

COMMONWEALTH OF PENNSYLVANIA  
Pennsylvania Labor Relations Board

STATE COLLEGE AND UNIVERSITY :  
PROFESSIONAL ASSOCIATION, PSEA/NEA :  
 :  
v. : CASE NO. PERA-C-21-152-E  
 :  
PENNSYLVANIA STATE SYSTEM OF HIGHER :  
EDUCATION (INDIANA UNIVERSITY) :

**PROPOSED DECISION AND ORDER**

On July 19, 2021, the State College and University Professional Association, PSEA/NEA (SCUPA or Association) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (PLRB or Board) alleging that the Pennsylvania State System of Higher Education (Indiana University) (PASSHE, IUP, University or Employer) violated Section 1201(a)(1) and (5) of the Public Employee Relations Act (PERA or Act).

On August 20, 2021, the Secretary of the Board issued a complaint and notice of hearing designating October 20, 2020, in Harrisburg, as the time and place of hearing.

Before the scheduled hearing date, on October 5, 2021, the Association filed an amended charge of unfair practices with the Board alleging that PASSHE violated Section 1201(a)(1) and (3) of the Act when the University outsourced the Social Media Strategist bargaining-unit position. The amended charge did not include an allegation that PASSHE violated Section 1201(a)(5).

On October 6, 2021, the Secretary of the Board issued an amended complaint and notice of hearing designating January 12, 2022, in Harrisburg, as the time and place of hearing.

A hearing was held on January 12, 2022, via Microsoft Teams, before the undersigned Hearing Examiner, at which time all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The Association filed its post-hearing brief on February 25, 2022. PASSHE filed its post-hearing brief on April 1, 2022.

The Hearing Examiner, based upon all matters of record, makes the following:

**FINDINGS OF FACT**

1. PASSHE is a public employer within the meaning of Section 301(1) of PERA. (N.T. 7).
2. The Association is an employe organization within the meaning of Section 301(3) of PERA. (N.T. 7).
3. On January 28, 2019, the Association filed a Petition for Unit Clarification with the Board seeking to include the Social Media Strategist, Administrative Director of Media Relations, and Assistant

Director (Annual Giving) positions into an existing unit of professional employees of PASSHE certified at PERA-R-11-447-C. (In the Matter of the Employees of the Pennsylvania State System of Higher Education (Indiana University), PERA-U-19-27-E, 52 PPER 15 (Proposed Order of Unit Clarification, 2020)).

4. On May 22, 2020, the undersigned Hearing Examiner issued a Proposed Order of Unit Clarification which concluded that the Social Media Strategist, Assistant Director of Media Relations, Multimedia Producer, and Assistant Director, Annual Giving positions are professional employees and share an identifiable community of interest with the other members of the bargaining unit and are properly included in the bargaining-unit. (In the Matter of the Employees of the Pennsylvania State System of Higher Education (Indiana University), PERA-U-19-27-E, 52 PPER 15 (Proposed Order of Unit Clarification, 2020)).

5. PASSHE filed timely exceptions and a supporting brief with the Board on June 11, 2020, to a Proposed Order of Unit Clarification issued on May 22, 2020. On September 18, 2020, the Board issued a Final Order which dismissed PASSHE's exceptions to the Proposed Order of Unit Clarification and made it absolute and final. The Final Order was not appealed by either party. (Association Exhibit 4; In the Matter of the Employees of the Pennsylvania State System of Higher Education (Indiana University), PERA-U-19-27-E, 52 PPER 76 (Final Order, 2020)).

6. Tessa Lukesh testified on behalf of the Association during the Unit Clarification hearing which resulted in her position, Social Media Strategist, being accreted into the Association's bargaining unit. (N.T. 21).

7. Stephanie Keppich was the Assistant Director of Media Relations. She testified on behalf of the Union at the unit clarification hearing. Keppich no longer works for IUP. Chris Noah, the Chief marketing Officer and Director of Marketing and Communications Division at IUP, evaluated her position and furloughed her to gain financial savings. (N.T. 38-39).

