

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ASSOCIATION OF CLINTON COUNTY EDUCATORS :  
PSEA/NEA :  
v. : CASE NO. PERA-C-21-41-E  
KEYSTONE CENTRAL SCHOOL DISTRICT :  
:

**PROPOSED DECISION AND ORDER**

On March 25, 2021, the Association of Clinton County Educators (Union, ACCE, or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Keystone Central School District (District or KCS D) violated Section 1201(a)(1), (2) and (3) of the Public Employe Relations Act (Act or PERA). The Union also alleged an independent violation of Section 1201(a)(1) of the Act. The Union specifically alleged that the District retaliated against 5 Association officers on the leadership team for an email they jointly sent to Union members who signed up to receive Union emails on private, non-District email accounts or equipment. The Union further alleged that the District retaliated against, intimidated and coerced Union officers in the exercise of protected rights when the Superintendent investigated the Union officers, held a Loudermill hearing, charged each of the 5 Union officers, subsequently disciplined each of them, and negatively notated their evaluations.

On April 20, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of Friday, September 17, 2021, via Microsoft Teams video. During the video hearing on that date, both parties were afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. Also during the hearing on that date, the Union withdrew its cause of action under Section 1201(a)(2). (N.T. 8). The September 17, 2021 hearing did not conclude that day. The record remained open, and a second day of hearing was scheduled for February 9, 2022, also via Microsoft Teams video. During the second hearing, the parties were again afforded a full and fair opportunity to present documents and testimony and to cross-examine witnesses. On April 14, 2022, the Union filed its post-hearing brief. On May 18, 2022, the District filed its post-hearing brief.

The examiner, based upon all matters 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. 8)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8)
3. Dr. Jacqueline Martin has been the District's Superintendent since February 1, 2019. Mark Condo is the District's Human Resources (H.R.) Director. Soon after Dr. Martin began her tenure as Superintendent, the Union

and Dr. Martin established regular meeting times on a weekly basis to combat rumors of low morale among staff, poor communication, as well as rumors that Dr. Martin would be like the former superintendent. The parties reached an early-bird CBA. (N.T. 30, 160-162, 174-177; District Exhibit 1)

4. On February 23, 2020, Dr. Martin emailed then Union President Ryan Broughton stating that "[o]n January 30, 2020, you inserted yourself into a meeting that was set up by Mr. Hall for me to meet with the Dickey [Elementary School] faculty and staff. At that meeting, you sat in the back of the room with your arms crossed and observed me facilitating a meeting." The email continued to describe a different occasion where Dr. Martin was surprised to see a teacher named Keith Killinger at an administrative reorganization meeting on behalf of the Union at Mr. Broughton's direction. Mr. Killinger was not a participant in the meeting. Dr. Martin further stated that "[b]ased on these two incidents, it appears to me that you believe your role is to act as a 'watchdog,' or to send someone to watch over, the [S]uperintendent and members of the administrative team. I want to be clear with you that this is not your role as President of ACCE and will not be tolerated." (District Exhibit 1)

5. Throughout February and March 2020, Dr. Martin and then President Broughton exchanged emails to establish a regular meeting schedule, every other Wednesday after 2:25 p.m. There could be additional meetings if needed. (N.T. 166; District Exhibit 1)

6. At some point, Dr. Martin heard reports from Union members that Thomas Temple was telling them that Dr. Martin was "punching them [the members] in the gut," because Dr. Martin allegedly refused to follow a Memorandum of Understanding (MOU) governing involuntary transfers and Flexible Instruction Day procedures.<sup>1</sup> Dr. Martin was advised by counsel that the MOU was linked to the expired CBA and was therefore expired. Dr. Martin explained to Mr. Temple that he was creating a hostile work environment between the Superintendent and the staff by making negative comments about the Superintendent. (N.T. 174-177)

7. Dr. Martin believes that comments to staff that are critical of her create a hostile work environment. She believes that such comments inhibit her ability to improve morale and to meet the goals of her comprehensive plan, which includes improving trust and communication. Dr. Martin believes that this incident resulted in a verbal agreement between the Union leadership and the Superintendent that the Union would discuss matters with her before making critical statements to the teachers. (N.T. 177-178, 190-191)

8. In February 2021, Thomas Temple was the President of the Association. Ryan Broughton was the Vice President of the Association. Stacy Kline was the President-Elect for the Association. Stephanie Swinehart was the Treasurer, and Nichole Massullo was the Secretary. All five Union officers comprise the Union leadership team.<sup>2</sup> (N.T. 14, 80-81, 108-109, 132-133; Association Exhibit 2)

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<sup>1</sup> The Union office held by Mr. Temple at this time is unclear.

<sup>2</sup> Throughout this decision and order, I will refer to the titles that the Union officers held in February 2021. The record indicates that, in February 2020, Ryan Broughton was President and in February 2021, Tom Temple was President and Stacey Kline was President-Elect.

9. Between late October or early November 2020 and January 2021, the District was providing educational services through remote learning, where students and staff worked from home, as a result of the COVID pandemic. In January 2021, the District gradually transitioned the return of students and staff, during which time some students and staff worked at District buildings and some remained home until all students and staff were returned to the District. (N.T. 16-17, 267)

10. Also, Dr. Martin provided weekly updates regarding COVID and other community and humanitarian aid matters to the staff and community. Dr. Martin had received complaints from community and school board members criticizing the District for allowing teachers and staff to work remotely during COVID. One retired teacher told Dr. Martin that she did not believe that teachers were being held accountable when working from home on remote learning days. Dr. Martin assured that person that the administration had procedures and protocols in place for synchronous learning providing accountability for teachers. Dr. Martin credibly testified: "there are people who believe that teachers were working super hard and there were people who believed that teachers were getting a free pass for remote learning." (N.T. 181-183, 290-291)

11. On Friday, February 19, 2021, Dr. Martin sent an email to staff and members of the community. (N.T. 6-17, 80-81, 109-110; Association Exhibit 1)

12. Dr. Martin's email stated, in relevant part, as follows:

KCSD Families, Staff and Community,

This has been a crazy weather week with a closure and two delays! I have been asked several times about why we do not use Remote Learning Days instead of snow days which have to be made up at the end of the year. The PA Department of Health and the PA Department of Education (PDE) do[] not give us a choice when we close for pandemic reasons and we are forced to use remote learning. While we can do it fairly well, many of our students are not successful in a remote format; a lot of missed work and absences accumulated in the fall. I strongly believe that face to face learning is best for most students; therefore making up lost weather days has been my choice for the time being.

KCSD is not approved for Flexible Learning Days by PDE. We have 500+ employees that need to be accounted for on any given workday. As a long-time educator, I do not agree that sending home a packet of independent work, or asking students to log onto a website for a whole day of school is effective. Additionally, having teachers and aides be available for office hours does not equal a traditional employee workday. We are ironing out details for Synchronous Remote Days instead of snow days. Some of the challenges include how to fairly accommodate staff and students without internet access and on poor weather days, how to make-up special services for students with disabilities, and how to have clear employee accountability.

