challenging the discipline. (N.T. 29-31; Exhibit A-3)

12. On December 18, 2018, the Association filed another grievance on behalf of Aftewicz challenging the denial of her unpaid leave request. (N.T. 29-31; Exhibit A-4)

13. The Association advanced both grievances to Step 3 of the grievance arbitration process, which includes review by the School Board. On January 2, 2019, the School Board President Tony Prushinski wrote "[School] Board will vote to terminate on 1-10-19" as the disposition. (N.T. 31-32, 90; Exhibit A-3, A-4)

14. On January 10, 2019, the District's School Board voted in a public meeting to terminate Aftewicz 8-0 with one person abstaining. Aftewicz attended the meeting and testified that she left the meeting room immediately following the vote because she became upset. (N.T. 34-40, 90, 93-94, 101-102; Exhibit A-6, A-7)

15. When Aftewicz left the meeting, Prushinski immediately made a series of remarks to those still in attendance at the public meeting. The Association entered a recording of the remarks as Exhibit A-14. The parties also stipulated to a transcript of the remarks, which provided as follows:

> Prushinski: I would just like to say something and I've said it many times before. When people come to a meeting and they decide to walk out in the middle of the meeting I don't appreciate that. Stay for the meeting. That's not nice. It's happened in the past and I've commented on it every single time. So what happened today and I'm disgusted by it, completely disgusted, if you come to a meeting at 7 o'clock, you stay to the end. I don't need anyone slamming the door and waving their [sic] hands around at anybody. Nobody at all.

Two other people: She sounded like – [unintelligible]

Prushinski: Well, that should – you know, we can agree or disagree. But when you have – we're here for the children. We're not here for our ourselves. We're here for the taxpayers. We're not here for any individual person. We're here for the [S]chool [D]istrict. And as the [School] [B]oard can tell you, we've had people walk out before and I stopped it. In the middle of them I stopped it and told them to go. And if anybody decides in the future to walk out during the meeting, let them go but I will comment. That's ignorant. Don't come. The [S]chool [B]oard will do what they think is right with the consent of our solicitor and our superintendent. This man gets paid and this man gets paid. That's why we have them here. This isn't a popularity contest or this isn't a show. This is a place where you come to work and you do your job. And if there's any kind of circumstances from this day forward or from this day to the past twenty years, we have two men who advise the [School] [B]oard on what to do and how to do it. So if it's a relative of mine and my niece sitting in the back or a child or Mr. Yengieski or Mr. Marks, decide to pick up and walk out during the middle of a meeting, you're going to hear it from me. Rudeness – pure rudeness! And I would just like to remind everybody, every single person working at this [D]istrict got voted in by the [S]chool [B]oard. This [School] Board. 75 percent of the people working at this [D]istrict we're [sic] voted in by these very individuals. And that's the way it goes. This is America. Do we have a right to walk out? Absolutely. But it's rude. Thank God those children weren't here to see it. We're here for the children, not for adults that take advantage.

Other Person: You don't get paid for this—

Prushinski: Absolutely. I don't get paid for this and I'll tell you something. When someone asks me for a position, I do everything possible for that person to get that position and so does the whole [School] Board. This [School] Board gets blamed for nonsense, but they do the right thing. And anybody that walks out, I'm glad they [sic] walked out, because I don't want them at Nanticoke. We want role models, the teachers and the principals here, that's who we want. We don't want someone who slams the door in the middle of a [S]chool [B]oard meeting. I wanted to get out of here early, and now we'll be here later than ever.

(N.T. 102-103; Exhibit A-15)

16. The Association processed the grievance challenging Aftewicz's discipline to arbitration, and on November 14, 2019, Arbitrator Thomas Krapsho issued an Opinion and Award finding that the District did not have just cause to terminate her. The Arbitrator also found that the District did have just cause to suspend Aftewicz for insubordination and reinstated her without backpay, benefits, or seniority. (Exhibit A-11)

17. The District has since reinstated Aftewicz consistent with the Award where she remains a District employe. (N.T. 21-23, 25)

DISCUSSION

In its charge, the Association alleged that the District violated Section 1201(a)(1), (3), and (5) of the Act[2] by terminating Pamela Aftewicz on January 10, 2019 in retaliation for her protected activity. Specifically, the Association alleged that the District was unlawfully motivated because of the two grievances challenging Aftewicz's discipline and use of unpaid leave, which occurred on December 16, 2018 and December 18, 2018, respectively. The District, on the other hand, contends that the charge should be dismissed because the Association failed to meet its burden of proving a prima facie case, and there were legitimate nondiscriminatory reasons for terminating Aftewicz.

