

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

OCTORARA AREA EDUCATION ASSOCIATION :
:
:
v. : CASE NO. PERA-C-21-9-E
:
OCTORARA AREA SCHOOL DISTRICT :
:
:

PROPOSED DECISION AND ORDER

On January 19, 2021, the Octorara Area Education Association (Union or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that the Octorara Area School District (District) independently violated Section 1201(a)(1) and Section 1201(a)(3) of the Public Employe Relations Act (Act or PERA). The Union specifically alleged that the District retaliated against the Association and School Psychologist Dr. Ryan Kieffer, who is the spouse of the Union President.

On March 26, 2021, the Secretary of the Board issued a Complaint and Notice of Hearing designating a hearing date of July 9, 2021, via Microsoft Teams video. The hearing was continued to September 24, 2021, also via Microsoft Teams video, at the request of the Complainant and without objection from the Respondent. 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. On January 14, 2022, the Union filed its post-hearing brief. On February 14, 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. 8-9)
2. The Union is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 8-9)
3. Dr. Ryan Kieffer held the position of School Psychologist at the District for 20 years from 2001 to 2021. (N.T 10, 31)
4. For the twenty years that Dr. Kieffer worked as a School Psychologist at the District, the District employed 2 school psychologists. The other school psychologist was Mike Vnucak. Both school psychologists were 12-month employes of the District. (N.T. 11, 17-18)
5. Dr. Kieffer is the husband of the Union President, Amanda Kieffer. The District Superintendent is Dr. Michele Orner. Dr. Orner is aware that Union President Amanda Kieffer and School Psychologist Dr. Ryan Kieffer are spouses. (N.T. 12, 24, 39, 49, 106, 136)

6. Amanda Kieffer is a teacher of 7th grade earth and space science and has taught at the District for 25 years. Union President Kieffer has had a position in the Union during her entire 25-year tenure with the District. (N.T. 38-39)

7. Wendy Leary is a full-time UniServ Representative for the Pennsylvania State Education Association (PSEA) assigned to the District. (N.T. 66-67)

8. Cale Hilbolt was Dr. Kieffer's direct supervisor at the District. Mr. Hilbolt became the Director of Student Services on July 13, 2020. Mr. Hilbolt is also aware that Dr. Kieffer is married to the Union President. Amanda Fraterman became the Supervisor of Special Education in late July 2020. (N.T. 12, 119-120, 149-150, 154, 161, 181; District Exhibits 2 & 5)

9. Prior to the 2020-2021 school year, the two school psychologists primarily conducted educational evaluations for the whole District. They engaged in various meetings and data collection, peer processes, attended instructional support meetings and activities, conducted child studies, obtained and processed student data, attended team meetings, engaged in Multi-tiered systems of support, which is a program for levels of intervention and instructional support for students. Dr. Kieffer was also a member of the student assistance program; he actively participated in IEPs, multi-disciplinary evaluation meetings, and grief counseling. (N.T. 13)

10. Dr. Kieffer evaluated referred students and provided input and assistance to the child study team and the intervention specialist, prior to conducting the evaluation of students. At this point, Dr. Kieffer gathered data, met with families and explained the process to them. Data collection took several weeks or months, after which Dr. Kieffer reconvened the team to determine whether an evaluation was warranted. (N.T. 13-14)

11. If an evaluation was warranted, Dr. Kieffer began the evaluation process by observing the student(s) against the behavioral checklist, consulting with teachers, working with the student(s) over various testing sessions, scoring those tests and analyzing and interpreting the results. Dr. Kieffer then provided his findings to the multi-disciplinary team and consolidated those findings into an evaluation report, which he shared with the family. Dr. Kieffer also participated in the IEP team meetings to assist with identifying expectations for development as well as the special instructional needs to facilitate meeting those goals. (N.T. 13-14)

12. Student data collection involves pre-referral data from investigating and analyzing a student's previous performance and teacher observations, curriculum-based assessments, and IQ or acumen testing. Dr. Kieffer administered various types of tests involved in conducting a standard evaluation for students at the District. These tests included a cognitive measure test, achievement measure test, behavioral scales test, observations, and adaptive behavior tests. (N.T. 14-16)

13. Dr. Kieffer was responsible for performing these duties and providing these services for students Districtwide. When Mr. Vnucak worked at the District, he and Dr. Kieffer split the District in half by surname for all students who needed intervention from before kindergarten to 12th grade. Dr. Kieffer had students with surnames beginning with the letters A through L, and Mr. Vnucak had the latter half of the alphabet. (N.T. 16)

14. There were 2 types of occasions when the Chester County Intermediate Unit (CCIU) conducted evaluations: (1) when ruling out whether a language barrier was impeding a student's learning rather than a disability; and (2) when the CCIU's Psychiatrist, performed psychiatric evaluations. Neither Dr. Kieffer nor Mr. Vnucak is qualified to perform either of those 2 types of evaluations. (N.T. 17, 41)

15. Union President Kieffer learned, in the fall of 2019, that Mr. Vnucak was considering retirement. Mr. Vnucak retired around June 30, 2020 or July 1, 2020. Dr. Kieffer was not party to any discussions at this time regarding plans to replace or not replace Mr. Vnucak. (N.T. 18, 40-41, 120)

16. During the 2019-2020 school year, the CCIU studied the Special Education program at the District for grades K-12. The results were presented to the District in a report dated February 25, 2020. At the time of the study and the report, the District had 2 full-time bargaining unit psychologists, both of whom participated in the focus groups for the study. (N.T. 114, 118-119, 137-138; District Exhibit 2)

17. On page 13, the report states, in relevant part, as follows:

Provide continued professional development to school psychologists related to current best practices in evaluations, assessment instruments, trends in the field, and writing legally defensible reports.