(Association Exhibit 1)

13. Prior to Dr. Martin's February 19, 2021 email, no one from administration expressed concerns to the Union about the level of success of online learning nor did anyone from administration complain to the Union about holding teachers accountable. (N.T. 17, 271-273)

14. After receiving Dr. Martin's email, a large number of Union members reported concerns to the Union officers and other Union representatives throughout the District over their interpretation of the language in the email. Specifically, Union members were "very upset" that, after two months of remote learning, Dr. Martin, in their view, was stating that the administration was having a difficult time holding teachers accountable. Union members were also upset that the message went out to the community and that, in their view, Dr. Martin was telling the community that there was a teacher accountability issue. The members felt like their integrity was being questioned because of Dr. Martin's email. (N.T. 18-21, 110-111, 134-135)

15. At the Keystone Elementary School, where teachers instruct students ages 5-10, Union Secretary Massullo heard from colleagues that they were offended by the Superintendent's "accountability" comment after two months of remote learning, which was extra challenging with the students in that age group. Secretary Massullo also heard comments from community members about Dr. Martin's email. Secretary Massullo shared these community concerns with the other Union officers when they crafted the Union email. (N.T. 134-135)

16. On Friday afternoon, February 19, 2021, President Temple contacted H.R. Director Condo to discuss Dr. Martin's email. H.R. Director Condo indicated that he understood the Union's position, and he referred President Temple to Dr. Martin. (N.T. 29-30, 276)

17. The next day, on Saturday, February 20, 2021, all five Union officers met on a conference call to discuss Dr. Martin's email. Together, the Union leaders discussed membership anger and frustration regarding Dr. Martin's email. They collaborated on crafting a response email to Union members. The intent of the Union officers' email was to inform the membership that the leadership team heard their concerns. All 5 officers crafted the email as part of a team, and they all signed it "in solidarity." (N.T. 21-24, 80-82, 90, 127-128, 132-133, 139, 142-144, 249-250; Association Exhibit 2)

18. Dr. Martin left for a vacation trip to Florida Saturday morning. Dr. Martin did not communicate with the Union prior to sending out her February 19, 2021 email. The Union did not communicate with Dr. Martin before sending its email. The Union President and Vice President have Dr. Martin's cell phone number and everyone has access to her email. (N.T. 149-150, 153, 216-217, 271-275)

19. The Union leadership's response email was sent during non-work time. It was sent only to Union members who provided private email accounts and signed up for the Union's ListServ group distribution list. These email accounts are not District email accounts, and the Union's response email was not sent from or to any District owned equipment. (N.T. 25-26, 249-250; Association Exhibit 2)

20. The Union officers' collaborative email provided, in relevant part, as follows:

We have heard from many of you in regards to the [S]uperintendent[']s email to the community. The frustration and disappointment you feel is justified. Unfortunately, it feels as employees of KCSD that the assumption is you are not doing your job unless you prove otherwise.

For most of us, this past year has been the most challenging year of our career. Learning how to teach all of our students remotely, (while not requiring too much), to teaching kids in our room while simultaneously teaching students at home, to teaching all students remotely (while making sure this time we hold them strictly accountable), to teaching in a cohort model, to teaching back face to face while some students remain at home has been a roller coaster of stress and emotions to say the least. Not to forget, spending countless hours preparing and trying to do the very best job we can in a very fluid situation speaks to your work ethic. The rightful fears some of us have in regards to our own health, our loved ones['] health, our students['] health and that of our colleagues is real and should not go unrecognized as well. Again, it has been the most challenging year of most of our careers.

Our [S]uperintendent[']s communication to the public about her concern of having clear employee accountability to a work day, is insulting and disappointing. What is a "traditional work day" in her eyes? The [S]uperintendent[']s perception of our professionalism and work ethic was made clear yesterday to not only us, but the entire community we live and work in as well. Remember, too much screen time is too much, too little apparently means you aren't doing your job. The other districts that have seemed to "figure this out" must have a different approach to understanding their teacher[s'] accountability. Notifying employees of the [D]istrict about her feelings on our accountability is one thing, taking it to the public is quite another.

Your students and [A]ssociation leadership greatly thank you for all you have done and continue to do in these ever changing times. You make the difference, the time you spend away from your families outside of the "traditional work day" is noticed.

Lean on each other, it's the best support you will receive.

In solidarity,

Tom Temple-President ACCE  
Ryan Broughton-Vice President ACCE  
Stacy Kline-President Elect ACCE  
Steph Swinehart-Treasurer  
Nichole Massullo-Secretary

(Association Exhibit 2)

21. One week later, on February 26, 2021, Dr. Martin sent an email to all five officers on the Union leadership team, using District email accounts. (N.T. 221-222; Association Exhibit 3)

22. The email stated, in relevant part, as follows:

Dear ACCE Leadership Team,

I was very disheartened to learn of the communication that you sent to the ACCE group on Saturday, February 20, 2021. Since each of you were signed as authors to this document, I am requesting individual investigatory interviews.

I will send you an electronic invitation to you for your individual meeting. You have the right to have a [U]nion representative join you in this meeting. In light of the extenuating circumstances (each of you are being investigated as individuals related to the same incident), I would recommend that you seek a [U]nion representative that is outside of this group. If necessary, you may request coverage through your building principal.

(Association Exhibit 3)

23. As she stated in her notice of investigatory interviews, Dr. Martin was "disheartened" and "deflated" by the Union email because she felt that she made an effort to build a relationship and open communications with the Union that did not produce results. Dr. Martin believed that the Union leaders "twisted" her words when they told members that Dr. Martin did not trust them to be accountable and that they had to prove otherwise. Dr. Martin was also frustrated because she had previously talked to both Mr. Broughton and Mr. Temple about open communications and informed them that the administration had no hidden agenda. She felt "thwarted" by the negative rhetoric to the teachers which she believed created a hostile work environment. She felt that the Union email provided false information that impeded progress and that it was inconsistent with the verbal agreement to communicate first with her. From Dr. Martin's perspective, the Union email did not constitute Union business because there was nothing in the Union email raising contractual issues and nothing "making [the] members feel heard where supporting [the] members is not the role of an Association." (N.T. 189-195, 215, 220, 222-225, 284-288; District Exhibit 4)

24. Dr. Martin and H.R. Director Condo were both present during the investigatory interviews of each of the 5 Union officers, which were conducted the same day. Dr. Martin had the same pre-scripted list of questions that she asked each of the five Union officers during their separate investigatory interviews. During the interviews, Dr. Martin expressed concerns that the Union leadership should have communicated with her before sending out the Union email. President Temple described Dr. Martin's demeanor during his interview as being upset and Dr. Martin stated that the Union's email affected her ability to perform her job. Dr. Martin asked President Temple if he had the ability to do a job performance evaluation of the Superintendent and referred to the Union email as an evaluation of Dr. Martin. (N.T. 31-33, 82-84, 193, 222-225, 277; District Exhibit 4)

25. Dr. Martin and H.R. Director Condo expressed their position, during the Temple interview, that the Union should have come to them first and characterized the Union email as interfering with Dr. Martin's ability to perform her job. Question number 8 on the list of questions was: "Have clear lines of communication been established for you to express any concerns to the administration, the Superintendent or the board?" All five Union officers answered "yes." (N.T. 33, 82-84, 193; District Exhibit 4)

26. President Temple credibly testified that Dr. Martin was angry and aggressive during his investigatory interview and that Dr. Martin told President Temple that he needed leadership courses. Dr. Martin also told President Temple that he needed to understand his position with the Union and that she already told him that he was not to evaluate the Superintendent and that he was not to interfere with her work. Dr. Martin stated that the Union was "undercutting her work." During her interview with H.R. Director Condo and Dr. Martin, Union Secretary Massullo became upset when the interview became intense, and she left the interview, returning later. Dr. Martin tried to get Union Treasurer Swinehart to change her opinion about her perception of the February 19, 2021 email, during her interview. Dr. Martin told Treasurer Swinehart that communication between Dr. Martin and the Union leadership is a "problem." Mr. Broughton and Mr. Temple both told Dr. Martin during their investigatory interviews that she was trying to "gag" the Union. (N.T. 34-37, 135-136, 144-145, 147-148, 287-288)