8. Brian Henry is an employe in the Marketing division. He produced multimedia content for use in IUP marketing and communications. He participated in the Unit Clarification hearing on behalf of the Association and his position was accreted into the bargaining-unit. Henry's position was not outsourced by IUP because Noah chose to keep multimedia content creation in-house. (N.T. 163; In the Matter of the Employees of the Pennsylvania State System of Higher Education (Indiana University), PERA-U-19-27-E, 52 PPER 15 (Proposed Order of Unit Clarification, 2020)).

9. Debra Fitzsimons is IUP's vice President of Administration and Finance. She started her position on December 16, 2019. When Fitzsimons arrived to IUP she did not consider IUP to be financially viable. She found that IUP did not have a balanced budget and that IUP was drawing on reserves to balance the annual budget. Her review of the financial indicators at that time showed her that IUP had only

enough cash to operate for about four more years at current trends. (N.T. 81-85).

10. IUP's student enrollment hit a high in fiscal year 2010-2011 at approximately 15,000 students. When Fitzsimons arrived at IUP at the end of 2019, enrollment was at approximately 9,000 students. (N.T. 85).

11. Fitzsimons found that while enrollment had dropped approximately 40% from 2011 to 2019, staffing levels at IUP had dropped approximately 5% in the same time period. Salary and benefits make up approximately 80% of IUP's operating budget. (N.T. 86-87).

12. When Fitzsimons arrived in late 2019, IUP (which is a constituent university in PASSHE) was required by PASSHE to develop a full sustainability plan to demonstrate how IUP could achieve financial sustainability within five years. This report was due in January 2020. IUP produced such a plan on January 17, 2020. This plan foresaw the elimination of hundreds of positions. (N.T. 88-90).

13. On March 6, 2020, Governor Wolf issued emergency disaster declaration for Pennsylvania with respect to Covid-19. In response to Covid-19, PASSHE and IUP quickly pivoted to remote learning. IUP had to refund certain housing costs and fees to students. (N.T. 92-96; Employer Exhibit 1).

14. IUP had another decline in enrollment for the spring 2020 semester. Due to Covid-19 financial stress and continuing declining enrollment, IUP had to provide an updated financial sustainability plan in June 2020 that focused on a three-year time frame for sustainability. As part of the shift to a new three-year sustainability plan, IUP's President directed management at IUP to review their budgets to determine where budget and workforce reductions could be made. (N.T. 96-99).

15. Starting with IUP's financial sustainability plan submitted in June 2020, and through additional follow up plans in September 2020 and February 2021, IUP planned on eliminating more than 300 full time positions which equal approximately \$30 million in salary and benefits. In IUP's September 2021 report, IUP is still does not have a balanced budget and had approximately a \$12 million shortfall. (N.T. 100-103).

16. In fiscal year 2018-2019, IUP had approximately 1306 full time positions including approximately 607 full time faculty and 699 full time staff. By September 2021, IUP projected that in fiscal year 2021-2022, it will have reduced full-time positions to 970 including approximately 432 full time faculty and 538 full time staff. This would be an approximate reduction of 25% in employees from fiscal year 2018-2019 to 2021-2022 with a savings of approximately \$31 million. (N.T. 103-104; Employer Exhibit 3).

17. Of the staff (non-faculty) reductions, positions in the AFSCME bargaining unit were reduced 30% since fiscal year 2018-2019. Positions not represented by a union were reduced 21%. Positions in the Association bargaining unit were reduced 9%. (N.T. 105-109; Employer Exhibit 4).

18. As Director of Marketing and Communications Division at IUP, Chris Noah became aware of IUP's need to make budget and workforce cuts in late 2019 and early 2020. The need to make cuts became stronger when PASSHE demanded that IUP produce a plan for financial responsibility. Division heads, such as Noah, were given discretion to determine how they could contribute in terms of eliminating positions and still having a productive division. Noah began thinking about what positions to cut in the summer of 2020. When deciding who to keep, Noah favored keeping employees who created content such as writers, videographers, web developers, and employees who work in brand management. Noah believed these positions were absolutely critical to the mission of the Marketing and Communications Division and relatively expensive to outsource. Noah decided it was less important to keep the Social Media Strategist in-house because the job was more of a coordination role rather than a creator role and the position was relatively less expensive to outsource. (N.T. 96-99, 119-127, 134, 156, 159-160, 165, 168-169).