. . . .

Have the school psychologist take a more active role in the reevaluation process such as completing section 1 and 3 in section I. of the report.

(District Exhibit 2)

18. On page 22 of the report, the CCIU recommended that the District hire a cabinet level director. Based on this recommendation, the District hired Mr. Hilbolt. The report does not recommend reducing the existing number of school psychologists or that 1 school psychologist would be sufficient to satisfy the recommended improvements in special education services. Page 13 of the CCIU report recommends that school psychologists take a more active role in the re-evaluation process. (N.T. 115-117, 137-138, 151-152; District Exhibit 2)

19. On May 21, 2020, the Pennsylvania Economy League (PEL) submitted a report to the District analyzing demographics, housing and, inter alia, enrollment projections for the District. Throughout Chapter 5, the PEL report provides that "pupil counts are based on October 1 figures as provided by the [D]istrict for the respective years and reflect all regular classroom pupils as well as all those engaged in the Octorara Area Virtual Academy . . . and some of the [D]istrict's special education pupils." (District Exhibit 1)

20. Page 5-20 of the PEL report states:

Enrollment projections for the Octorara Area School District were prepared using the 'grade progression' technique, which is based on the ratio of enrollments in a given grade in a given year to enrollments in the next lower grade in the preceding year.

. . . . Ratios below 1.00 are generally indicative of net out-migration, transfers out of the school system or to special classes or programs, failure to promote pupils from the prior grade, and/or dropouts in the high school grades. Ratios above 1.00 usually indicate net in-migration, transfers into the school system from private/parochial and other schools or special classes and programs, and/or failure to promote pupils to the next grade.

(District Exhibit 1 at 5-15)

21. The PEL report also provides the following:

In Octorara Area during the current school year the progression ratios for grades 5,7,9,11 and 12 are 1.0 or higher suggesting net in-migration of pupils in these grades. In the grades with a ratio below 1.0 (1,2,3,4,6,8 and 10) there was not necessarily an absence of in-migration, but any in-migration may not have been as strong as in the other grades, and/or may have been more than offset by out-migration, transfers to private/parochial and other schools, entry into special classes and programs, failure to promote pupils from the previous grade, and/or the dropout of pupils in the high school grades.

(District Exhibit 1 at 5-15)

22. On July 22, 2020, Union President Kieffer and Dr. Orner, the District Superintendent, discussed the District's plan to use the CCIU for 1 year after Mr. Vnucak's retirement. In an email memorializing the meeting, Union President Kieffer wrote: "The school psychologist position (mike Vnucak) will be temporarily (1 year) contracted through the CCIU and will be reevaluated by Cale Hilbolt. The district is not prepared to commit funds for a position from the general fund and the short-term solution is contracting out." (N.T. 41-43, 139-140; Association Exhibit 2)

23. The same day, Dr. Orner confirmed receipt of President Kieffer's email and her understanding. (N.T. 43, 139-140; Association Exhibit 3)

24. In late summer or the beginning of the fall of 2020, PSEA Representative Wendy Leary learned that the Association had an issue with the District's plans to contract with the CCIU instead of hiring a bargaining unit replacement. (N.T. 67-68)

25. On July 24, 2020, President Kieffer email Dr. Orner the following:

[I]n working with PSEA to account for all positions held and then lost due to retirement or resignation, they are concerned that the School Psychologist position as discussed at our meeting this past Wednesday is considered subcontracting and therefore, would be considered an unfair labor practice. Next week, if you would like, we could discuss how to remedy the situation. Respectfully, I would like to work together to craft a solution that would meet the needs of both organizations.

(Association Exhibit 4)

26. On July 27, 2020, Mr. Hilbolt emailed Dr. Kieffer stating, in relevant part, as follows:

We are making a few changes to our tracking forms and this information will also be present on the new form. Once the new form is ready, I am going to ask you and the new school psychologist to manage it as a google doc that is shared with the leadership team.

(District Exhibit 5)

27. At this time, Mr. Hilbolt also agreed to contact the CCIU for a contract school psychiatrist. (N.T. 185)

28. At the end of July 2020, Dr. Orner and President Kieffer had discussions regarding the vacant School Psychologist position, and the Union offered to develop an MOU with the District once the position was posted. In such an MOU, the Union would agree to the contracting out of the position with the CCIU temporarily until the position could be filled by a bargaining unit member. (N.T. 45, 61)

29. On August 25, 2020, Dr. Orner emailed President Kieffer the following:

I asked Cale Hilbolt to research Octorara's use of outside services to provide support to the school psychologists. Attached is documentation from the 2019-2020. Last year, OASD contracted with Dr. Steadman to provide 175 hours of service. The cumulative expense for July-March was \$19,471.25. Legal counsel confirms this constitutes past practice for the district's use of contracted psychological services. Some of the invoices reference direct services/evaluations

Jeff Curtiss shared that psychology services contracted support has been a line in the special education/student services budget for a number of years.

Let me know when you are available for a follow-up conversation. In the meantime, Cale has been asked not to engage the services of outside services for psychological support until we have a change to discuss next steps.

