

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

DEBORAH BENDER :
 :
 v. : Case No. PERA-C-10-345-E
 :
 ACHIEVEMENT HOUSE CYBER :
 CHARTER SCHOOL :

PROPOSED DECISION AND ORDER

On September 27, 2010, Deborah Bender (Bender or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Achievement House Cyber Charter School (School or Respondent) alleging that the School violated Sections 1201(a)(1) and (3) of the Public Employee Relations Act (PERA) when it terminated her employment.

On October 7, 2010, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of resolving the matters in dispute through the mutual agreement of the parties and January 5, 2011 in Philadelphia was assigned as the time and place of hearing if necessary. On December 13, 2010, counsel for the complainant requested a continuance of the hearing to allow the conciliation process to take place. The conciliation process did not resolve the dispute and a hearing was necessary.

The charge was consolidated for hearing with the charges of three other terminated employees: Constance Brooks, at Case No. PERA-C-10-346-E, Evelyn Hekking at Case No. PERA-C-10-347-E and Ruth Wallace, at Case No. PERA-C-10-348-E. The four charges were consolidated for hearing and the location of the hearing was changed to West Chester. Three additional days of hearing were held on June 24, August 19, and November 1, 2011.

At the hearing, the parties were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. The examiner, on the basis of the testimony presented at the hearing and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. The Achievement House Cyber Charter School is a public employer within the meaning of Section 301(1) of the Public Employee Relations Act. (N.T. 7)
2. Deborah Bender worked as a special education teacher at the School from October 2005 until the end of June 2010, when the School terminated her employment. (N.T. 340-41).
3. The School's main administrative office is in Bryn Mawr. Seven full-time employes and one part-time employe, Ruth Wallace, the Certified School Nurse, worked in the Bryn Mawr office. The rest of the staff worked from home. (N.T. 48, 395)
4. In 2010, the School employed approximately 25 to 30 employees. This included 15 teachers, ten support staff and two administrators. (N.T. 49, Complainant's Exhibit 1)
5. She worked from her home in central Pennsylvania, using internet technology. (N.T. 341).
6. Bender was a full-time employee, working 10 months a year. (N.T. 341)

7. Bender's duties as special education teacher were to manage the cases of students with special needs. This included monitoring their IEPs, writing their goals, monitoring small group or individual support, supporting regular education teachers and making suggestions for modifications. (N.T. 341)
8. In mid-January, 2010, Dr. Timothy Daniels became the School's CEO. The School hired Daniels to turn around a charter school that had certain deficiencies. (N.T. 523-525).
9. On February 17, 2010, Daniels informed staff of retroactive raises. Daniels sent Bender a letter, similar to that sent to other teachers, indicating that due to steady growth in student enrollment and improved retention rates, the school was in a position to "revisit salaries for the 2009-2010 school year" resulting in 3% pay increase, made retroactive to the 2009-2010 school year. (N.T. 390, Complainant's Exhibit 24)
10. By way of example of the deficiencies, the School lacked a cohesive curriculum, there was no functioning human resources assistance for employees, and the technology for the cyber charter school was deficient. (N.T. 525-527).
11. Daniels described the early months at the School as a triage situation. The most critical issues had to receive the direct attention. He first focused on the technology of the school and then turned to the special education issues. (N.T. 531-32).
12. When Daniels took the CEO position, he found the School's special education department in a dysfunctional state. (N.T. 530-531).
13. The school's files were out of compliance with federal mandates, the documentation was not up to date and the director of special education, Constance Brooks, was resistant to change. (N.T. 530-531, 537, 556)
14. Of the enrolled students, approximately 25% received special education services. In the 2009-2010 school year, of the 465 students, 110-120 were special education students. (N.T. 539)
15. In the spring of 2010, Sue Ellen Stiver, a teacher at the School, received a call on a Saturday on her cell phone from Ann Marie Daly, a former employe who had been terminated in January, 2010. Daly was inquiring how she would feel about PSEA representing the employes. (N.T. 396-397)
16. At that time, Stiver had no position on the question of PSEA representing the employes and told Daly that it was not an appropriate time to talk about the issue. She went home, talked with her friends and her husband and decided that PSEA was not something she was interested in. (N.T. 397)
17. Stiver also told Daniels about Daly's call. Daniels told her that a union "was not something that the Board would be happy to have in place there." (N.T. 398)
18. Every time Stiver received an e-mail from Daly, Stiver informed Daniels. On April 12, at 9:00 PM, she identified to him the names of the employes who had sought information from PSEA. Bender's name was on the list. (N.T. 173, 403, Complainant's Exhibit 12)
19. Stiver's initial inquiry to Daniels led to a string of e-mails over a few days culminating with Daniels reminding employees in his own e-mail message that they should be focused on students and take care of their personal business on their own time. (N.T. 542).

