

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

RUTH WALLACE :
 :
 v. : Case No. PERA-C-10-348-E
 :
 ACHIEVEMENT HOUSE CYBER :
 CHARTER SCHOOL :

PROPOSED DECISION AND ORDER

On September 27, 2010, Ruth Wallace (Wallace 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 complainants requested a continuance of the hearing to allow the conciliation process to take place. The conciliation process did not resolve the dispute.

A hearing was necessary and the charge was consolidated with the charges of three other terminated employees, Deborah Bender, at Case No. PERA-C-10-345-E, Constance Brooks at Case No. PERA-C-10-346-E and Evelyn Hekking, at Case No. PERA-C-10-347-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. Ruth Wallace is a registered nurse (RN). She worked as a part-time, twelve month certified school nurse (CSN) at the School from January 2006 until June 2, 2010, when the School chose to have the School nurse work done by a subcontractor and eliminated the position. (N.T. 162, 175)
3. The School's main administrative office is in Bryn Mawr. Seven full-time employes and one part-time employe, Wallace, worked in the Bryn Mawr office. The rest of the staff worked from home. (N.T. 162, 468)
4. In 2010, the School employed approximately 25 to 30 employes. This included 15 teachers, ten support staff and two administrators (N.T. 49, Complainant's Exhibit 1)
5. Wallace was responsible to maintain student records, send out mailings to students, make sure their records were up to date, make sure they had their yearly screenings, obtain student records from previous schools, communicate with parents, work with the counselors and the special education department to ensure that the students were receiving the assistance they needed regarding their IEPs and Section 504 plans. (N.T. 163).

6. 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)
7. On February 17, 2010, Daniels sent Wallace a letter similar to that sent to other employees 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 13)
8. In Daniels' first weeks on the job, he found that 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).
9. 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).
10. When Daniels took the CEO position, he found the School's special education department in a dysfunctional state. (N.T. 530-531).
11. 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. 529-539)
12. 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)
13. 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 employee who had been terminated in January, 2010. Daly was inquiring how she would feel about PSEA representing the employees. (N.T. 396-397)
14. At that time, Stiver had no position on the question of PSEA representing the employees 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)
15. Stiver also told Daniels about Daly's call. He told her that a union "was not something that the Board would be happy to have in place there." (N.T. 398)
16. 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 employees who had sought information from PSEA. Wallace's name was on the list. (N.T. 403, Complainant's Exhibit 12)
17. 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).
18. In March, 2010, Wallace met with other School employees to talk about having a union represent the employees. On April 14, 2010, they met at the PSEA office in West Chester with PSEA organizer Kelby Waltman. Some of the employees participated via teleconference. Besides Wallace, present at the meeting were Constance Brooks, the School's Director of Special Education; Chris Knoll, the Spanish teacher; Ann Marie Daly, a former School employee 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 and 356)

19. At the meeting, Wallace spoke in favor of PSEA representing the School's employes. (N.T. 168)
20. Wallace became a member of the organizing committee, along with Deborah Bender, Constance Brooks and Evelyn Hekking. (N.T. 56)
21. On April 14, 2010, Wallace sent an email to everyone on the School's e-mail address list, including Daniels, explaining what she believed to be misinformation and errors concerning the case of a union representing the School's employes. (N.T. 169-170, Complainant's Exhibit 7)
22. 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 the School employes had a "chilling effect" on the organizing campaign and PSEA had not hit its internal target of collecting signatures from 65% of the employes. (N.T. 19-20)
23. No employe told PSEA directly that he or she did not want to join the organizing campaign because of the termination of Wallace and the other employes. (N.T. 43)
24. On April 12, around the same time, Daniels had sent the e-mail regarding employes' use of School equipment and facilities for union organizing, Stiver also sent an e-mail to Daniels identifying the names of the employes who had sought information from PSEA. Wallace's name was on the list. (N.T. 173, Complainant's Exhibit 12)
25. Wallace's employment ended on June 2, 2010. (N.T. 162, 175).
26. Daniels told Wallace that her services were no longer needed and the School would find a new means for fulfilling its nursing obligations. (N.T. 175-176).
27. Wallace was told on multiple occasions that there were issues regarding her work. Specifically he had three conversations regarding her use of overtime without permission. (N.T. 199, 200).
28. Wallace was instructed by Daniels on at least three occasions not to work more than 30 hours per week. (N.T. 191, 197, 200).
29. Daniels decided that the School would use an alternative means to comply with its state health requirements. Daniels informed Wallace of the School's rationale. (N.T. 176-177; 457-458; Respondent Exhibit 23).
30. Daniels memorialized the reasons for Wallace's termination in a memorandum to the School's counsel on May 28, 2010 which details concerns with her employment. (N.T. 602, Respondent Exhibit 25).
31. Wallace cost the School money by failing to file timely reports with the state. The School lost reimbursements as a result of Wallace's inaction. (N.T. 184-186, 478-79, 545-46, 550, Respondent Exhibits 5 and 6).
32. Daniels did not know Wallace was involved in union organizing activity until the unfair practices complaint was filed in this matter. (N.T. 570)