(Association Exhibit 5)

30. After receiving Dr. Orner's August 25, 2020 email, President Kieffer consulted with Dr. Kieffer who clarified that Dr. Steadman was used for different types of evaluations than the ones performed by the school psychologists employed at the District, e.g., intensive therapy evaluations. These were services that the District's school psychologists had not done because they were not qualified to do them. Any school psychologist help from the CCIU was work that was in addition to the 2 full-time bargaining unit school psychologists. (N.T 46, 49, 125)

31. Dr. Orner and President Kieffer subsequently had conversations towards the end of August discussing subcontracting. As a result of those conversations, Dr. Orner decided to refer the matter of using the CCIU to replace Mr. Vnucak to legal counsel, and the Union understood that there

would be no replacement school psychologist hired under the collective bargaining agreement to replace Mr. Vnucak. (N.T. 47-48)

32. UniServ Representative Leary also discussed with labor counsel for the District that the Association would be willing to enter into an MOU agreeing to a temporary contracting out of the vacant school psychologist position until a qualified full-time bargaining unit replacement could be hired. The attempts of Union President Kieffer and PSEA Representative Leary to agree to a subcontract with the CCIU for school psychologist services on a temporary basis were not successful. (N.T. 61, 68-69)

33. Adam Udell is a bargaining unit teacher and a Union official. Shirley Williams is the Union Vice President. Late in the summer of 2020, Mr. Udell, Ms. Williams, and President Kieffer held a meeting with Dr. Orner during which Dr. Orner stated that she would temporarily fill the position with someone from the CCIU. (N.T. 70-72)

34. Since the District did not hire or temporarily subcontract a replacement for Mr. Vnucak, the entire student body, surnames beginning with the letters A through Z, became the responsibility of Dr. Kieffer, who was the only school psychologist remaining at the District. (N.T. 19, 40, 140)

35. Beginning with the 2020-2021 school year, Dr. Kieffer became responsible for additional work for which he had not previously been responsible, such as maintaining testing timelines, generating permissions to evaluate and re-evaluate students, sending notices of recommended educational placements or assignments, comprehensive re-evaluations, mailing paperwork to families, informing the secretary of student services when the permissions were returned in addition to the work of the students whose surnames began with the letters M through Z. (N.T. 20-21, 194; Association Exhibits 1 & 6)

36. Secretarial duties in Special Education were performed by the Secretary of Special Education, Anna Baker. When Ms. Baker retired at the end of the 2019-2020 school year, she was replaced with a new Secretary, named Nicole Little. At that time, Mr. Hilbolt transferred duties previously performed by Ms. Baker to Dr. Kieffer. (N.T. 19, 21-22, 161; Association Exhibits 1 & 6; District Exhibit 5)

37. In an email dated September 27, 2020, addressed to Union President Amanda Kieffer, Dr. Kieffer listed the added duties that he had at the beginning of the 2020-2021 school year and the person who was previously responsible for those duties. At the start of the new school year, Dr. Kieffer had the added duties of all students including M through Z formerly done by Mr. Vnucak, and certain secretarial duties formerly performed by Ms. Baker. (N.T. 24-26, 30; Association Exhibits 1 & 6)

38. Also in September 2020, Mr. Udell had meetings with Dr. Orner concerning the School Psychologist position, during which he informed her that the workload on Dr. Kieffer was unsustainable. He told Mr. Hilbolt and Dr. Orner that for 20 years 2 people did the work and the double workload was affecting Dr. Kieffer. He specifically referenced the secretarial duties that were newly assigned to Dr. Kieffer in addition to the double workload. He also reiterated that the Union would sign an agreement permitting temporary subcontracting with the CCIU to fill the school psychologist position for the 2020-2021 school year. (N.T. 73-75, 77-79)

39. In a September 29, 2020 email to Dr. Orner, Mr. Udell memorialized a discussion he had with Dr. Orner that day and reiterated the conditions for an MOU regarding the subcontracting of Mr. Vnucak's vacant position. The conditions were as follows: (1) the District will post for the position; (2) If the position remains unfilled, the District may subcontract with the CCIU or other agency for the 2020-2021 school year; (3) the agreement ends on June 30, 2021; and (4) the agreement does not establish any precedent. (N.T. 75-77; District Exhibit 3)

40. Dr. Orner acknowledged receipt of Mr. Udell's email on the same day and stated that she would reply by Friday, October 2, 2020. (District Exhibit 3)

41. On November 19, 2020, the Union filed a charge of unfair practices with the Board alleging that the District unlawfully transferred the work of school psychologist outside of the bargaining unit. On December 30, 2020, the Secretary of the Board administratively dismissed the charge as premature. (Association Exhibit 8)

42. During a liaison meeting on November 20, 2020, President Kieffer told Dr. Orner that Dr. Kieffer needed help, and she asked Dr. Orner about what the District was doing about the vacant school psychologist position. Dr. Orner was agitated and angry when she responded. (N.T. 52; Association Exhibit 7)

43. That same day, President Kieffer emailed Dr. Orner as follows:

Today's meeting was indeed productive until the mention of the outstanding personnel issue. If you felt that it was inappropriate to discuss, I would have preferred a more civil approach rather than being admonished for delivering the due diligence expected by the membership. My intention as a president is to resolve concerns in an efficient and effective way.

(Association Exhibit 7)

44. The double caseload and additional clerical duties assigned to Dr. Kieffer caused him to work "feverishly" to keep up with the added demands and to make a good impression on his new supervisors, Mr. Hilbolt and Ms. Fraterman. The additional work endured the entire 2020-2021 school year and required Dr. Kieffer to work beyond his contractual workday, plus weekends and holidays with much greater frequency than in the past 20 years. Dr. Kieffer suffered personal and professional stress. The work felt "overwhelming" and "unsustainable." Mr. Udell recognized that Dr. Kieffer was "drowning," and regularly told Mr. Hilbolt and Ms. Fraterman that Dr. Kieffer was "in desperate need of assistance." (N.T. 27-28, 31, 33, 77-79)

45. In previous years, Dr. Kieffer was permitted to submit overtime stubs for hours worked beyond his contractual workday, subject to the approval of the Supervisor of Special Education. Mr. Hilbolt informed Dr. Kieffer that there would be no overtime pay, unless it was related to due process, and not to submit overtime stubs during the 2020-2021 school year. (N.T. 35-36)

46. Dr. Orner and Mr. Udell had conversations about the amount of work imposed on Dr. Kieffer. (N.T. 141)

47. On January 19, 2021, Mr. Udell emailed Mr. Hilbolt and Ms. Fraterman a reminder that Dr. Kieffer "really needs help." Mr. Hilbolt emailed Mr. Udell as follows:

This summer, Ryan requested contracted, part time assistance through December to help him "get on his feet" as we rebounded back to school. The District agreed to pursue these services until January 2021. However, the Association indicated dismay with the fulfilling the request of the school psychologist because it utilized a contractor rather than a full-time, bargaining unit employee. Nevertheless, the window of time for which the part-time contractor would have assisted has now closed and the school psychologist [Dr. Kieffer] has performed all of his duties during the time he otherwise requested additional assistance.