20. During these early months, Daniels experienced resistance from some employees to changes he was implementing. (N.T. 556).
21. Specifically, Constance Brooks, the Director of Special Education and the teachers in the special education department appeared to have difficulty in transitioning to new rules of conduct. (N.T. 555-56).
22. For example, Daniels decision to implement co-teaching, change how legal work was procured for special education issues, and maintaining student documentation properly met with significant resistance form the Special Education department members. (N.T. 556-558).
23. On or about April 14, 2010, Bender participated via teleconference with School employes and a PSEA organizer, Kelby Waltman, to discuss the possibility of PSEA representing the School's employes. Waltman and School employes who lived near West Chester were physically at the PSEA office in West Cheser. In addition to Waltman at the PSEA office were Constance Brooks, the School's Director of Special Education; Ruth Wallce, the School's certified school nurse; Chris Knoll, the Spanish teacher; Ann Marie Daly, a former School employe who had been terminated in January, and Sara Minnick, a history teacher. Waltman described to those present and on the conference call, what was involved in having PSEA represent the employes and the process the employes would have to follow in order to have PSEA become the collective bargaining representative. (N.T. 11, 221, 343-344, 356)
24. At the meeting, Bender spoke in favor of PSEA representing the School's employes. (N.T. 345)
25. Bender became a member of the organizing committee, along with Constance Brooks, Evelyn Hekking and Ruth Wallace. (N.T. 56)
26. After the meeting, Bender made calls in the evenings in support of PSEA to several employes. (N.T. 346)
27. Bender did not use the School's phone, computers or equipment when she was contacting fellow employes about the PSEA. (N.T. 357)
28. On April 14, Stiver sent an e-mail to fellow employes using the School's e-mail address list ("ahcs-all"), stating why she was not in support of PSEA's representation and listing the reasons why PSEA's representation was not good for the employes. On April 14, 2010, at 2:39 p.m. Bender sent an e-mail to the School's e-mail list, "ahcs-all," that was in favor of the PSEA and addressed concerns about union representing the employes. The e-mail went to all School employes, including Dr. Daniels. (N.T. 121, 173, Complainant's Exhibits 8 and 12)
29. Stiver became principal on April 21, 2010. (N.T. 395)
30. PSEA began to seek union authorization cards from employes of the School. However, Waltman testified that PSEA did not file a Petition for Representation with the Board for three reasons: it was getting late in the school year; the subsequent termination of Bender and other employes had a "chilling effect" on the organizing campaign and PSEA had not hit its internal target or goal of collecting signature from 65% of the employes. (N.T. 19-20)
31. No employe told PSEA directly that he or she did not want to join the organizing campaign because of the termination of Bender and the other employes. (N.T. 43)

32. On or about July 2, 2010, Bender received notification that her employment was terminated upon receipt of a letter terminating her employment. (N.T. 352, Complainant's Exhibit 18).
33. Daniels testified that Bender was terminated on an at will basis to preserve her reputation despite ample cause existing for her terminating her employment. (N.T. 352).
34. Daniels testified that Bender was significantly behind on updating documentation on her student case load at the School. (N.T. 262-70; 306-16, 412-13, 425-26; 566-69).
35. Months had gone by without Bender updating student information in the schools' selected IEP software. (N.T. 262-70; 306-16, 412-13, 425-26; 566-69).
36. Bender was told on more than one occasion to update this documentation and she failed to do so in a timely manner. (N.T. 262-70; 306-16, 412-13, 425-26; 566-69).
37. Daniels did not know Bender was involved in union organizing activity until the unfair practices complaint was filed in this matter. (N.T. 570)
38. Except for Christina Botes, six of the seven special education department employees were terminated in the first part of 2010. The terminated employees included three who claimed they were terminated in violation of PERA: Bender, Evelyn Hekking and Constance Brooks. (N.T. 570-571)

DISCUSSION

Deborah Bender's charge of unfair practices alleges that the School terminated her employment as an act of retaliation and discrimination because of her support for the Pennsylvania State Education Association in its effort to represent the employees of the School. Bender contends that the termination violated Sections 1201(a)(1) and (3) of PERA.