19. IUP sent out a request for proposal seeking proposals for digital and non-digital marketing services in June, 2020 (RFP 2020). The RFP 2020 was primarily seeking media, planning, strategy and buying services. IUP had one agency, Red House, that planned and bought traditional media. IUP had another agency, Carnegie Dartlet, that bought all digital media and social media advertising. The RFP 2020 was an attempt to consolidate the two relationships. IUP received responses for the RFP 2020 and entered into an agreement with Brunner. The Brunner contract was executed on or about October 15, 2020. (N.T. 39-42; Association Exhibit 3, 5).

20. At a February 17, 2021, meeting between the Association and IUP, IUP told the Association that it was considering furloughing employees and outsourcing work. After this meeting, IUP sent a letter to Lukesh telling her that IUP was considering outsourcing her position. (N.T. 176; Employer Exhibit 8).

21. In February 2021, IUP issued another request for proposal for Social Media Services (RFP 2021). RFP 2021 was developed specifically to determine whether or not outsourcing the Social Media Strategist positions was viable. Included in the RFP 2021 was essentially all of the job functions performed by Lukesh as the Social Media Strategist. IUP received nine bids in response to RFP 2021. Brunner was awarded the contract. Of the top three bids, Brunner's cost proposal was lowest at \$48,000 annually. Another company, ChatterBlast proposed \$122,500 annually. And a third company, NFM-Dynum, proposed \$117,000 annually. Brunner's proposal was lower than the others in part because Brunner was already providing some of the requested reporting services requested in the RFP in the adjacent contract with IUP and Brunner personnel were already in place with IUP. IUP eventually entered into a contract with Brunner for the social media work in May 2021. (N.T. 55-60, 141-152, 161-162; Association Exhibit 6, 7, 14, Employer Exhibit 14).

22. On March 17, 2021, IUP shared with the Association documents supporting the decision to outsource the Social Media Strategist work. (N.T. 178; Employer Exhibit 9).

23. On March 18, 2021, the University sent the Association a letter which states in relevant part: "(IUP) is notifying you of its intent to contract out social media services in the Office of Marketing and Communications at IUP. This action would result in the elimination of one bargaining unit position, the Social Media Strategist." The letter further states that "[t]he successful proposal is for \$48,000 per year as compared to a current annual cost of labor totaling \$74,666 for the incumbent." (N.T. 20, 65; Association Exhibit 8).

24. Lukesh was ultimately not furloughed as she resigned on March 25, 2021, when she got notice that IUP was beginning the process of outsourcing her position. (N.T. 69-70; Association Exhibit 9).

25. On March 25, 2021, IUP sent the Association an email which notified the Association that Tessa Lukesh, the Social Media Strategist, had resigned on March 25, 2021, with her last day being April 8, 2021. (N.T. 21; Association Exhibit 9).

#### **DISCUSSION**

In its Amended Charge, the Association asserts that IUP violated Section 1201(a)(1) and (3) of the Act when IUP outsourced the work of the Social Media Strategist which had recently been accreted into the Association's bargaining unit.<sup>1,2</sup>

Section 1201(a)(3) of PERA prohibits public employers from "[d]iscriminating in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any employe organization." 43 P.S. § 1101.1201(a)(3). The Association, as the party asserting an unfair practice, bears the burden of proving the Employer violated this subsection. Perry County v. PLRB, 634 A.2d 808, 810-11 (Pa. Cmwlth. 1993). To prove an unfair practice, a union must show, "by a preponderance of the evidence, that: (1) the employee was engaged in protected activity; (2) the employer knew of the activity; and (3) the employer was motivated by an unlawful motive or anti-union animus in taking adverse action against the employee." Lancaster Cty. v. PLRB, 633 Pa. 294, 322 (2015).

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<sup>1</sup>In its Amended Charge, the Association alleges that IUP also committed an independent violation of Section 1201(a)(1). The Association does not argue that IUP committed an independent violation of Section 1201(a)(1) in its Brief and therefore the independent Section 1201(a)(1) charge is dismissed. Even if the issue had not been waived, the Association would not have prevailed on such a claim as IUP in this matter has presented a legitimate basis for its conduct, the reduction of costs due to declining enrollment, that outweighs any coercive effect the out-sourcing of Lukesh's position may have had, if any.