In a Section 1201(a)(3) discrimination claim, the Complainant has the burden of establishing the following three-part conjunctive standard: (1) that the employe engaged in activity protected by PERA; (2) that the employer knew the employe engaged in protected activity; and (3) the employer engaged in conduct that was motivated by the employe's involvement in protected activity. Audie Davis v. Mercer County Regional Council of Government, 45 PPER 108 (Proposed Decision and Order, 2014) citing St. Joseph's Hospital v. PLRB, 373 A.2d 1069 (Pa. 1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). 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. Teamsters Local 776 v. Perry County, 23 PPER ¶ 23201 (Final Order, 1992). If the employer offers 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 (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. Mercer County Regional COG, *supra*, citing Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 (Final Order, 1992).

In addition, the Board has recognized that, in the absence of direct evidence, it will give weight to several factors upon which an inference of unlawful motive may be drawn. City of Philadelphia, 26 PPER ¶ 26117 (Proposed Decision and Order, 1995). The factors which the Board considers are: the entire background of the case, including any anti-union activities by the employer; statements of supervisors tending to show their state of mind; the failure of the employer to adequately explain the adverse employment action; the effect of the adverse action on unionization activities-for example, whether leading organizers have been eliminated; the extent to which the adversely affected employes engaged in union activities;

[2] Section 1201(a) of PERA provides that "[p]ublic employers, their agents or representatives are prohibited from: (1) Interfering, restraining or coercing employes in the exercise of the rights guaranteed in Article IV of this act...(3) Discriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization...(5) Refusing to bargain collectively in good faith with an employe representative which is the exclusive representative of employes in an appropriate unit, including but not limited to the discussing of grievances with the exclusive representative. 43 P.S. § 1101.1201.

and whether the action complained of was "inherently destructive" of employe rights. City of Philadelphia, *supra*, *citing* PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing alone is insufficient to support a basis for discrimination, Teamsters Local 764 v. Montour County, 35 PPER 12 (Final Order, 2004), the Board has long held that the timing of an adverse action against an employe engaged in protected activity is a legitimate factor to be considered in determining anti-union animus. Berks Heim County Home, 13 PPER ¶ 13277 (Final Order, 1982).

In this case, the Association has sustained its burden of proving the first two elements of a Section 1201(a)(3) discrimination claim. The record shows that Aftewicz engaged in protected activity by having the Association file two grievances on her behalf protesting her discipline and use of unpaid leave. Likewise, the record shows that the District was aware of this protected activity, as the Superintendent, Ronald Grevera, and the School Board President, Tony Prushinski, were both involved in denying the grievances. (Exhibit A-3, A-4). In its post-hearing brief, the District concedes that the Association has sustained its burden on the first two elements of the test. (*See* District brief at p. 3). The only remaining issue then is whether the District was motivated by Aftewicz's protected activity when it suspended her on December 12, 2022 and eventually terminated her on January 10, 2019. The Association has not sustained its burden of proving the final element of the test.

First of all, the timing of the events here does not support an inference of unlawful motive on behalf of the District. Although the Association is quick to point out that Aftewicz's discipline immediately followed the December 16 and 18, 2018 grievances, the record shows that Grevera suspended Aftewicz and recommended her discharge on December 12, 2018. In fact, Grevera informed Aftewicz before she even took her unpaid leave beginning on or about December 6, 2018 that if she went, he would recommend her termination to the School Board for insubordination and job abandonment. Needless to say, the Superintendent could not possibly have been unlawfully motivated as his conduct predated the Association's grievances challenging the discipline and denial of unpaid leave. As such, the timing of the events here militates against rather than in favor of a finding that Aftewicz's termination was a result of the December 16 and December 18, 2018 grievances. *See* Peter Glasser v. Pennsylvania State System of Higher Education, California University, PERA-C-10-269-E (Proposed Decision and Order, 2011) *citing* Delaware County Prison Employees Independent Union v. Delaware County, 28 PPER ¶ 28005 (Final Order, 1996)(no discriminatory intent found where the genesis of the employer's conduct predated the protected activity on the part of employes).[3]

In support of its argument that the District was unlawfully motivated, the Association also points to several other factors, which allegedly show

[3] While the Arbitrator's November 14, 2019 Opinion and Award does mention that Aftewicz stated to Grevera in an email dated December 5, 2018 that any discipline imposed for her use of unpaid leave would result in a grievance, which immediately preceded Grevera's warning on December 5, 2018 that he would recommend her termination to the School Board if she took the unpaid leave without approval, the Association has neither alleged in the charge nor argued in this proceeding that such a statement was protected by the Act and the source of the District's unlawful motivation. Nor is such an averment borne out by the credible evidence of record here.

discriminatory intent. Aside from the timing of the adverse action, the Association maintains that the School Board President's direct statements should yield an inference of anti-union animus. In particular, the Association contends that Prushinski's written response to both grievances reveals his true intent here, as he stated on the form "[School] Board will vote to terminate on 1-10-19." According to the Association, these statements were threats of retaliation for the December 16 and 18, 2018 grievances. The Association posits that the statements represented that the School Board had already made its decision to terminate Aftewicz at that time, which is particularly troubling given that the second grievance only dealt with the denial of unpaid leave, and not any potential discipline. The Association further contends that Prushinski's discriminatory intent can be gleaned from the grievance forms because he did not actually follow the instructions on the forms of indicating whether the grievances were granted or denied. Instead, he simply wrote that the "[School] Board will vote to terminate on 1-10-19." The Association's argument in this regard, however, is not persuasive.