Section 1201(a)(3) Allegation

Section 1201(a)(3) of PERA prohibits "public employers, their agents or representatives 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 employee organization." 43 P.S. 1101.1201(a)(3). In order to sustain a charge of discrimination under Section 1201(a)(3) of PERA, the complainant must prove that the employee engaged in protected activity, that the employer was aware of that protected activity, and that but for the protected activity the adverse action would not have been taken against the employee. **St. Joseph's Hospital v. PLRB**, 473 Pa. 101, 373 A.2d 1069 (1977). The complainant must establish these three elements by substantial and legally credible evidence. **Shive v. Bellefonte Area Board of School Directors**, 317 A.2d 311 (Pa. Cmwlth. 1974). **St. Joseph's Hospital, supra**.

Protected Activity

Bender proved the first element of the **St. Joseph's Hospital** test. She engaged in protected activity by attending a PSEA informational meeting, speaking in favor of PSEA representation at that meeting and then making telephone calls to other School employees in support of the PSEA representation.

Knowledge

As for proof of the employer's knowledge of Bender's protected activity, it is not so obvious. Dr. Timothy Daniels, the School's CEO, was the decision maker to terminate Bender's employment. He testified that he did not know Bender was an organizer. He testified in a credible fashion and his testimony was not impeached.

Bender counters with an argument that Daniels had to know that she was an organizer because of the peculiar facts of this case. On April 12, Sue Ellen Stiver, a teacher at the time, sent Dr. Daniels an e-mail telling him the names of the School employees who had asked Ann Marie Daly to send them information about PSEA. Bender's name was on Stiver's list of names. On April 14, Bender herself used the School's e-mail address list ("ahcs-all") in communicating her support of PSEA. Bender's e-mail went to School employees, including Daniels. Therefore, even though it is possible to conclude that Daniels did not know that Bender was an organizer it is also possible from Stiver's e-mail to conclude that Daniels had knowledge of Bender's protected activity.

Motivation

The next issue is whether the union proved the third element of the **St. Joseph's Hospital** test, that the School was motivated by anti-union animus in terminating Bender. In a charge of discrimination it is the employer's motivation which creates the offense. **Perry County v. PLRB**, 364 A.2d 898 (Pa. Cmwlth. 1994).

Since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. **PLRB v. Montgomery County Geriatric and Rehabilitation Center**, 13 PPER ¶ 13242 (Final Order, 1982); **St. Joseph's Hospital**, *supra*. However, an inference of anti-union animus must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." **Shive**, *supra* at 313.

In **Child Development Council of Centre County (Small World Day Care Center)**, 9 PPER ¶ 9188 (Final Order, 1978), the Board stated:

There are a number of factors the Board considers in determining whether anti-union animus was a factor in the layoff of the Complainant: the entire background of the case, including any anti-union activities by the employer; statements by the discharging supervisor tending to show the supervisor's state of mind; the failure of the employer to adequately explain the discharge, or layoff, of the adversely affected employe, the effect of the discharge on unionization efforts—for example, whether leading organizers have been eliminated; the extent to which the discharged or laid-off employe engaged in union activities; and whether the action complained of was "inherently destructive" of important employe rights."

9 PPER 9188, at 380.

The Board has also noted that the timing of the adverse action against the employes would be a factor that could be used to infer that anti-union animus was the motivation for the employer action. **PLRB v. Berks County (Berks Heim County Home)**, 13 PPER ¶ 13277 (Final Order, 1982).

Bender, as the complainant, bears the burden of proving the elements of the alleged violations by substantial and legally credible evidence. **St. Joseph's Hospital**, *supra*. Substantial evidence means evidence that does more than just create a suspicion of the existence of the fact necessary to establish each element of the unfair practice charge. **Township of Upper Makefield**, 10 PPER ¶ 10299 (Nisi Order of Dismissal, 1979).

Bender argues that anti-union animus can be inferred from four factors: the anti-union state of mind of CEO Dr. Timothy Daniels, the discharging supervisor; the failure of the School to adequately explain her termination, which eliminated a leader of the organization campaign; the resulting shutdown of the campaign and the close timing between her union activity and her termination.

First, it is clear from the record that Daniels did not favor the idea of PSEA representing the employees. As soon as he was informed of the PSEA interest in talking with the employees, Daniels did not tell the staff directly that he was against the union. He did explain to them the School's rules against taking work time for non-work issues. However, he told Sue Stiver that the Board thought that PSEA's representation would not be a good idea. He gave Stiver no indication that he disagreed with the Board.

Second, timing could also be a factor to infer animus. In April Bender became involved with the PSEA organizing drive and in June the School terminated her employment.