<sup>2</sup> Another bargaining-unit member, Stephanie Keppich, who was the Assistant Director of Media Relations and worked in the Marketing and Communications Division, was also furloughed by IUP as part of IUP's cost-savings initiative. The Association does not argue here that her furlough was an unfair practice.

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). The Board will weigh several factors upon which an inference of unlawful motive may be drawn. In PLRB v. Child Development Council of Centre County, 9 PPER 3 9188 (Nisi Decision and Order, 1978), the Board opined that "[t]here are a number of factors the Board considers in determining whether anti-union animus was a factor." *Id.* at 380. These factors include the entire background of the case, including any anti-union activities or statements by the employer that tend to demonstrate the employer's state of mind, the failure of the employer to adequately explain its action against the adversely affected employee, the effect of the employer's adverse action on other employees and protected activities, and whether the action complained of was "inherently destructive" of important employee rights. Centre County, 9 PPER at 380. Close timing combined with another factor can give rise to the inference of anti-union animus. PLRB v. Berks County, 13 PPER ¶ 13277 (Final Order 1982); City of Philadelphia, *supra*; 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 3 16020 (Final Order, 1984). However, close timing alone is insufficient to support a basis for discrimination. Teamsters Local 764 v. Montour County, 35 PPER 12 (Final Order, 2004); Judith Ainsworth v. Temple University, 53 PPER ¶ 57 (Final Order, 2021). Evidence that the employer has failed to adequately explain its adverse actions or that it has set forth shifting reasons for an adverse action can support an inference of anti-union animus and may be part of the union's prima facie case. Stairways, *supra*; Teamsters Local 312 v. Upland Borough, 25 PPER 3 25195 (Final Order, 1994); Montgomery County Geriatric and Rehabilitation Center, 13 PPER 3 13242 (Final Order, 1982), *aff'd*, Montgomery County v. PLRB, 15 PPER 3 15089 (Court of Common Pleas of Montgomery County, 1984).

Moving to this matter, the record is clear that Tessa Lukesh, the Social Media Strategist, engaged in protected activity before her position was outsourced. She participated in the unit clarification proceedings on behalf of the Association which led to her position being accreted into the Association's bargaining unit. There is no contention that IUP was not aware of these PLRB decisions or Lukesh's role as a witness for the Association. IUP was present at the hearing for the unit-clarification and filed exceptions to the Proposed Decision and Order.

After a careful review of the record, I conclude that the Association cannot show that IUP was motivated by anti-union animus when it made the decision to outsource Lukesh's position. The record in this matter is devoid of any evidence showing IUP expressing any explicit anti-union animus. Therefore, anti-union animus must be inferred. The Association argues that animus is shown by "(1) a timeline of events; (2) that similarly situated employees were treated differently; and (3) [IUP's] inability to explain their justification for the outsourcing." (Association's Brief at 12).

Turning to timing, I agree with the Association that timing is a factor in this matter. The Proposed Decision and Order accreting the

Social Media Strategist position to the unit was issued on May 22, 2020, and the Final Order which upheld the Proposed Decision and Order was issued on September 18, 2020. The record shows that Noah identified Lukesh's position as one that could be outsourced in the summer of 2020, or in between the issuance of the Proposed Decision and Order and the Final Order. The record shows that, in the summer of 2020, Noah considered the outsourcing of Lukesh's job as "something that could work." (N.T. 127). The formal outsourcing of the Social Media strategist position happened somewhat later with the February 17, 2021, meeting with the Association and IUP and the February, 2021, issuance of the request for proposals for Social Media Services. This led to the March 18, 2021, letter where IUP told the Association of its intent to contract out social media services in the Office of Marketing and Communications at IUP and Lukesh's subsequent resignation on March 25, 2021. Thus, while the record shows that the formal decision to outsource the Social Media Strategist positions happened in March, 2021, the informal decision to do so was made by Noah sometime in summer, 2020, in the midst of the unit clarification litigation where Lukesh engaged in protected activity. This record supports a conclusion that timing was a factor in this matter.