At this time, the District is not pursuing additional staff for the role of school psychologist.

(N.T. 80; District Exhibit 3)

48. On February 8, 2021, Mr. Udell again emailed Mr. Hilbolt and Ms. Fraterman stating: "As his Union Representative I must inform you that Ryan Kieffer is in desperate need of help and cannot carry out the work of two people." The same day, Mr. Hilbolt responded: "Based on the pending Unfair Labor Practice filed against the District, specifically regarding this employee, we cannot engage in discussion about the concerns named in your email." (Association Exhibit 11)

49. On February 15, 2021, Mr. Udell again emailed Mr. Hilbolt and Ms. Fraterman to inform them that "Ryan [Kieffer] is not able to keep up with the workload of two people and is concerned the district will be out of compliance if they do not staff properly." In response, Mr. Hilbolt stated, in relevant part: "I am worried about your rationale committing Ryan to becoming out of compliance in the future if demands are not met for creating an additional position. What has changed?" The email further summarized the ways in which the administration believed it had worked with Dr. Kieffer to mitigate some of the problems. (District Exhibit 10)

50. During a meeting in the spring of 2021, Mr. Udell presented administrators with the number of evaluations that Dr. Kieffer had to complete based on records kept by Dr. Kieffer. Dr. Kieffer had an "undoable" number of evaluations to complete by the deadlines established by the District. (N.T. 84)

51. At the end of the 2020-2021 school year, in July 2021, Dr. Kieffer resigned from the District because he "could not maintain the work of two people." Dr. Kieffer credibly testified that he "reached out several times to try to obtain assistance and some empathy at times as well. But to no avail . . . it [was] time to go." (N.T. 27-28, 30, 34).

52. During the hearing, Mr. Hilbolt cited the National Association of School Psychologists (NASP) guidelines for school psychologist-student ratios as being authoritative. On its website, NASP provides that a school psychologist should serve between 65 and 91 students receiving special education services and where there are no more than 500 to 700 students in the school district overall per school psychologist. Mr. Hilbolt also

testified that the District has approximately 400 students receiving special education services. (N.T. 167; www.nasponline.org)

53. As of the date of the hearing on September 24, 2021, the District had not replaced either of the two bargaining unit school psychologist positions with full-time bargaining unit employees. In September 2021, the school board voted to subcontract school psychologist services. Currently, the District has 3 independently contracted school psychologists performing the work of Mr. Vnucak and Dr. Kieffer. On July 27, 2021, the District posted and advertised for 1 full-time bargaining unit school psychologist. (N.T. 85-86, 128)

DISCUSSION

In this case, the Association claims that the District discriminated against the Union, its President, Amanda Kieffer, and her husband, School Psychologist Dr. Ryan Kieffer. The Union specifically contends that the District retaliated against the Union and Dr. Kieffer by assigning additional clerical duties and all the caseload duties of the retired school psychologist to Dr. Kieffer as a result of Amanda Kieffer's protected activity, i.e., raising concerns about the District's intent to subcontract a school psychologist position. The Union posits that, thereafter, the District refused to sign an MOU with the Union agreeing to limited subcontracting with the CCIU to perform the duties formerly done by Mr. Vnucak and/or refused to hire a bargaining unit replacement. Keeping Mr. Vnucak's position vacant caused Dr. Kieffer's workload to double, which increased his hours and impacted his professional and personal life. Additionally, the Union claims that Mr. Hilbolt required Dr. Kieffer to perform nonprofessional, clerical duties that were not previously assigned to Dr. Kieffer.

In a discrimination claim, the complainant has the burden of establishing that the employe(s) engaged in protected activity, that the employer knew of that activity and that the employer took adverse employment action that was motivated by the employe's involvement in protected activity. St. Joseph's Hospital v. PLRB, 473 Pa. 101, 373 A.2d 1069 (1977). Motive creates the offense. PLRB v. Stairways, Inc., 425 A.2d 1172 (Pa. Cmwlth. 1981). 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 employe's prima facie case. Stairways, supra; Teamsters Local 312 v. Upland Borough, 25 PPER ¶ 25195 (Final Order, 1994). Other factors include: any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to explain its action against the adversely affected employe(s), shifting reasons and/or pretext, and the effect of the employer's adverse action on other employes and their protected activities. PLRB v. Child Development Council of Centre County, 9 PPER ¶ 9188 (Nisi Decision and Order, 1978). Although close timing of an employer's adverse action alone is not enough to infer animus, when combined with other factors, close timing can give rise to the inference of anti-union animus. Teamsters Local No. 764 v. Montour County, 35 PPER 12 (Final Order, 2004); AFSCME, AFL-CIO, Council 13 v. Commonwealth, Department of Labor and Industry, 16 PPER ¶ 16020 (Final Order, 1984).