However, the School argues that the other factors to infer animus do not bear scrutiny. First, as for School's "failure to adequately explain her termination" the School has introduced evidence that Daniels had believable reasons for terminating Bender's employment that were not simply a pretext to eliminate a union supporter. Daniels testified that the reason was Bender's falling behind in updating her special education student files despite repeated requests to update them. The explanation may not be one that would satisfy a just cause analysis in a grievance arbitration setting. However, its explanation is not a pretext to cover up an anti-union motivation.

Also, Daniels testified, with conviction and sincerity, that the special education department, which served 25% of the students, was a focus of his attention because of its serious deficiencies. The School points out that Bender and the three other PSEA supporters were not the only employees who were terminated. The School ended the employment of six of the seven employees in the School's special education department. Given that the employer did not single out Bender and the three other union supporters but also terminated two others as part of an improvement of operations, it is difficult to see this as a pretextual termination.

Second, as for the resulting shutdown of the PSEA organizing drive as a factor from which anti-union animus could be inferred, this argument is not so clear. It is true that the organizers were terminated. However, PSEA did not achieve its target of 65% level of support from the employees and its organizer stated this was also a reason for the shutdown. It is not clear from the evidence which occurred first, the terminations or PSEA's decision to end the organizing campaign.

The School has presented legitimate non-discriminatory reasons for terminating Bender. The facts advanced by the School convince me that the School's motivation was not related to Bender's protected activity. I cannot conclude that but for Bender's protected activity, she would not have been terminated. Without this proof of the third element of the **St. Joseph's Hospital** test, she has not proven that the School violated Section 1201(a)(3) of PERA.

Section 1201(a)(1) Allegation

The Union also has charged that the County violated Section 1201(a)(1) of PERA, which prohibits public employers from "interfering, restraining or coercing employees in the exercise of the rights guaranteed in Article IV of this act." 43 P.S. 1101.1201(a)(1). An independent violation of Section 1201(a)(1) of PERA occurs, "where in light of the totality of the circumstances the employer's actions have a tendency to coerce a reasonable employee in the exercise of protected rights." **Fink v. Clarion County**, 32 PPER ¶ 32165 at 404 (Final Order, 2001). Under this standard, the complainant does not have to show improper motive or that any employees have in fact been coerced. **Northwestern School District**, 16 PPER ¶ 16092 (Final Order, 1985); **Pennsylvania State Corrections Officers Ass'n v. Commonwealth of Pennsylvania, Department of Corrections, Pittsburgh SCI**, 35 PPER ¶ 97 (Final Order, 2004).

"If the complainant carries its burden of establishing a prima facie case of a Section 1201(a)(1) violation, the burden shifts to the respondent to establish a legitimate reason for the action it took and that the need for such action justified any interference with the employees' exercise of their statutory rights. **Philadelphia Community College**, 20 PPER ¶ 20194 (Proposed Decision and Order, 1989)." **Bethel Park Custodial/Maintenance Educational Personnel Association v. Bethel Park Sch. Dist.**, 27

PPER ¶ 27033 (Proposed Decision and Order, 1995). In **Ringgold Educ. Ass'n v. Ringgold Sch. Dist.**, 26 PPER ¶ 26155 (Final Order, 1995), the Board held that an employer does not violate Section 1201(a)(1) where, on balance, its legitimate reasons justifiably outweigh concerns over the interference with employe rights. **Id.** at 360.

As discussed above in the Section 1201(a)(3) discussion, Bender did not prove that the School was motivated by anti-union animus when Daniels terminated Bender's employment. Under the "totality of the circumstances" a reasonable employe could conclude that the School's decision was related to performance and not an effort to coerce employes in the exercise of protected rights. Even if Bender had proven that the School's action had a "tendency to coerce a reasonable employe in the exercise of protected rights" the School has proven that it had its own legitimate reasons for its termination decision that outweighed concerns over any interference with employe rights. Bender has not satisfied her burden of proving that the School violated Section 1201(a)(1) of PERA.

CONCLUSIONS

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

1. That Achievement House Charter School is a public employer within the meaning of Section 301(1) of PERA.
2. That Deborah Bender is a public employe within the meaning of Section 301(2) of PERA.
3. That the Board has jurisdiction over the parties hereto.
4. That the School has not committed unfair practices in violation of Sections 1201(a)(1) and (3) of PERA.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair practices 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 from Harrisburg, Pennsylvania this fifteenth day of March, 2013.

PENNSYLVANIA LABOR RELATIONS BOARD

Thomas P. Leonard, Hearing Examiner