27. After the investigatory interviews of the 5 Union officers, H.R. Director Condo issued notices to the individual Union officers that they would be subjected to Loudermill hearings. On March 16, 2021, H.R. Director Condo scheduled President Temple's Loudermill hearing for Friday, March 19, 2021 at 1:00 p.m. ((N.T. 37, 226, 277; Association Exhibit 4)

28. President Temple attended the March 19, 2021 Loudermill hearing, with his PSEA attorney. Dr. Martin and H.R. Director Condo were also present and conducted the hearing. As a result of the Loudermill hearing, H.R. Director Condo disciplined President Temple with a formal written reprimand placed his file, also dated March 19, 2021. H.R. Director Condo also caused the discipline to be noted in Section 4F of his performance evaluation under the professionalism category: "Follows District Policy and Procedure," with a notation: "Needs Improvement." (N.T. 38, 226, 277; Association Exhibit 5)

29. The beginning of H.R. Director Condo's March 19, 2021 disciplinary letter to President Temple, and the 4 other officers, provides as follows:

This letter will serve as official documentation of the results of a meeting held on Friday, March 5, 2021 between you, Mark Condo, Director of Human Resources and KCS D Superintendent Dr. Jacquelin Martin. Also present at the meeting were PSEA UniServ Representative Mr. Brian Landis and PSEA staff attorney Ms. Amy Marshall. This meeting was initiated in response to an email you admitted to have sent on February 20, 2021. According to your testimony, this email was sent to members of the Association of Clinton County Educators of which you are an officer and whose members are employees of the District.

(Association Exhibit 5)

30. Next, the March 19, 2021 disciplinary letter contains H.R. Director Condo's findings as a result of the Loudermill hearing. Those findings are, in essence, delineated as follows: It was established that you co-authored the message and authorized its release; clear lines of communication had been established for ACCE leadership to express your formal and informal concerns to Dr. Martin and that ACCE leadership has utilized these lines of communication prior to February 19, 2021; you did not attempt to contact Dr. Martin regarding any concerns or negative feedback related to Dr. Martin's KCS D Weekly Update dated February 19, 2021; Dr. Martin has

shared her past concerns with you regarding your role as ACCE officers when on multiple occasions you acted in an incongruent manner and have actively interfered with the work of the Superintendent; your email provided false information when it was claimed in your email that "the superintendent[']s perception of our professionalism and work ethic was made clear yesterday to not only us, but the entire community we live and work in as well;" you made a false claim about knowing the intentions of Dr. Martin when you stated: "Notifying the employees of the district about her feelings on our accountability is one thing, taking it to the public is quite another;" and that this was evidenced in the email when you claimed to know the Superintendent's perception of an issue that you never spoke to her about. (Association Exhibit 5)

31. The remainder of H.R. Director Condo's disciplinary letter provides, in relevant part, the following:

It was determined that your decision to send a communication to KCSD staff members criticizing the Superintendent had a negative impact on the school district culture and attempted to discredit her district leadership.

. . . . .

Dr. Martin's collaborative vision is all of us working interdependently to achieve a common goal with mutual accountability. Your email communication directly undercuts the leadership of the Superintendent and School Board to achieve this vision. I believe this discipline to be appropriate based on your violation of KCSD policies #248, #317, #320, #326 and #906 when you sent an inappropriate email to KCSD teachers on February 20, 2021.

. . . The Keystone Central School District, via its School Board of Directors and the District Administration, hereby impose upon you the following discipline: this letter will serve as a formal letter of reprimand and will be placed in your personnel file. In addition, information about this incident will be documented in your annual performance evaluation.

Please consider this formal notice that should you engage in any like or similar conduct in the future, progressive discipline steps will be taken and a recommendation for further disciplinary action up to and including dismissal may be recommended.

(Association Exhibit 5)

32. Dr. Martin and/or H.R. Director Condo told President Temple during his Loudermill hearing that the email was not an Association email, rather it was from the 5 individual officers as employe educators and that they were being disciplined as individuals who broke District policies. (N.T. 39-40, 250-252)

33. President Temple works at the Career and Technology Center (CTC) which is managed by a Director and not a Principal. The CTC director told President Temple that he was directed by the administration to reflect his discipline in the professionalism category of his performance evaluation. As a result of the discipline, the Union leadership relies heavily on the PSEA



UniServ representative, Brian Landis, to be present at meetings to speak for the Association. (N.T. 41, 77-78)

34. All 5 Union officers received the same discipline. The Union officers are fearful that the District's discipline of Union leaders for their February 20, 2021 email started a precedent of disciplining Union officers in the future for confronting issues and speaking out to Union members about the administration's activities. The Union officers are presently unsure of what they can say without getting into trouble or being disciplined. Mr. Landis attends meetings to make sure that nothing is said that could be attributed to employe Union officers and cause them trouble. President-Elect Kline now "second guesses" how she communicates to members. As a result of the discipline, Treasurer Swinehart feels cautious about what she can say to people. She does not know what members will report back to Dr. Martin. (41-42, 88-90, 105, 130, 135-136, 148, 153)

35. Union officers are concerned that the administration will retaliate against them for Union work, and they are concerned that officers are unable to openly discuss issues with the membership after the discipline, based on the second sentence of the 4<sup>th</sup> paragraph of the disciplinary letter. That sentence provides as follows: "It is expected that you will cease and desist any negative comments or communication towards Dr. Martin, administration or staff of the Keystone Central School District. (N.T. 41-42, 88-90; Association Exhibit 5)

36. President Temple, President-Elect Kline and Vice President Broughton credibly testified that the Union email was not coming from anyone individually. It was from the Union leadership team speaking as a Union "in solidarity." (N.T. 43, 82, 110, 127-128)

37. President Temple has Dr. Martin's email and cell phone number, and he has called her in the past outside of work hours. He and the other Union officers did not consult with her about the meaning of her email before the Union officers sent their email to the members. A large number of Union members complained of Dr. Martin's email and they were very upset. The intent of the Union email was to let members know that their voices were heard, they were not alone, and to offer support for what they were already saying about Dr. Martin. (N.T. 46, 58-59, 60-62, 65, 84, 111, 137, 149-150)

38. A PIC meeting is a meeting among some school board members, administration officials and Union leaders which is provided for in the CBA to address issues between the Union, the administration and/or the school board. Anyone involved can add issues to the agenda online. President Temple did not wait for the March PIC meeting before sending out the Union email, and once he received the notice of investigation, he followed advice not to bring it up during the March PIC meeting. (N.T. 70-71)

39. President Temple and President-Elect Kline admitted that they do not know what Dr. Martin's responsibilities are regarding accounting for janitors, cafeteria workers, teaching aides and secretaries on flexible instruction days. President Temple admits that he does not know for certain what Dr. Martin meant in her email and that he assumed that she meant that teachers were not accountable. (N.T. 47, 52-54, 58, 96-97)

40. The Union email expressed and reflected the opinion of the Union membership. President Temple credibly testified that, in the Union email the officers reflected the opinion of the complaining members, the officers, the

other Union representatives and the community members from whom they heard. When the Union officers wrote: "it feels as employees of KCS D that the assumption is you are not doing your job unless you prove otherwise," they were referencing the membership's feelings that the Superintendent, based on her email, assumed they were not performing their jobs unless the teachers affirmatively proved it to the Superintendent. The Union email was the membership's and the leadership's interpretation and perception of Dr. Martin's email and her reference to accountability. President Temple credibly testified that the leadership was not making a representation that Dr. Martin actually in fact doubted the work ethic and professionalism of the teachers; they were reflecting the members' perception of the Superintendent's perception of the teachers' work ethic and professionalism. (N.T. 47-52, 54-57, 67-68, 92-95, 104-105, 116-117, 127-128, 137, 140-141, 248)