In Teamsters, Local 776 v. Perry County, 23 PPER 23201 (Final Order, 1992), the Board stated that "once prima facie showing is established that the protected activity was a motivating factor in the employer's decision, the burden shifts to the employer to demonstrate that the action would have occurred even in the absence of that protected activity." Perry County, 23 PPER at 514. Upon the employer's offering of such evidence, "the burden shifts back to the complainant to prove, on rebuttal, that the reasons proffered by the employer were pretextual." Teamsters Local #429 v. Lebanon County, 32 PPER ¶ 32006 at 23 (Final Order, 2000). "The employer need only show by a preponderance of the evidence that it would have taken the same actions sans the protected conduct." Pennsylvania Federation of Teachers v. Temple University, 23 PPER ¶ 23033 at 64 (Final Order, 1992). The parties, however, may elicit and offer evidence in support of their primary burdens of proof or their rebuttal case at any time during the proceeding. More importantly, however, the burden only shifts to the employer if the Union establishes a prima facie case of discrimination. Id.

The record establishes that the District was aware that Union President Amanda Kieffer, Mr. Udell and Ms. Williams were engaged in protected Union and collective bargaining activities. The record also shows that District administrators, at all times relevant hereto, were aware that Union President Kieffer is the wife of school psychologist Dr. Kieffer. Also, the District does not dispute that the Superintendent and Mr. Hilbolt were aware that Amanda Kieffer and Mr. Udell were engaged in protected activities related to the vacant school psychologist position. Moreover, Dr. Kieffer was engaged in protected activities for mutual aid and protection when he asked for support from Mr. Hilbolt and when he sought the Union's assistance in obtaining help from the District. Accordingly, the first two requisite elements of a discrimination claim have been satisfied.

Additionally, the record supports a strong inference that the District was unlawfully motivated by Union animus when administrators doubled Dr. Kieffer's caseload and added clerical duties to his work plate. Therefore, the Union has met its burden of establishing a prima facie case of discrimination. Moreover, I have not credited the reasons offered by the District to explain its behavior. I have concluded that the District's reasons are inadequate, not credible and lack a sufficient nexus to the adverse employment action against Dr. Kieffer to rationally support deliberately overloading Dr. Kieffer while placing students, who are at the core of the District's mission, at risk. The District's reasons are therefore pretextual, which further supports the conclusion that the District's administrators were unlawfully motivated.

As with any discrimination claim, the chronology is important to understanding the context of statements, revealing state of mind, the timing of adverse employment decisions, and the inferences supporting a determination of unlawful motive in this case. For 20 years, Dr. Kieffer was 1 of 2 school psychologists at the District, both of whom were both 12-month employees. Dr. Orner was appointed Superintendent in the summer of 2018, and she was aware of the spousal relationship between Amanda and Ryan Kieffer. During their tenure at the District, the 2 school psychologists were responsible for a significant amount of duties including but not limited to the following summary: conducting educational evaluations for the whole District; engaging in data collection and sharing data during various meetings and peer processes; attending instructional support meetings and activities; conducting child studies; engaging in Multi-tiered systems of support; participating as a member of the student assistance program, IEPs

and multi-disciplinary evaluation meetings; conducting grief counseling; evaluating referred students and providing assistance to the child study team and the intervention specialist, prior to conducting the evaluation of students; gathering data, meeting with families.

If an evaluation were warranted, Dr. Kieffer and Mr. Vnucak began the evaluation process by observing the student(s) against a behavioral checklist, consulting with teachers, working with the student(s) over various testing sessions, scoring those tests, then analyzing and interpreting the results. Dr. Kieffer provided his findings to the multi-disciplinary team, consolidated those findings into an evaluation report, and he shared the findings with the family. Dr. Kieffer also participated in the IEP team meetings to assist with identifying and facilitating instructional needs and goals for development. Student data collection involves analyzing pre-referral data about a student's previous performance, teacher observations, curriculum-based assessments, and IQ or acumen testing. Dr. Kieffer administered various types of tests involved in conducting a standard evaluation for students at the District. These tests involve and determine a cognitive measure, an achievement measure, behavioral observations and scale placement, and adaptive behavior.

Dr. Kieffer successfully shared these numerous and complicated responsibilities with Mr. Vnucak for 20 years, without any reported deficiencies in his performance, by splitting the alphabet Districtwide. The CCIU always provided psychiatric evaluations and language barrier determinations because neither Mr. Vnucak nor Kr. Kieffer were qualified to perform these studies or evaluations. Also, the District contracted with Dr. Steadman to provide different types of evaluations than the ones performed by Dr. Kieffer and Mr. Vnucak, such as intensive therapy evaluations. Then, in February 2020, the CCIU issued a report evaluating the special education program at the District. Significantly, at this time, the CCIU recommended increasing school psychologist services and training to improve the District's Special Education Program, which already had 2 school psychologists.

Surprisingly, the District relies on this report to justify reducing the number of school psychologists down to 1 when the CCIU recommended that the 2 school psychologists do more. The District contends that the CCIU report did not directly address the number of school psychologists the District should maintain. Rather the report focused on the administration of the program through the new Director who streamlined Dr. Kieffer's performance to better handle the workload. The CCIU report, however, speaks for itself and contradicts the District's argument. The CCIU report recommended that the school psychologists become more involved in specific areas of special education. There simply is no interpretation of or support in the CCIU report, which recommended a greater involvement by the existing 2 school psychologists, for leaving vacant a school psychologist position.

In fact, the CCIU report explicitly contemplated maintaining more than 1 school psychologist. Page 13 of the report recommends providing "continued professional development to school psychologists [PLURAL] related to current best practices in evaluations, assessment instruments, trends in the field, writing legally defensible reports." The report, in this context, clearly opined that improving the special education program at the District required both school psychologists to receive more training in certain areas. The same section of the report states that the District should have "the school psychologist take a more active role in the reevaluation process such as

completing section 1 and 3 in section I. of the report." Again, the CCIU report is recommending that each school psychologist become more involved and take on more duties to improve service, and these recommendations were reported after the CCIU program evaluation team conducted focus groups with both District school psychologists. Accordingly, the District's reliance on the CCIU report to justify its elimination of a school psychologist position for the 2020-2021 school year is pretextual and not credible.