DISCUSSION

Ruth Wallace'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 employes of the School. Wallace 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 employe 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 employe 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 employe. **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

Wallace proved the first element of the **St. Joseph's Hospital** test. She engaged in protected activity as that term has come to be defined in the case law. In April of 2010 she attended a PSEA informational meeting where the employes learned what was involved in having a union represent them. At that meeting she spoke in favor of PSEA representation. She later sent an email to everyone on the School's internal email address list that explained what she believed was false information about the PSEA, that explained the advantages of PSEA representation and urging fellow employes to come to the meeting to "form their own opinion" about PSEA.

Knowledge

Dr. Timothy Daniels, the School's CEO, was the decision maker to terminate Wallace's employment. He testified that he did not know Wallace was involved in organizing. Wallace counters that Daniels had to know that she was an organizer. On April 12, Sue Ellen Stiver, a teacher at the time who later was promoted to Principal, sent Daniels an e-mail telling him the names of the School employes who had asked Ann Marie Daly to send them information about PSEA. Wallace's name was on this list of the employes. On April 10, Wallace herself used the School's e-mail address list ("ahcs-aall") to inform employes to correct misinformation she believed was being disseminated about the union and to urge employes to "go to the meeting and form your own opinion." Wallace's e-mail went to all School employes, including Daniels.

Based on this evidence, it is possible to conclude that Daniels was truthful when he answered that he did not know that Wallace was an organizer. However, it is also possible to conclude that Daniels had knowledge of Wallace's active support for the PSEA effort. This is a fine distinction, but nevertheless, it must be concluded that Daniels had knowledge of Wallace'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).

Wallace, 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).

Wallace argues that anti-union animus can be inferred from four factors: the anti-union state of mind of CEO Daniels, the discharging supervisor; the failure of the School to adequately explain her termination; the resulting shutdown of the PSEA organizing campaign and the close timing between her union activity and her termination.

Two of these factors have weight. First, Daniels made it clear to Sue Stiver that he wanted to know who was seeking information from PSEA and that the School's Board would not want PSEA to represent the employes. Second, the close timing evidence is meaningful. Wallace attended a PSEA informational meeting in April and the School terminated her on June 2.

The School has cast doubt on the other two factors, the failure to adequately explain the termination and the resulting shutdown of the PSEA organizing campaign following Wallace's termination. First, the School has set forth credible and persuasive reasons that its motivation for terminating Wallace were due to her performance. Daniels testified that he found Wallace's work to be deficient, that she worked more hours than her part-time arrangement permitted and that she cost the School money by failing to file for reimbursements in a timely manner. Second, the School questions if PSEA organizing drive did not end prior to Wallace's termination because PSEA had not achieved its preferred level of 65% employe support for filing a PLRB representation petition.

Even if a prima facie case for anti-union motivation could be based on the two factors above, the School has satisfactorily demonstrated that it had non-discriminatory reasons for terminating Wallace. Besides the reasons stated above, the School presented convincing evidence that it eliminated Wallace's school nurse position and outsourced the work because Daniels believed that the School could obtain better services through an outside contractor and not because of her protected activity.

Section 1201(a) (1) Allegation

Wallace has also charged that the School violated Section 1201(a) (1) of PERA, which prohibits public employers from "interfering, restraining or coercing employes 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 employe 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 employes 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 employes' 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, Wallace did not prove that the School was motivated by anti-union animus when Daniels chose to have an outside contractor provide the School's nursing services. 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 Wallace 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, a subcontracting of the services, that outweighed concerns over any interference with employe rights.

CONCLUSIONS

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

1. That Achievement House Cyber Charter School is a public employer within the meaning of Section 301(1) of PERA.
2. That Ruth Wallace 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