41. President Temple and President-Elect Stacey Kline credibly testified that Union members expressed that they were frustrated, insulted and disappointed by the Superintendent's email because of the extensive amount of hours teachers were working on a regular basis to make online learning work. The teachers worked beyond their contractual workday, working "countless" hours. Teachers had a difficult year "pulling it all together" during the pandemic. Teachers complained to the Union leadership that they were insulted by their interpretation of Dr. Martin's email that they were not accountable, after successfully completing remote learning. Treasurer Swinehart credibly testified that Union members were offended by the wording of Dr. Martin's email. Members interpreted the email as saying that while teachers were remote, they were not able to be held accountable on those days. (N.T. 52-54, 81-82, 116-117, 145)

42. Union members were offended because they thought the Superintendent said that 500-plus employees, which includes teachers, are not accountable for any given remote workday. (N.T. 104)

43. President Elect Kline credibly testified that the leadership was not advocating a position or advocating for the members to take any action. The leadership did not intend to characterize the Superintendent as unable to do her job. The Union email was not intended as a criticism of Dr. Martin. (N.T. 84, 90-91, 137)

44. H.R. Director Condo stated in his disciplinary letter that the Union officers violated District policies #248, #317, #320, #326 and #906 by sending the Union email. Policy 248 prohibits unlawful or sexual harassment of students and third parties by students and staff members, contractors, vendors, volunteers and third parties in schools. (District Exhibit 7)

45. Policy #317 requires all staff to conduct themselves in a manner consistent with appropriate and orderly behavior. It requires employees to maintain professional, moral and ethical relationships with students at all times. As applied to interactions, behaviors and relationships with non-students, the policy addresses prohibited conduct during work hours. (District Exhibit 7)

46. In summary, Policy # 317 expressly states, in relevant part, the following: "When engaged in assigned duties, district employees shall not participate in activities that include but are not limited to the following: Physical or verbal abuse, or threat of harm, to anyone; Nonprofessional relationships with students; Causing intentional damage to district property, facilities or equipment; Forceful or unauthorized entry to or occupation of

district facilities, buildings or grounds; Use, possession, distribution, or sale of alcohol, drugs or other illegal substances; Use of profane or abusive language; Breach of confidential information; Failure to comply with directives of district officials, security officers, or law enforcement officers; Carrying or possessing a weapon on school grounds without authorization from the appropriate school administrator; Violation of [b]oard policies, administrative regulations, rules or procedures; Violation of federal, state, or applicable municipal laws or regulations; Conduct that may obstruct, disrupt, or interfere with teaching, research, service, operations, administrative or disciplinary functions of the district, or any activity sponsored or approved by the [b]oard."

(District Exhibit 7) (reformatted)

47. Policy #320 addresses freedom of speech in non-school settings and provides that when a District employe is not engaged in the performance of assigned duties, he or she shall state clearly that the comments are personal views and not those of the District; refrain from comments that would interfere with student discipline; refrain from public comments about the District known to be false or made without regard to truth or accuracy; and refrain from making threats to coworkers, supervisors or District officials. (District Exhibit 7)

48. Policy #326 directs the Superintendent to establish a process to resolve complaints and conflicts among employes and to establish communication between supervisory personnel and District employes for situations not covered by the CBA. (District Exhibit 7)

49. Policy #906 establishes a specific procedure for "[a]ny parent/guardian, student resident or community group" to present a request, suggestion or complaint regarding the District's programs, personnel, operations and facilities. (District Exhibit 7)

#### **DISCUSSION**

In this case, the Association claims that the District unlawfully retaliated against the Union officers who jointly, in solidarity, crafted and sent their February 20, 2021 email to its members. The District claims that the Union officers acted as individual District employes and not in the capacity of their Union leadership positions and as such were not engaged in protected activity because in their email they made false statements about the Superintendent, violated District policies and did not address contractual issues.

In a discrimination claim, the complainant has the burden of establishing that the affected employes engaged in protected activity, that the employer knew of that activity and that the employer took adverse employment action that was motivated by the employes' 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). 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 Employes 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 employes' prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195

(Final Order, 1994). 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.

There is no dispute on this record that Dr. Martin and H.R. Director Condo were aware that the 5 Union officers comprising the Union leadership team authored and sent the February 20, 2021 email to its members. The question remains whether the email communication was protected and whether the District had a right to separately discipline the Union officers even if the email was protected. The District cites to National Labor Relations Board precedent in General Motors, LLC, 369 NLRB No. 127 (2020), for the proposition that "inappropriate workplace speech by employees engaged in protected union activity is not protected under the National Labor Relations Act and that employers may discipline workers for engaging in such conduct, provided, that the discipline is not shown to be retaliation for protected conduct." (District Brief at 9). The District maintains that the email authored by the Association leadership and sent to its members did not constitute protected union activity. (District Brief at 10). The District further posits that, even if the Union email constituted protected activity and the Superintendent harbored animus toward said activity, the Superintendent would have disciplined the employees anyway for the "inappropriate speech," relying on the General Motors standard of applying a Wright Line analysis to the speech. (District Brief at 10).

In General Motors, *supra*, employe and union committee person Charles Robinson was disciplined several times after he engaged in profane and racially offensive conduct toward management on the employer's premises in the course of union activity on multiple occasions. The National Board, in General Motors, held that it will apply Wright Line to situations where protected union speech in the labor context also creates a hostile work environment if the speech contains abusive, profane, and/or discriminatory comments. The employer will have the opportunity to prove that it would have taken the disciplinary action against that behavior sans the protected activity. National Board precedent is certainly persuasive authority for this Board. Also, this Board already applies a Wright Line analysis in discrimination cases. However, the National Board's General Motors decision is not applicable here. The Union email at issue in this case was not workplace speech, it was not issued or conducted during work hours, and it was not of a profane, violent, sexual or racial nature so as to separately implicate the employer's obligation to protect its employees from discriminatory conduct or a hostile work environment, justifying disciplinary action under Wright Line.<sup>3</sup>

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<sup>3</sup> On one occasion, Mr. Robinson yelled at a manager that he did not "give a fuck about . . . cross-training," that "we're not going to do any fuckin' cross-training if you're going to be acting that way," and that he [the manager] could "shove it up [his] fuckin' ass." On another occasion, a manager told Mr. Robinson that he was speaking too loudly, and Mr. Robinson mockingly acted a caricature of a slave and said: "Yes, Master, Your Master Anthony," "Yes, sir, Master Anthony," "Is that what you want me to do, Master Anthony?," and also stated that [the manager] wanted him "to be a good Black

Moreover, the Union did not intend for management to witness, observe or read the Union email, as was the case in General Motors, where the statements were loudly directed at management employees and intended to be heard by management. The Union email here was not a "res gestae," heat-of-the-moment explosion, as in General Motors; rather it was a carefully and thoughtfully crafted document that articulated the membership's concerns and opinions about the perceptions of the Superintendent without any abusive, profane or discriminatory language. Significantly, the National Board did not determine whether Mr. Robinson was unlawfully disciplined for his speech or whether his speech lost the protections of the National Act. Instead, the National Board remanded that determination to the ALJ to apply Wright Line to the employer's discipline of Mr. Robinson for his profane and arguably abusive speech.