On that point, the School Board President testified that what he meant in completing the form was that the School Board would vote on a motion to terminate, not that the School Board would vote to definitively terminate Aftewicz. (N.T. 89, 95-97). This testimony has been accepted as credible. While Prushinski may have completed the forms in an inartful manner, this is not the smoking gun the Association alleges it to be, especially given Prushinski's credible testimony that he was simply following the recommendation of the Superintendent and that he was not motivated by Aftewicz's protected activity. (N.T. 80-81, 96). Nor does Prushinski's rant at the January 10, 2019 School Board meeting lead to an inference of unlawful motive either. The Association insists that Prushinski's tone and remarks at the School Board meeting are indicative of anti-union animus as he made them in direct response to Aftewicz leaving the meeting after the vote on her termination. Prushinski's outburst, however, as unfortunate as it may have been, was nevertheless devoid of any reference whatsoever to the Association's grievances or any other protected activity. Instead, the credible evidence of record shows that the District terminated Aftewicz because she requested unpaid leave, which the Superintendent denied, and she took the leave anyway, in defiance of the Superintendent's clear warning that he would recommend her discharge if she did so.

The Association further argues that the District was unlawfully motivated because the School Board had the authority to reject the Superintendent's recommendation and impose a lesser penalty on Aftewicz, which the District should have done because Aftewicz had no prior history of discipline. The Association alleges that the District did not even follow its own progressive disciplinary policy in this regard. However, the Board has held that an employer's lack of just cause as an arbitrator might define the term will not support a finding of discriminatory motivation. Utility Workers Union of America, AFL-CIO v. Hempfield Township Municipal Authority, 41 PPER 11 (Proposed Decision and Order, 2010) citing Bucks County Community College, 36 PPER 84 (Final Order, 2005). Once again, the District has offered credible and compelling reasons for its conduct here, i.e. that Aftewicz openly flouted the Superintendent's clear denial of her leave request, as well as his direct admonishment that he would recommend her termination to the School Board if she went. Why Aftewicz did not simply grieve the denial of her leave request in the first instance before leaving work is a mystery. This Board should not countenance her flagrant insubordination and insulate her from disciplinary repercussions, under the

guise of a discrimination claim, simply because she subsequently resorted to the grievance process. As a result, the charge under Section 1201(a)(3) of the Act must be dismissed.

Finally, the Association also contends that the District committed an independent violation of Section 1201(a)(1) of the Act by essentially terminating Aftewicz immediately after she filed two grievances and subjecting her to a humiliating public excoriation during the January 10, 2019 School Board meeting. The Board has held that 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 employes have been shown in fact to have been coerced. Bellefonte Area School District, 36 PPER 135 (Proposed Decision and Order, 2005)(citing Northwestern School District, 16 PPER ¶ 16092 (Final Order, 1985)). Improper motivation need not be established; even an inadvertent act may constitute an independent violation of Section 1201(a)(1). Northwestern School District, supra. 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. Dospoy v. Harmony Area School District, 41 PPER 150 (Proposed Decision and Order, 2010)(citing Ringgold Education Ass'n v. Ringgold School District, 26 PPER ¶ 26155 (Final Order, 1995)).

In the instant matter, the record does not support a finding that the District has independently violated Section 1201(a)(1) of the Act. As previously set forth above, the District clearly had a legitimate reason for initiating disciplinary action against Aftewicz following her willful insubordination. What is more, the District's legitimate reason justifiably outweighs concerns over any alleged interference with employe rights to file grievances, especially considering that the District began its disciplinary process against Aftewicz before any grievances were even filed. Furthermore, I am unable to conclude that the District's actions would have the tendency to coerce any employes, given that Prushinski did not mention or even allude to the grievances during his outburst at the January 10, 2019 School Board meeting. To the contrary, his comments were actually directed towards Aftewicz leaving in the middle of the meeting. Accordingly, the charge under Section 1201(a)(1) will also be dismissed.[4]

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

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

3. The Board has jurisdiction over the parties hereto.

[4] The Association has not offered any evidence whatsoever to support a violation of Section 1201(a)(5) of the Act either. Nor does the Association argue in its post-hearing brief that the District violated this section. Therefore, the charge under Section 1201(a)(5) is dismissed.

4. The District has not committed unfair practices in violation of Section 1201(a)(1), (3), or (5) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Public Employe Relations Act, the Examiner

HEREBY ORDERS AND DIRECTS

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

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this 17th day of May, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ John Pozniak
John Pozniak, Hearing Examiner