Later, in May 2020, the Pennsylvania Education League (PEL) issued a report analyzing demographics, housing and, inter alia, enrollment projections for the District. The report explicitly states that it only considered some, not all, the District's special education pupils. The PEL report used a "grade progression" method of determining pupil ratios by comparing the enrollments of a given grade in a given year to the enrollments in the next lower grade in the preceding year. The District relies on the PEL report and argues that "the overall students and the number of students in the Student Services department were down." The PEL report, however, does not address Special Education students, as argued by the District. Rather the PEL report actually shows that, over the years, there has been a fluctuation in student enrollment in various grade levels and that "during the current school year [2019-2020] the progression ratios for grades 5,7,9,11 and 12 are 1.0 or higher suggesting net in-migration of pupils in these grades," i.e., an increase in pupil enrollment.

The PEL report further provides that, "in the grades with a ratio below 1.0 (1,2,3,4,6,8 and 10) there was not necessarily an absence of in-migration, but any in-migration may not have been as strong as in the other grades, and/or may have been more than offset by out-migration, transfers to private/parochial and other schools, entry into special classes and programs, failure to promote pupils from the previous grade, and/or the dropout of pupils in the high school grades. Accordingly, 5 of 12 grades increased in population, and the report was somewhat inconclusive regarding the remaining 7 grades. The PEL report did state that the ratio of less than 1.0 for those 7 grades could have been caused by an increase in student population in special education programs and classes or failure to promote, among other transfers. Therefore, the student enrollment data for the District as a whole did not reflect the student enrollment data for Special Education in the PEL report, contrary to the District's argument.

Without examining the enrollment trends in Special Education, which the PEL report excluded and which could have increased or remained the same, the District reduced the number of school psychologists to 1. The PEL report did not correlate a reduction in enrollment for the District to a reduction in the number of students requiring special education services. The PEL report provides no basis for reducing the number of school psychologists during a time when the CCIU determined that the Special Education Program at the District needed to provide more school psychologist services to its students. Therefore, I find that the PEL report and the CCIU report do not justify the District's refusal to fill the vacant school psychologist position resulting in an overload of work for Dr. Kieffer. For a proffered business reason to constitute a credible defense there must be a nexus between the proffered reason and the complained-of activity. These two reports provide no rational justification for eliminating a school psychologist position resulting in an overwhelming amount of work for one psychologist.

On July 22, 2020, Dr. Orner confirmed her understanding via email with Amanda Kieffer that the Union was willing to agree to the District's

subcontracting with the CCIU for 1 year for a school psychologist. Dr. Orner had a meeting with Union leaders Adam Udell, Union Vice President Shirley Williams, and Union President Kieffer, during which Dr. Orner stated that she would temporarily fill the vacant school psychologist position with someone from the CCIU. Also at around this time, Director of Student Services, Cale Hilbolt, also agreed to contact the CCIU for a contract school psychologist. In his July 27, 2020 email to Dr. Kieffer, Mr. Hilbolt recognized that there would be a new school psychologist. Accordingly, both Dr. Orner and Mr. Hilbolt, from the District, and President Kieffer, Vice President Williams and Mr. Udell, from the Union, all recognized the need for a second school psychologist to replace Mr. Vnucak. During July 2020, therefore, the District was in possession of the PEL and the CCIU reports and recognized the need for a second school psychologist to help Dr. Kieffer. The administrators were not, during this time, taking the position that those two reports justified eliminating a school psychologist position for the school year; that construct came later. Indeed, it was because of what those two reports concluded that the District agreed to at least subcontract with the CCIU for a second school psychologist.

However, the District's recognition that a second school psychologist was needed changed after President Kieffer questioned the District's subcontracting and advocated in favor of a full-time bargaining unit replacement for Mr. Vnucak. On July 24, 2020, Union President Kieffer emailed Dr. Orner informing her that she discussed the school psychologist matter with PSEA representatives who believed that subcontracting the school psychologist position to the CCIU would constitute an unfair practice and sought to reach an amicable resolution. During discussions at the end of July 2020, with Dr. Orner, Amanda Kieffer offered to enter an MOU agreeing to temporary subcontracting until the District hired a full-time bargaining unit replacement for Mr. Vnucak.

On August 25, 2020, Dr. Orner emailed Amanda Kieffer informing her that the District has had a history of using outside services to support the school psychologists and that she directed Mr. Hilbolt not to engage the services of outside services for psychological support until next steps are discussed. Although not relevant to the instant charge, Dr. Kieffer confirmed with Amanda Kieffer that outside services had been used to perform the types of evaluations that Mr. Vnucak and Dr. Kieffer were not qualified to perform, but not the same services. By the end of August, after further discussions between Dr. Orner and President Kieffer, Dr. Orner referred the matter of using a CCIU subcontractor to its legal counsel. At this time, PSEA UniServ Representative Wendy Leary also reached out the District's labor counsel offering to enter into an MOU permitting temporary subcontracting until a full-time bargaining unit replacement could be hired. These attempts were unsuccessful.

At the beginning of the 2020-2021 school year there was 1 school psychologist doing the work of 2 with no indication from the District that it would post and hire a replacement for Mr. Vnucak or use a temporary school psychologist from the CCIU. As the school year began, Dr. Kieffer became responsible for all students in special education and for evaluations for the entire District. He also was assigned work for which he had not previously been responsible such as the following: maintaining testing timelines, generating permissions to evaluate and re-evaluate students, sending notices of recommended educational placements or assignments, comprehensive re-evaluations, mailing paperwork to families, informing the secretary of

student services when the permissions were returned, in addition to the caseload work of the students whose surnames began with the letters M through Z, and associated clerical duties.