In PSSU, Local No. 668 v. Washington County, 23 PPER 23040 (Proposed Decision and Order, 1992), affd'd, 23 PPER 23073 (Final Order, 1992), the chief shop steward wrote three reports to the union membership that were discovered by management and served as the "major part" of the employer's reason for discharging the steward. The examiner surveyed the case law in the area of Union leadership communications with its members and concluded that the writings were protected activity and that the County violated the Act because those writings served as the basis for the discipline imposed on the chief steward.

The writings at issue in Washington County were quoted in detail, and a comparison of those writings to the email at issue in this case demonstrate that the mild language and the message contained in the Union's email must qualify as protected activity. In Washington County, management argued that the chief steward's reports lost the protection of the Act because of the abusive language and message that he included in those reports about the director of children and youth services. Therein, the chief steward referred to the director as being "thoroughly inept at communicating," as having delivered "bizarre ranting diatribes," as being reminiscent of "a deranged King Lear wailing uncontrollably because his world is going awry," as having "a fragile sense of identity," as being "devoid of insight," as exhibiting "immature and boorish behavior," "peculiar behavior" and "craven and dishonest behavior," as having a "dark and vindictive personality" and as being "intemperate, vituperative, contradictory, and incoherent." The District in this case, as did the employer in Washington County, "misapprehends the reach of the Act." Washington County, 23 PPER 23040.

The hearing examiner in Washington County relied on NLRB precedent construing the federal counterpart to Section 401 of PERA. Without including the NLRB citations here, the examiner noted that, under federal law, protected conduct will only lose that protection if it is "offensive, defamatory, or opprobrious" and not if it is merely "intemperate, inflammatory or insulting." Even letters accusing a manager of "megalomania" and being "tyrannical" and "despotic" constituted protected activity. An employe engaged in protected activity even when he accused his supervisor of malice, gross negligence and carelessness. Washington County, 23 PPER 23040 (citations omitted); see also, NLRB v. Electrical Workers IBEW Local 1229 (Jefferson Standard), 346 U.S. 464 (1953) (holding that a communication is

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man." Disrupting another meeting, Mr. Robinson told a manager that he would mess him up and later began playing very loud music on his phone that contained profane, racially charged, and sexually offensive lyrics.

protected as long as it is not so disloyal, reckless or maliciously untrue so as to lose the protection of NLRA).

Additionally, the Board's decision in Pennsylvania State Troopers Association v. Commonwealth of Pennsylvania, Pennsylvania State Police, 41 PPER 33 (Final Order, 2010), is controlling and binding on this examiner, albeit decided under the same protections provided by the Pennsylvania Labor Relations Act (PLRA). In that case, the FOP local vice president, Corporal Williams, wrote and circulated an email, while off duty and from his home computer, critical of the State Police leadership. In one of his emails that he circulated, the union officer stated: "The department is screwing the members all the time and grievances are coming in at the rate of 25 to 30 a month! Our money is being spent mostly to defend our members from the unfair discipline that is being handed out by this administration and the unfair treatment of our members by the classless, good-ole boy network of commissioned officers." In yet another email, Corporal Williams stated that his loyalty is with the PSTA president and vice president. "I know first hand what they do for us unlike some of the people that are circulating this misinformation to suit their own agendas."

The State Troopers Board adopted the analysis in Washington County, and affirmed the examiner's determination that the Commonwealth committed unfair practices by subjecting Corporal Williams to an internal investigation because of his emails. The Commonwealth argued on exceptions that Corporal Williams "lost the protections of the [Act] when he engaged in insubordinate conduct by referring to commissioned officers in his emails as a "classless, good-ole boy network" and by encouraging those receiving his emails to disseminate them to "whomever you see fit, including commissioned officers." The Board disagreed concluding that Corporal Williams' statements were protected and stated the following:

As the Hearing Examiner correctly pointed out, under Board law, an employe's criticism of the employer will lose the protection of the act only if it is "offensive, defamatory, or opprobrious," and not if it is merely "intemperate, inflammatory or insulting." Washington County, 23 PPER ¶ 23040 (Proposed Decision and Order, 1992), 23 PPER ¶ 23073 (Final Order, 1992); see also, AFSCME, District Council 85, Local 3530 v. Millcreek Township, 31 PPER ¶ 31056 (Final Order, 2000) (employe's conduct will lose protection of the act where it is so obnoxious or violent as to render the employe unfit for service).

Pennsylvania State Troopers, 41 PPER 33. Accordingly, the Board, in State Troopers, held that it agreed with the examiner that while Corporal Williams' statements were critical of management and arguably insulting, intemperate and inflammatory, they were not offensive, defamatory or opprobrious. I conclude that the Union email was protected speech constituting concerted activity to engage in the representation and support of members who sought the mutual aid and protection from their Union advocates and representatives.<sup>4</sup>

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<sup>4</sup> The Union did not herein claim retaliation for speech protected under the First Amendment to the United States Constitution or the Constitution of the Commonwealth of Pennsylvania. Indeed, this Board does not have jurisdiction over such constitutional questions. The communications at issue in this case have been evaluated solely under PERA, as alleged. Federal courts have, however, held that a public employe's union or labor speech criticizing their

The District's disciplinary response to that email, therefore, constituted unlawful retaliation for, interference in, and coercion regarding protected Article IV rights and activities that was not separately justified under Wright Line. The District's discipline constitutes the unlawful censorship and muzzling of the Union's legitimate, protected speech, thereby impeding the representative rights and responsibilities of the Union. While Dr. Martin is concerned that the Union leadership has undermined her ability to function as Superintendent, her disciplining the 5 Union officers crippled the Union's ability to perform one its most vital functions in representing members.

The Union email composed jointly by the Union leadership was sent during nonwork time to private email addresses and equipment. Nothing in the Union email was "so obnoxious or violent as to render the [Union officers] unfit for service." The email did not contain any language that could be construed as "offensive, defamatory, or opprobrious." Also, the Board expressly held, in Stated Troopers, that a union representative is allowed to make statements critical of management. The tone, implications and opinions contained in the Union email were the reflections of the teachers who sought mutual aid and protection from their Union leadership. During the hearing, the District emphasized the distinction between Flexible Instruction Days, as being asynchronous, and remote learning, which is synchronous, and that Dr. Martin's email, taken literally, was not referring to the synchronous remote learning days during COVID, and therefore her email was not critical of teacher accountability. However, Mr. Broughton credibly testified that they are both remote learning because children are not in the classroom and the teachers did not see the distinction as they read the language in Dr. Martin's email expressing concern over accountability during remote learning days.

Also, the teachers' understanding of the literal language used in Dr. Martin's email was certainly reasonable. The District's position, that Dr. Martin's email literally referenced accountability for non-teaching staff during asynchronous FID days (for which the District is not approved) during weather closures and not the synchronous remote learning, which was utilized during COVID, ignores the last part of Dr. Martin's email, where she referenced both asynchronous flexible instruction days and synchronous remote learning in the same sentence. She stated: "As a long-time educator, I do not agree that sending home a packet of independent work [i.e., asynchronous FID], or asking students to log onto a website for a whole day of school [i.e., synchronous remote] is effective." Dr. Martin also clearly and literally referenced synchronous remote days in lieu of flexible instruction days for snow days. Dr. Martin stated: "We are ironing out details for Synchronous Remote Days instead of snow days. Some of the challenges include how to fairly accommodate staff and students without internet access and on poor weather days, how to make-up special services for students with disabilities, and how to have clear employee accountability."

