COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

CONSTANCE BROOKS	:	
	:	
v.	:	Case No. PERA-C-10-346-E
	:	
	:	
ACHIEVEMENT HOUSE CYBER	:	
CHARTER SCHOOL	:	

PROPOSED DECISION AND ORDER

On September 27, 2010, Constance Brooks (Brooks or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) against Achievement House Cyber Charter School (School or Repsondent) alleging that the School violated sections 1201(a)(1) and (3) of the Public Employe 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. The case was consolidated with the charges of three other terminated employes, Deborah Bender, at Case No. PERA-C-10-345-E; Evelyn Hekking at Case No. PERA-C10-347-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. Achievement House Cyber Charter School is a public employer within the meaning of Section 301(1) of the Public Employe Relations Act. (N.T. 7)

2. Constance Brooks worked as the Director of Special Education teacher at the School from August, 2004 until the end of June 2010, when the School terminated her employment. (N.T.

3. The School’s main administrative office is in Bryn Mawr. (N.T. 48)

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. In the Spring of 2010, seven full-time employes and one part-time employe, Ruth Wallace, the certified school nurse, worked in the Bryn Mawr office. The remainder of the work force worked from their homes. (N.T. 468)

6. Brooks began employment in August 2004 as a Special Education Director and Senior Management Team Member. (N.T. 214).

7. She worked in the Bryn Mawr office of the Achievement house and from her home office. (N.T. 215).

8. Brooks was a full-time employee, working 10 months a year. (N.T. 341)

9. Brooks' duties as director of special education teacher were to be a consultant to the staff for special education issues. She had been a senior management team member before she was the director. (N.T. 216)

10. 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)

11. On February 17, 2010, Daniels sent Brooks a letter similar to that sent to other employes indicating that due to steady growth in student enrollment 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)

12. In the spring of 2010, Sue Ellen Stiver, a teacher at the School, received a call from Ann Marie Daly, on a Saturday on her cell phone. Daley was a former employe who had been terminated in January, 2010, inquiring how she would feel about PSEA representing the employes. (N.T. 396-397)

13. 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)

14. Stiver also told Dr. 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)

15. 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. 403, Complainant's Exhibit 12)

16. 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).

17. In Daniels' first weeks on the job, he found that the School lacked a cohesive curriculum, that there was no functioning human resources assistance for employees, and the technology for the cyber charter school was deficient. (N.T. 525-527).

18. 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).

19. When Daniels took the CEO position, he found the School's special education department in a dysfunctional state. (N.T. 530-531).

20. The school's files were out of compliance with federal mandates and the documentation was not up to date. (N.T. 531)

21. During these early months, Dr. Daniels experienced resistance from some employees to changes he was implementing. (N.T. 537, 556).

22. Specifically, 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).

23. For example, Dr. 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. 556-58).

24. 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)

25. On or about April 6, 2010 Kelby Waltman, a PSEA organizer, met with "six to eight" School employes at Kelly's restaurant in Bryn Mawr to talk with them about PSEA representation and to answer questions. (N.T. 12)

26. On or about April 16, 2010 Waltman set up a conference call with Brooks and other employes to further discuss the idea of representing the employes. Six to eight people attended in one room for the conference and other people were on the phone. Brooks was one of the six to eight people in the room. (N.T. 13-15).

27. Brooks spoke in favor of forming a union representation. (N.T. 15)

28. Brooks became a member of the organizing committee, along with Deborah Bender, Evelyn Hekking and Ruth Wallace. (N.T. 56)

29. 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 Brooks 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)

30. No employe told PSEA directly that he or she did not want to join the organizing campaign because of the termination of Brooks and the other employes. (N.T. 43)

31. From the outset, the relationship between Daniels and Brooks was strained. The two had different opinions regarding the method and quality of the work performed in the Special Education Department at the School. (N.T. 229, 281-84; 556).

32. Daniels' attempts to change the way special education services were delivered at the School were met with resistance. Ms. Brooks supervision of the Special Education department was lacking as well. Files were not properly updated, teachers were permitted to go months without documenting in the school required program their contacts with Special Education students. (N.T. 595, Respondent Exhibit 13).

33. On June 2, 2010, CEO Daniels, sent Brooks a letter notifying her that her employment was terminated. (N.T. 227, Complainant's Exhibit 15)

34. Daniels memorialized his concerns about Ms. Brooks performance in a memorandum dated June 1, 2010. In the memorandum, Daniels detailed the numerous issues regarding Ms. Brooks performance. (577, 583, Respondent Exhibit 27).

35. Daniels informed Brooks that she was not being renewed on June 2, 2010 by telephone. (N.T. 227, 608, Complainant's Exhibit 15).

36. Daniels told Brooks she was separated from her employment on an at-will basis. (N.T. 578).

37. At this hearing, Daniels explained that the reason he did not give Brooks a reason for her termination was because he believed that in terms of future employment, it would be better for Brooks if she was separated from her

employment on an "at-will basis" without telling the employe the cause. (N.T. 578).