While timing is a strong factor in this case, timing alone is insufficient to show animus. Judith Ainsworth v. Temple University, supra. In this matter I find that, taking the record as a whole and mindful of the Association's burden to support its *prima facie* case by a preponderance of the evidence, the record does not support a conclusion that other factors of animus exist. In its Brief, the Association argues that the record supports a conclusion of disparate treatment which can support an inference of animus. (Association's Brief at 14). The Association points specifically to Marketing employes Marilyn Kukula (Web Editor / Writer), Rachel Kiser (Designer), Eric Pinkerton (Web Developer) and Bruce Dries (Web Editor) who were not laid off or considered for out-sourcing. (Association's Brief at 14.) I find that the record supports a conclusion that IUP did not treat Lukesh differently than these other employes due to her protected activity. I credit Noah's testimony that the positions pointed to by the Association were different from Lukesh's position because the positions were creators of content, which is expensive to outsource and critical to IUP's core mission, whereas Lukesh's position was primarily functioning as a coordinator of social media which is less expensive to outsource and not as critical to IUP.

An important fact which supports my conclusion in this context is the fact that Brian Henry, who is a bargaining unit member in Marketing and Communications and testified on behalf of the Association at the Unit Clarification hearing, was not considered for out-sourcing by Noah based on Noah's principle of keeping as much content creation in-house as possible. I infer from the record that if Noah's motivation for outsourcing Lukesh's position had been based on animus, he would not have kept Henry's position. Moreover, the record in this matter shows that, outside of the scope of the Marketing and Communications Division, there was an approximate reduction of 25% of employes at IUP from fiscal year 2018-2019 to 2021-2022. Thus, Noah's decision to reduce staff is firmly rooted in a campus-wide direction to reduce staff based on the financial condition of IUP and not any anti-union animus. In fact, the record shows that, of the staff (non-faculty)

reductions, positions in the AFSCME bargaining unit (a separate union from the Association in this matter) were reduced 30% since fiscal year 2018-2019. In the same time frame, positions not represented by any union were reduced 21% and positions in the Association bargaining unit were reduced 9%. This is further evidence to support a conclusion that animus against the Association in this matter did not support any decision to outsource Lukesh's position.

The Association also argues that an inference of animus can be made due to IUP's failure to adequately explain its actions against Lukesh. (Association's Brief at 20). I find that this record supports a conclusion that IUP has adequately explained its actions. In its case, IUP called Debra Fitzsimons, Vice President of Administration and Finance, who credibly testified at length about IUP's dire financial position and how that dire financial position motivated IUP's management to make campus-wide budget and personnel cuts culminating in an approximate reduction of 25% in employees from fiscal year 2018-2019 to 2021-2022 with a savings of approximately \$31 million. Additionally, IUP called Chris Noah, who credibly explained at length his rationale for deciding which employees in his division could be outsourced under the campus-wide directive to reduce costs. The Association further argues that the amount quoted by Brunner to replace Lukesh (\$48,000) is a result of "phantom accounting" and, therefore, an indication of pretext. (Association's Brief at 22). However, I find that the record does not support a conclusion that the \$48,000 amount is "phantom accounting". Noah adequately explained that the \$48,000 figure included savings IUP would receive as a result of synergy with Brunner's other contract with Marketing and Communications. The other bidders did not have such a preexisting relationship with Marketing and Communications. There is insufficient evidence in the record to support a conclusion that Noah's explanation of the bid was pretextual.

Thus, while the Association in this matter has shown timing, the record does not support an additional inference of animus. For the above reasons, IUP has not committed a violation of Section 1201(a)(1) and (3) of the Act.

#### CONCLUSIONS

The Hearing Examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. PASSHE is a public employer within the meaning of Section 301(1) of PERA.
2. The Association is an employe organization within the meaning of Section 301(3) of PERA.
3. The Board has jurisdiction over the parties hereto.
4. PASSHE has **not** 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 PERA, the Hearing Examiner

**HEREBY ORDERS AND DIRECTS**

that the charge is dismissed and the complaint rescinded.

**IT IS HEREBY FURTHER ORDERED AND DIRECTED**

that in the absence of any exceptions filed pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this decision and order shall become and be absolute and final.

**SIGNED, DATED AND MAILED** at Harrisburg, Pennsylvania, this twenty-ninth day of April, 2022.

PENNSYLVANIA LABOR RELATIONS BOARD

/s/ Stephen A. Helmerich  
STEPHEN A. HELMERICH, Hearing Examiner