The terms "staff" and "employee" include teachers. The teachers had just successfully and arduously completed synchronous remote learning days during the COVID school closure. Dr. Martin literally referenced the challenges of fairly accommodating staff and students without internet access and having clear employe [including teachers] accountability with respect to

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public employer can also be protected from retaliation under the First Amendment to the United States Constitution, as a matter of public concern. Davignon v. Hodgson, 524 F.3d 91 (1<sup>st</sup> Cir. 2008).

synchronous remote learning days. In fact, this part of Dr. Martin's email was not referencing accountability regarding flexible learning days where a packet is sent home. Dr. Martin's email is referencing synchronous remote learning for weather days during which it would be a challenge to have "clear employee accountability." Accordingly, the teachers justifiably understood that Dr. Martin believed that teacher accountability was a challenge and a concern for synchronous remote learning, which the teachers had worked "countless" hours to successfully complete. Moreover, the reasonableness of the teachers' and Union officers' understanding of Dr. Martin's email is supported by the undisputed fact that community members came to the same conclusion as the teachers and Union officers. Additionally, Dr. Martin testified that school board and community members as well as a retired teacher criticized the District for allowing teachers to work remotely from home during COVID because they believed that the teachers could not be held accountable. Accordingly, at the time of Dr. Martin's email, the teachers had been subject to those very same criticisms from multiple sources making them understandably sensitive to the Superintendent's comments.

Significantly, there were no false statements or misrepresentations of fact contained in the Union email, as claimed by the District, (District Brief at 11), any more than the email in State Troopers contained false misrepresentations of fact when Corporal Williams referred to commissioned officers as a "classless good-ole boy network." Indeed, a reasonable understanding of the Union email does not even rise to the permissible level of "intemperate, inflammatory or insulting." As the email communications at issue in the State Troopers case demonstrate, a union leader's communication to his/her members can certainly criticize management as part of their job to raise awareness and protect the members from management where management acts against their interests.

After reviewing the hard work and extra hours that teachers endured during remote learning education during COVID, the Union leaders' email stated, in relevant part, as follows:

Our [S]uperintendent[']s communication to the public about her concern of having clear employee accountability to a work day, is insulting and disappointing. What is a "traditional work day" in her eyes? The [S]uperintendent[']s perception of our professionalism and work ethic was made clear yesterday to not only us, but the entire community we live and work in as well. Remember, too much screen time is too much, too little apparently means you aren't doing your job. The other districts that have seemed to "figure this out" must have a different approach to understanding their teacher[s'] accountability. Notifying employees of the [D]istrict about her feelings on our accountability is one thing, taking it to the public is quite another.

(F.F. 20). The Union leadership's email clearly conveys back to the members the frustration and disappointment they reported to the leadership about Dr. Martin's email. The teachers were the ones who were insulted. The leadership simply wrote about the perceptions and opinions reported to them from the teachers. The Union officers' email did not contain factual misrepresentations but critical opinions, which is the function of the Union leadership. There is no call to action, and no suggestion that members withdraw support or respect for Dr. Martin. The communication of negative assessments, opinions and criticisms of management are protected activities fundamental to the



rights and obligations of Union leadership on behalf of members. The District's bald assertion that the Union email contained false statements in an attempt to characterize the email as defamatory and to lose the protection of the Act does not transform statements of obvious opinion, interpretation and reflection of teachers and Union leaders into defamatory misrepresentations. Accordingly, the February 20, 2021, email written and distributed to Union members by the Union leadership constituted protected activity under the Act and the case law applying the Act's protections.

The record demonstrates that Dr. Martin and H.R. Director Condo investigated and disciplined the 5 Union leaders for engaging in the protected activity of participating in the sending of the email. It is also without question that Dr. Martin and H.R. Director Condo would not have taken the investigative and disciplinary action against the Union leadership if they had not sent their email to the members. Accordingly, Dr. Martin and H.R. Director Condo unlawfully retaliated against the 5 Union officers for engaging in protected activity.

The District's defenses are also unavailing. As previously stated, the opinions of the leadership were permissible regardless of whether they were critical of the Superintendent and/or her administration or had a speculative effect on managerial authority. It is the role of the leadership to raise awareness among the membership and challenge management's behavior to improve terms and conditions of employment and the treatment of members. The Union leadership's right to communicate with its members is so sacrosanct and protected that for the communication to lose the protection of the Act, the language must be so obnoxious and violent that the union officer can no longer serve the employer in a productive, civilized manner. In this regard, it is not relevant that the Superintendent believes, in her opinion, that the Union email undermined her authority among the teachers, as Dr. Martin expressed during the hearing.

Moreover, the District did not establish that Dr. Martin's beliefs were warranted. The District did not present testimony or other evidence supporting the claim that the Union email interfered with Dr. Martin's ability to perform her duties or that morale was compromised. Therefore, it remains Dr. Martin's opinion that this was the effect of the Union email. Dr. Martin is permitting only her own opinion about her behavior and performance to become known; she is controlling the message and crushing dissent instead of welcoming transparency and criticism with a view toward improving relations, morale and operations. Additionally, the fact that the Union email did not address a contractual issue did not render the communication unprotected, as asserted by Dr. Martin during the hearing and the District in its Brief. (District Brief at 12). The Union's ability to communicate with its members in a representative capacity for the purpose of mutual aid and protection and to further the interests, ideals and goals of the members to address issues with management is a statutorily protected right independent of any contractual rights bargained for by the parties.

The District distinguishes between flexible instruction days and remote learning. This distinction, however, is not relevant to this analysis. The relevant inquiry is the manner in which the teachers interpreted Dr. Martin's email as being critical of teacher

accountability during remote, synchronous learning, and not what Dr. Martin actually meant to convey. The specific "accountability" that Dr. Martin intended to address, and whether the teachers' and Union officers' perception about Dr. Martin's intent were inaccurate, are not factors to be considered under the case law. The teachers who complained were entitled to express their opinions about Dr. Martin's email and complain to the Union officers who, in turn, were entitled to communicate about those very concerns back to the members.

The District relies on an alleged verbal agreement between Dr. Martin and the Union leadership to first communicate any problems or issues to her. (District Brief at 12). Dr. Martin believes that a prior alleged communication from President Temple to members that Dr. Martin was "punching them in the gut" by not following an MOU resulted in a verbal agreement between the Union leadership and the Superintendent that the Union would discuss matters with her before making critical statements to the teachers. Dr. Martin also believes that the Union leadership should discuss grievable matters with her before filing the grievance. Notwithstanding any such verbal agreement, the Union leadership is entitled to criticize the administration to their members before discussing those criticisms with Dr. Martin. The Union has no obligation to approach or contact Dr. Martin before discussing matters among the Union officers and with the membership. Communicating the opinion to members that Dr. Martin was "punching [the members] in the gut" is protected Union speech.

Also, the Union leadership does not have any obligation to discuss grievances before they are filed where contractual deadlines could be compromised by doing so. Indeed, internal Union communications are required to occur first so the leadership can accurately flesh out the concerns of the members and formulate an articulable issue for discussion with the administration. Moreover, the Union officers on this record credibly and consistently testified that their email was merely a reflection of the opinions already expressed by the teachers and was designed to merely comfort the membership with the message that the leadership heard their concerns. The next step may have been to approach Dr. Martin when she returned from Florida. However, Dr. Martin and H.R. Director Condo began their retaliatory investigation. In this regard, any alleged verbal agreement was not violated nor was it a binding protocol that could eclipse internal Union communications.

H.R. Director Condo cited several District policies that the Union officers allegedly violated to justify his investigation and discipline of the Union officers. First, policies of the District are subordinate to the Act and the caselaw. In this regard, any District policies conflicting with the Act must yield. Accordingly, to the extent that the 5 Union officers violated any District policies by writing and issuing their email communication to their members in this case, those violations cannot be enforced under the facts and circumstances in this case. It would be ludicrous to accept that the District could have, for example, a policy prohibiting employees from joining and forming a union for mutual aid and protection contrary to the rights granted under PERA. Simply put, the application of District policies in a manner inconsistent with Board law cannot be a defense or a legitimate justification for discipline.