Throughout the fall of 2020, the Union begged for help for Dr. Kieffer and reiterated the Union's position that they would sign an MOU permitting subcontracting. On September 29, 2020, Mr. Udell emailed Dr. Orner outlining the terms of an MOU to subcontract Mr. Vnucak's position. Dr. Orner confirmed receiving the MOU email. Mr. Udell met with Dr. Orner on multiple occasions informing her that the workload on Dr. Kieffer was unsustainable. The District contends that Mr. Hilbolt was working with Dr. Kieffer to help him streamline his operations and organize his tasks. However, no amount of streamlining or organizing could possibly make up for the fact that Dr. Kieffer was doing the work of more than 2 people. Re-organizing the load in a wagon so that more material can be packed into it only makes the wagon heavier and more difficult to pull, not easier. That is what happened to Dr. Kieffer in this case; Mr. Hilbolt's organizational tactics only served to increase the weight on Dr. Kieffer.

On November 19, 2020, the Union filed an unfair practice charge alleging subcontracting. During a liaison meeting on November 20, 2020, Amanda Kieffer again informed Dr. Orner that Dr. Kieffer was in desperate need of help. Dr. Orner's response was agitated and she admonished President Kieffer.

The double workload caused Dr. Kieffer to work "feverishly" to keep up with the added demands and to attempt to make a good impression on his new supervisors, Mr. Hilbolt and Ms. Fraterman. The additional work endured the entire 2020-2021 school year and required Dr. Kieffer to work beyond his contractual workday plus weekends and holidays. Dr. Kieffer suffered a lot of stress both professionally and personally. The work felt "overwhelming" and "unsustainable." Mr. Udell recognized that Dr. Kieffer was "drowning," and regularly told Mr. Hilbolt and Ms. Fraterman that Dr. Kieffer was "in desperate need of assistance." The District's argument that the CCIU report and the PEL report somehow justified these circumstances or suggested that operating Special Education program with 1 school psychologist in the District could improve special education services strains credulity. Also, the argument that the District somehow needed more time to determine whether a second school psychologist was necessary and proper also strains credulity given the immediate and patently obvious need for a second school psychologist, as soon as the 2020-2021 school year began.

The District stated in its brief that Dr. Kieffer did not submit any overtime for the work he completed. The implication of this statement misrepresents the record. Dr. Kieffer credibly testified that Mr. Hilbolt directed Dr. Kieffer that he was not permitted to submit overtime. In previous years, Dr. Kieffer was permitted to submit overtime stubs for hours worked beyond his contractual workday, subject to the approval of the Supervisor of Special Education. Mr. Hilbolt, however, informed Dr. Kieffer that there would be no overtime pay, and not to submit overtime stubs during the 2020-2021 school year, despite the extensive overtime he worked. I draw a negative inference from this misrepresentation of the record. I also draw a negative inference from Mr. Hilbolt's testimony questioning the extensive evening and weekend hours worked by Dr. Kieffer when Dr. Kieffer was undoubtedly doing the work of 2 school psychologists and a secretary in a field where deadline compliance is paramount.

The fact that Mr. Hilbolt told Dr. Kieffer not to submit overtime stubs also shows that the administration was well aware that Dr. Kieffer was overworked. I am drawing the inference that the administrators denied support and overtime for Dr. Kieffer as a result of animus toward the Union. I simply cannot credit the District's stated position that it was attempting to improve special education and comply with the CCIU report by reducing the number of school psychologists while simultaneously doubling the caseload and clerical load on the remaining school psychologist. I do not credit the District's assertion that the District needed more time to evaluate its staffing needs given the PEL report and its student enrollment projections in the face of overwhelming credible evidence that Dr. Kieffer was drowning. In this regard, the District not only retaliated against Dr. Kieffer and the Union for bargaining and attempting to limit subcontracting in the late summer of 2020, but it abused a dedicated District veteran employe who was a consummate professional. Indeed, Dr. Kieffer fulfilled all responsibilities loaded upon him in a timely manner, not because only one school psychologist was sufficient, but because of Dr. Kieffer's herculean efforts, advanced experience and his mission to put the students first.

The District argues that Mr. Hilbolt testified that the NASP recommends only 1 school psychologist per 500 students and that the District has only 400 Special Education students. Mr. Hilbolt's testimony was misleading and misrepresented the NASP recommendation as pointed out by the Union in its brief. Mr. Hilbolt's testimony about NASP recommendations was unobjected to, but uncorroborated, hearsay which I verified by looking to the NASP website at the direction of the Union in its brief. On its website, NASP recommends that a school psychologist should serve between 65 and 91 students receiving special education services and should serve no more than 500 to 700 students in the school district overall. Mr. Hilbolt also testified that the District has approximately 400 students receiving special education services. According to Mr. Hilbolt's own testimony, therefore, the District made Dr. Kieffer responsible for providing special education services for over 5 times the median number of students recommended by the NASP.

Moreover, even when Mr. Vnucak was still working at the District, Dr. Kieffer and Mr. Vnucak were responsible for approximately 200 special education students each, which is almost 3 times the NASP recommendation, at a time when the CCIU report concluded that special education at the District was deficient. Given these astonishing numbers, there simply is no justification for reducing the number of school psychologists or for believing that the CCIU would sanction the reduction in the number of school psychologists. The District vastly increased Dr. Kieffer's workload at a time when he was already overloaded with 3 times the recommended number of special education students while Mr. Vnucak was there, as a result of unlawful motive. District administrators knew of the stress and hardship that Dr. Kieffer was experiencing. Administrators knew that more involvement from the school psychologists per the CCIU report would require even more work and manhours which required maintaining at least the same number of school psychologists as it had maintained for the previous 20 years, if not more.