38. Daniels did not know Brooks was involved in union organizing activity until the unfair practices complaint was filed in this matter. (N.T 570)

39. Daniels was surprised to learn of Brooks' claim that she was an organizer for PSEA because he believed that as an administrator she would not be eligible to be in the bargaining unit should PSEA succeed in its efforts to represent the employes. (N.T. 578)

40. Except for Christina Botes, six of the seven special education department employes were terminated in the first part of 2010. The terminated employes included three who claimed they were terminated in violation of PERA: Deb Bender, Brooks and Evelyn Hekking. (N.T. 570-571)

DISCUSSION

Constance Brooks' 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. Brooks 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

Brooks proved the first element of the **St. Joseph's Hospital** test. Brooks did engage in protected activity. In the Spring of 2010, she attended a PSEA informational meeting where she and other employes learned from the PSEA organizer what was involved in having PSEA represent the School's employe. At that meeting, Brooks spoke in favor of PSEA representation.

Knowledge

The Complainant's proof of employer knowledge is another matter. Dr. Timothy Daniels, the School's CEO, was the decision maker to terminate Brooks employment. He testified that he did not know Brooks was an organizer. He testified in a credible fashion and his testimony was not impeached. Brooks never told Daniels that she was in favor of PSEA or of her interest in PSEA. Daniels testified that he did not know Brooks was involved. Unlike the cases of Deborah Bender and Ruth Wallace, whose expression of interest in PSEA was relayed to Daniels by Sue Ellen Stiver, there is no similar evidence of Stiver telling Daniels that Brooks was one of the employes who had sought information from PSEA. Brooks offers no countervailing evidence that would cast doubt on Daniels' testimony.

As an alternative means of proving employer knowledge, Brooks argues that the application of the Board's "small plant doctrine" to the facts of this case permits a finding that the employer had to know who was involved in seeking union help. The Board has stated.

> The small plant doctrine allows the Board to infer knowledge to a small employer when the facts establish that employe's protected

> activities were "carried out in such a manner, or at such times that in the normal course of events, [the Employer] must have noticed [the activity]."… However, the mere fact that an employer's plant is of a small size standing alone is insufficient basis upon which to apply this small plant doctrine.

Pennsylvania Fed. Of Teachers v. Temple Univ. 23 PPER ¶23033 (Final Order, 1992). (citations omitted). "The general premise of the small plant doctrine is that where there are only a few employes and close supervision, little goes unnoticed." **Smith, et al. v Lakeland School District**, 29 PPER 148 (Final Order, 2008)

However, the School correctly points out that this was not a case where a small group of employes worked in one location. Rather it was a cyber school with the majority of the employes working somewhere besides the main office in Bryn Mawr. Furthermore, the seven employes who did work in the main office in Bryn Mawr did not engage in open organizing, but rather restricted their communication in support of the union to their off hours and to their own computers.

Accordingly, absent the proof of Daniels' knowledge of Brooks' protected activity, Brooks has not proven the second element of the **St. Joseph's Hospital** test.

Motivation

For the sake of a thorough discussion, it is necessary to discuss the third element of the **St. Joseph's Hospital** test, whether the School was motivated by anti-union animus in terminating her employment. 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).

Brooks, 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).

Brooks 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 the Brooks' termination; the resulting shutdown of the PSEA organizing campaign and the close timing between her termination and her union activity.

The strongest factors to infer animus are Daniels' expression to Sue Ellen Stiver of his opposition to PSEA representing the employes and the close timing between Brooks speaking up for PSEA at a PSEA meeting in April and her termination in June.

However, the other factors are not as strong. As for "the failure of the employer to adequately explain" its termination decision, Brooks contends that her termination was without "notice or explanation," that it had "no pre or post-dismissal due process hearing provided to her," and that it was "without cause." These allegations would perhaps be useful if this was a grievance arbitration. However, the relevance of such evidence is not the same for proving anti-union animus in an unfair practice charge.

Regardless of Brooks' offer of evidence, Daniels testified credibly that he terminated Brooks for reasons that were closely related to Daniels' ideas on how the School's special education program, where 25% of the School's students were enrolled, should be operated. He believed that Brooks, the Director of Special Education, was management and that she not doing her job in a manner consistent with being a member of his management team.

As the resulting shutdown of the PSEA organizing drive as a factor from which anti-union animus could be inferred, the causal connection between the terminations and the end of the organizing campaign is not so clear. PSEA did not achieve its goal of 65% level of employe support. However, it is not clear from the evidence whether the employe terminations or the decision to end the PSEA campaign occurred first.

In support of its decision, the School offers two arguments. First, it points out that Brooks and the three other PSEA supporters were not the only employes who were terminated. The School terminated the employment of six of the seven employes in the School's special education department. Given that the employer did not single out Brooks and the three other union supporters but also terminated two others in its effort to improve operations, it is difficult to infer that this decision was motivated by anti-union animus. Second, it points out that Daniels did not invent Brooks' job performance issues as a pretext to terminate a union supporter or as evidence just developed in advance of this unfair practice hearing. The School produced evidence of Daniels' e-mail correspondence with her in the spring of 2010 discussing his concerns as well as a memorandum prepared around the time of her termination that sets forth the reasons for her termination.

When this evidence is considered, it are considered, it is difficult to infer that Daniels was motivated by anti-union animus in terminating Brooks' employment. Brooks has not sustained her burden of proving the unlawful motivation element of the **St. Joseph's Hospital** test for proving anti-union discrimination.

Section 1201(a)(1) Allegation

Brooks also has 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.

When all the of the circumstances of this case are considered as a whole, the School has presented legitimate reasons for terminating Brooks that would outweigh any concerns with interfering with her rights. Brooks 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 Cyber Charter School is a public employer within the meaning of Section 301(1) of PERA.

2. That Constance Brooks 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

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Thomas P. Leonard, Hearing Examiner