Moreover, an examination of the cited policies shows that none of the policies were applicable or violated, yielding the inference that they were

cited as pretextual reasons to justify the retaliatory discipline imposed on the 5 Union officers in this case. Policy # 248, cited by H.R. Director Condo in his disciplinary letter to all 5 Union officers, prohibits unlawful or sexual harassment of students and third parties by students, staff, contractors, vendors and third parties **in schools**. This policy has no application to the circumstances in this case and was clearly not violated by any of the 5 Union officers. Nor did the District explain how this policy could have been violated.

Policy #317 requires all staff to conduct themselves in a manner consistent with appropriate and orderly behavior. It requires employes to maintain professional, moral and ethical relationships with students at all times. As applied to interactions, behaviors and relationships with non-students, the policy addresses prohibited conduct **during work hours when engaged in assigned duties**. This policy also does not apply to the Union officers' email communication to its members. The Union email was an exercise of the protected rights of the Union officers to challenge the policies, attitudes and behaviors of the administration for the benefit of mutual aid and protection of the membership. There was nothing about the email that was conducted during work hours or during the performance of assigned duties, nothing that involved students, nothing that was unprofessional, immoral or unethical. Therefore, none of the enumerated prohibitions listed in Policy #317 were violated.

The email also did not violate Policy # 317 because it did not violate the prohibition of "Conduct that may obstruct, disrupt, or interfere with teaching, research, service, operations, administrative or disciplinary functions of the district, or any activity sponsored or approved by the [b]oard." The Union email did not obstruct, disrupt or interfere with any of these activities. To the extent that Dr. Martin is of the opinion that the Union email interfered with administration functions by undermining her authority, the District did not prove that the email interfered with any administrative operations. Also, notwithstanding whether the email interfered with administrative operations, the policy must yield to the protected activity under PERA. Accordingly, Policy #317 cited by H.R. Director Condo is simply inapplicable and therefore could not be violated. Policy #317 cannot provide a reason to discipline the Union officers. It would be significantly incongruous to conclude that protected activities under PERA are also in violation of a public employer's policy prohibiting unprofessional, immoral and unethical behavior.

Policy #320 was cited by H.R. Director Condo in his disciplinary letter to all 5 Union officers as a basis for discipline. Policy #320 addresses freedom of speech in non-school settings and provides that when a District employe is not engaged in the performance of assigned duties, he or she shall state clearly that the comments are personal views and not those of the District; refrain from comments that would interfere with student discipline; refrain from public comments about the District known to be false or made without regard to truth or accuracy; and refrain from making threats to coworkers, supervisors or District officials. Again, this policy is simply inapplicable to Union officers communicating with their members within their rights under the protections of PERA.

It is part of a Union officer's job to challenge or criticize management when communicating the goals of the bargaining unit, Union leadership and the employes in a representative capacity to bring change to the employment relationship with the employer. This policy, like the other

policies, must yield to the protections under PERA. Also, the Union officers simply did not knowingly make false or threatening statements to or about anyone including Dr. Martin. In fact, the Union email explicitly states that the matters expressed therein are the opinions and views of the teachers who complained being reflected back to the members. It was clear from the literal and explicit language of the email that the comments were clearly personal views of employes and not the views or position of the District, which is actually acceptable under the policy, not in violation of it. Accordingly, Policy #320 was not violated and cannot serve as a basis for discipline. It was a pretextual justification for the District's retaliation against the 5 Union officers.

Policy #326 directs the Superintendent to establish a process to resolve complaints and conflicts among employes and to establish communication between supervisory personnel and District employes for situations not covered by the CBA. The policy provides that "[i]t is the [b]oard's intent to establish reasonable and effective means of resolving conflicts among employees to reduce potential areas of complaints, and to establish and maintain clear two-way channels of communication between supervisory personnel and district employees for situations not covered by the terms of a collective bargaining agreement." First, there is nothing in the policy making the process mandatory. If a group of employes have a complaint about the administration, the policy does not prohibit those employes from discussing matters among themselves or with their Union leaders before filing a complaint, which is what happened among the Union members and their leaders here. The policy does not require employes to engage in the process. Also, it is not clear what procedures the Superintendent has developed to effectuate the policy, as required in the policy itself. Indeed, had Dr. Martin not disciplined the 5 Union officers, they may have come to her for an informal conference to discuss the teachers' opinions that Dr. Martin believed that teachers were not accountable during synchronous remote learning. Accordingly, Policy #326 is inapplicable, it was not violated, and reliance on it is pretextual.

And finally, H.R. Director Condo cited to Policy #906 entitled "Public Complaints." Policy #906 establishes a specific procedure for "[a]ny parent/guardian, student resident or community group" to present a request, suggestion or complaint regarding the District's programs, personnel, operations and facilities." It further provides: "Attempts to resolve public concerns and complaints of district residents shall begin with informal, direct discussions among the affected parties, following the established guidelines and district organizational structure. Only when informal meetings fail to resolve the issue shall more formal procedures be utilized." The Union officers and the District teachers do not fall within the class of individuals targeted by this policy. The Union officers and their members were not acting as parents or guardians; they are not students or a community group; and they were not acting in their capacity as residents. They were acting as Union officials which are classifications not covered or addressed by Policy #906. Again, as with Policy #326, there is nothing in Policy #906 that requires a citizen, resident, parent or student, who has a complaint or criticism of the District or its administration, to actually bring that complaint to the District. Accordingly, Policy #906 is inapplicable and it was not violated by any of the 5 Union leaders. It was, therefore, a pretextual basis for discipline.

H.R. Director Condo's pretextual assertion that the Union officers violated multiple work rules and/or policies as justification for the

retaliatory investigation and discipline, where none of those rules has a valid nexus to the Union officers' email communication to their members, further demonstrates a strong inference of anti-Union animus. In this manner, H.R. Director Condo attempted to provide layers of cover to hide the District's retaliatory motive and its campaign to control, if not crush, Union messaging and communication.

The Association also alleged an independent cause of action under Section 1201(a)(1) of the Act, when Dr. Martin and H.R. Director Condo conducted internal investigations and imposed discipline on 5 Union officers for sending the February 20, 2021 email to Union members. 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); Northwest Area Educ. Ass' n v. Northwest Area Sch. Dist., 38 PPER 147 (Final Order, 2007). 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).

Under the totality of the circumstances in this case, a reasonable person in the bargaining unit or the Union leadership would unquestionably be coerced in exercising protected rights under PERA. Specifically, the Union officers in this case were exercising a common, routine right of Union officers to communicate with Union members in support of members' expressed feelings and opinions. The officers' protected role under the Act, as representatives and advocates for its members, is to communicate freely. Union officers are permitted under the Act to complain about management and to foster discourse between the leadership and the members about a position and a course of action before addressing management. As the Union officers tried to tell Dr. Martin and H.R. Director Condo, the investigation and the discipline was an attempt to "gag" the Union. Dr. Martin is trying to subjugate the Union leadership to her will by disciplining the officers for routine protected activity. Not only is a reasonable person coerced and intimidated from any future communications by and among officers with their members, but also the record showed that there was actual intimidation and coercion that resulted from the fallout from Dr. Martin's and H.R. Director Condo's investigation and discipline.