The District relies on Mr. Hilbolt's testimony that the District only considered a support person for Dr. Kieffer only until January 2021 to help with the evaluations that Dr. Kieffer could not complete during the Spring of 2020 due to COVID. However, Mr. Hilbolt's testimony is not credible, and it contradicts the corroborated record evidence from documents and President Kieffer establishing that Dr. Orner agreed to consider a contractor to

replace Mr. Vnucak for one full year during the summer of 2020, until the Union attempted to bargain limitations on subcontracting the position.

In this context, Mr. Udell emailed Mr. Hilbolt and Ms. Fraterman on January 19, 2021, again reminding them that Dr. Kieffer "really needs help." Mr. Hilbolt revealed his anti-union motivations when he responded as follows:

The District agreed to pursue these services until January 2021. However, the Association indicated dismay with the fulfilling the request of the school psychologist because it utilized a contractor rather than a full-time, bargaining unit employee. Nevertheless, the window of time for which the part-time contractor would have assisted has now closed and the school psychologist [Dr. Kieffer] has performed all of his duties during the time he otherwise requested additional assistance.

At this time, the District is not pursuing additional staff for the role of school psychologist.

Even if the record showed that the District had agreed to provide support for Dr. Kieffer only until January 2021, which it does not, the District never provided even that much support because the Union dared to want to bargain limitations to subcontracting and wanted the District to eventually hire a full-time bargaining unit replacement for Mr. Vnucak. The District administrators increased their ire further when the Union subsequently filed an unfair practice charge alleging unlawful subcontracting on November 19, 2020, which the Secretary of the Board subsequently dismissed as premature on December 30, 2020.

Mr. Hilbolt again revealed his unlawful anti-union motivation in February 2021. On February 8, 2021, Mr. Udell emailed Mr. Hilbolt stating: "As his Union Representative I must inform you that Ryan Kieffer is in desperate need of help and cannot carry out the work of two people." Mr. Hilbolt responded stating: "Based on the pending Unfair Labor Practice filed against the District, specifically regarding this employee, we cannot engage in discussion about the concerns named in your email."

The administration attempted to punish the Union into submission at the expense of students. It is only due to the skills and efforts of Dr. Kieffer that students did not suffer from inadequate services. During a meeting in the spring of 2021, Mr. Udell presented administrators with the number of evaluations that Dr. Kieffer had to complete based on records kept by Dr. Kieffer. Dr. Kieffer had an "undoable" number of evaluations to complete in a small number of workdays, i.e., the deadlines established by the District. At the end of the 2020-2021 school year, in July 2021, Dr. Kieffer resigned from the District because he "could not maintain the work of two people." As it turns out, Dr. Kieffer was doing the work of at least 3-4 school psychologists. Dr. Kieffer credibly testified that he "reached out several times to try to obtain assistance and some empathy at times as well. But to no avail, so . . . it [was] time to go."

Significantly, Since Dr. Kieffer left the District, the District subcontracted for 3 outside professionals to perform the duties that the District expected Dr. Kieffer to perform by himself. This evidence certainly supports the inference that the District knew of the overwhelming duties it imposed on Dr. Kieffer and further supports a strong inference that they were punishing him and his wife for the Union's due diligence in attempting to

bargain for limited subcontracting while advocating for a full-time replacement bargaining unit school psychologist.

The Union further claims that the District committed an independent violation of Section 1201(a)(1) of PERA when it overloaded the Union President's husband and school psychologist with the work of 3 people (i.e., two school psychologists and a secretary) after the Union sought to limit subcontracting the vacant school psychologist position. 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 advocating for a common and routine union position. That is, the Union simply sought to limit subcontracting bargaining unit work and maintain bargaining unit positions on behalf of its membership. In response, the District unloaded a punishing and undoable amount of work on the husband of the Union President as a result of her advocacy. Any reasonable person would be chilled, coerced, and intimidated to speak to administration officials about routine Union matters after the District's attempt to force the Union into submitting to unlimited subcontracting by overloading the Union President's husband. Also, on this record there are no credible reasons proffered by the District that outweigh the adverse effect on protected activities and the Union leadership. Indeed, the District's proffered reasons are not supported by the record and bear no relationship to the District's actions.

Accordingly, the District independently violated Section 1201(a)(1) and 1201(a)(3) of PERA. Due to the fact that Dr. Kieffer has severed his employment relationship with the District, the standard make-whole remedy will be limited.

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 has independently committed unfair practices in violation of Section 1201(a)(1) and (3) of PERA.

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 employes 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 pay Dr. Kieffer any and all quantifiable overtime hours that he worked during the 2020-2021 school year;

(b) Immediately pay Dr. Kieffer interest at the rate of 6% per annum on quantifiable overtime hours worked during the 2020-2021 school year;

(c) 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

(d) 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 February 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

JACK E. MARINO/S

JACK E. MARINO, Hearing Examiner

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

OCTORARA AREA EDUCATION ASSOCIATION :
: :
: :
v. : CASE NO. PERA-C-21-9-E
: :
OCTORARA AREA SCHOOL DISTRICT :
:

AFFIDAVIT OF COMPLIANCE

The District hereby certifies that it has ceased and desisted from its violations of Section 1201(a)(1) and (3); that it has paid Dr. Ryan Kieffer quantifiable overtime for the 2020-2021 school year; that it has paid interest on the outstanding overtime payment at the rate of 6% per annum; that it has posted a copy of this decision and order as directed 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