First, during the investigatory interviews, Dr. Martin berated the Union officers for their email, which is in itself coercive. Dr. Martin became visibly angry with President Temple. Dr. Martin told President Temple that he needed leadership courses and that he was interfering with her work. These comments to President Temple, while he was captive to the double teaming of Dr. Martin and H.R. Director Condo, had a coercive effect on future internal Union communications. Secretary Massullo's interview was so intense that she became upset and had to leave the interview. Dr. Martin attempted to change Treasurer Swinehart's opinion about Dr. Martin's email. The manner in which the interviews were conducted and the statements made by Dr. Martin during those interviews as related to the Union communication were coercive and intimidating and violated Section 1201(a)(1) of the Act.

The Union officers credibly testified that they are concerned that the District's discipline of the 5 Union officers for their February 20, 2021 email is a precedent for disciplining Union officers in the future for confronting issues and speaking out to Union members about the administration's activities. The Union officers credibly testified that they are presently unsure of what they can say without getting into trouble or being disciplined. These very real concerns are certainly reasonable. Since the investigation and discipline at issue, PSEA UniServe Representative Brian Landis attends meetings to make sure that nothing is said that could be attributed to Association officers and cause them trouble. President-Elect Kline now "second guesses" how she communicates to members.

As a result of the discipline, Treasurer Swinehart feels cautious about what she can say to people because she is afraid that her comments will get back to Dr. Martin. Union officers are fearful that the administration will retaliate against them for Union work, and they are concerned that officers are unable to discuss issues with the membership, after the discipline. Indeed, the second sentence of the 4<sup>th</sup> paragraph of the disciplinary letter places fear in the Union officers for future communications. That sentence provides: "It is expected that you will cease and desist any negative comments or communication towards Dr. Martin, administration or staff of the Keystone Central School District." The letter further threatens: "**Please consider this *formal notice that should you engage in any like or similar conduct in the future, progressive discipline steps will be taken and a recommendation for further disciplinary action up to and including dismissal may be recommended.***" (emphasis added).

This language constitutes a clear threat meant to silence the Union for any communication with its members that criticizes the administration or the Superintendent. A Union cannot function in a representative capacity if the leadership fears reprisal for candid, honest opinions about the administration in formulating the Union's goals and policies for its members moving forward. This discipline has a very real effect on terms and conditions of employment by determining the level of future progressive discipline and professional opportunities. Contrary to Dr. Martin's assertion during the investigation and discipline of the 5 Union officers, the Union leadership does indeed get to evaluate her performance to its Union members. Although Union officers may not unilaterally insert themselves into administrative meetings in which they are not participating, the Union leadership does have the right to be a "watchdog" over Dr. Martin's behavior and performance as it relates to employees, for that is one of the roles of the Union and that is why Union criticism of management is protected speech under PERA and the PLRA. State Troopers, supra. Additionally, protected Union activity must not cause poor assessments on a Union officer's professional employe performance evaluation which negatively affects terms and conditions of employment by interfering with professional opportunities in the future.

During the hearing, Dr. Martin asserted her interests, in defense, that she believes that comments to staff that are critical of her create a hostile work environment. She asserted that she believes that such comments inhibit her ability to improve morale and to meet the goals of her comprehensive plan, which includes improving trust and communication. Dr. Martin's asserted beliefs, however, were speculative and were not borne out by the record. Perhaps, openly accepting criticism could just as speculatively have the opposite effect, and highly educated teachers could develop more respect for a Superintendent that accepted criticism and welcomed transparent debate as part of a comprehensive plan to improve morale, communication and trust. And

therein lies the problem with unproven speculations. Litigants may not use speculative reasons to justify their actions or establish the actor's interests when those reasons do not in reality exist or only exist in the imagination of the actor. Otherwise, an employer can make up any self-serving reason to justify adverse actions against employees. Therefore, Dr. Martin's speculative justifications (i.e., speech that is critical of her creates a hostile work environment and undermines her ability to perform her job) have not been established by substantial, competent evidence and are not objectively reasonable on this record. Those asserted interests are not legitimate business reasons or justifications. They cannot, as a matter of law, be given any weight in the calculus balancing the parties' interests. Accordingly, the District has no legitimate interests that could outweigh the Union officers' interests in communicating opinions critical of the Superintendent to their members to improve the treatment of and respect for employees, as protected under Article IV of PERA.

Accordingly, the District independently violated Section 1201(a)(1) of PERA and unlawfully coerced, intimidated and interfered with protected rights under the Act when it investigated and disciplined the 5 Union officers for collaboratively writing and distributing to its members the February 20, 2021 email. Also, the District violated Section 1201(a)(3) of PERA when it unlawfully retaliated against the 5 Union officers for collaboratively writing and distributing to its members the February 20, 2021 email by investigating and disciplining the Union officers.

#### **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 Union is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. The District independently committed unfair practices in violation of Section 1201(a)(1).
5. The District independently committed unfair practices in violation of Section 1201(a)(3).

#### **ORDER**

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

**HEREBY ORDERS AND DIRECTS**

that the District shall:

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

2. Cease and desist from 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.

3. Take the following affirmative action, which the hearing examiner finds necessary to effectuate the policies of PERA:

(a) Immediately remove the letter of discipline from all 5 Union officers' personnel files and anywhere else they may be recorded, placed or filed either in hard copy or electronic format, including but not limited to the personal or workplace files of any District administrators, managers, supervisors, principals, directors, teachers or other employes.

(b) Immediately remove the notation, "Needs Improvement," in Section 4F of the performance evaluations of all 5 Union officers, under the professionalism category, by providing identical, new replacement evaluations for that time period sans the negative notation: "needs improvement," and not by modifying that category on the existing evaluation. The replacement evaluation shall provide at least a satisfactory rating or higher in the professionalism category as independently evaluated by the appropriate building principal or CTC Director.

(c) Immediately cease and desist from threatening or imposing future investigations and/or discipline against any current or future Union officers for their individual or collective communications with Union members expressing critical/negative opinions about any management, administrative and/or supervisory employe, operation or policy.

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

(e) Furnish to the Board within twenty (20) days of the date hereof satisfactory evidence of compliance with this decision and order by completion and filing of the attached affidavit of compliance.

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty days of the date hereof, this decision and order shall be and become final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this twenty-third day of May 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

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JACK E. MARINO, Hearing Examiner



COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

ASSOCIATION OF CLINTON COUNTY EDUCATORS :  
PSEA/NEA :  
v. : CASE NO. PERA-C-21-41-E  
KEYSTONE CENTRAL SCHOOL DISTRICT :  
:

**AFFIDAVIT OF COMPLIANCE**

The District hereby certifies that it has ceased and desisted from its independent violations of Section 1201(a)(1) and Section 1201(a)(3) of PERA; that it has immediately removed the letter of discipline from all 5 Union officers' personnel files and anywhere the discipline may be recorded or filed either in hard paper copy or electronic format; that it has immediately removed the notation: "Needs Improvement," in Section 4F of the performance evaluations of all 5 Union officers, under the professionalism category by replacing those evaluations with new, identical ones sans the notation: "needs improvement" and caused the appropriate building principal or director to independently evaluate that category with a satisfactory rating or higher; that it has immediately ceased and desisted from threatening or imposing future investigations and discipline against Union officers for their individual or collective communications with Union members expressing critical opinions about any management/supervisory employe, operation or policy; that it has posted a copy of this decision and order as prescribed therein; and that it has served a copy of this affidavit on the Union at its principal place of business.

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

\_\_\_\_\_  
Title

SWORN AND SUBSCRIBED TO before me  
the day and year first aforesaid.

\_\_\_\_\_  
Signature of Notary Public