COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

EVELYN HEKKING	:	
	:	
v.	:	Case No. PERA-C-10-347-E
	:	
ACHIEVEMENT HOUSE CYBER	:	
CHARTER SCHOOL	:	

PROPOSED DECISION AND ORDER

On September 27, 2010, Evelyn Hekking (Hekking 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 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 and a hearing was necessary. 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 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 Employe Relations Act. (N.T. 7)

2. Evelyn Hekking was a 12 month employe the School from December, 2004 until her termination in June, 2010. (N.T. 49)

3. The School's main administrative office is in Bryn Mawr. (N.T. 468)

4. In 2010, the School employed approximately 20-25 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 were in another office or worked from their homes. (N.T. 468)

6. Hekking's first positions with the School were as a mentor and placement officer, serving in those roles until 2006. From June, 2006 until January, 2008, she worked in the Student Services Department as an assistant (N.T. 47-49)

7. From 2008 to 2010, she held the position of Assistant to the Director of Special Education, Constance Frownfelter-Brooks. Her duties were to keep the department's schedule and to handle paperwork for the department. (N.T. 48)

8. In mid-January, 2010, Dr. Timothy Daniels became the School's CEO having just spent two years as the superintendent of the South Carolina Public Charter School District. The School hired Daniels to turn around a charter school that had certain deficiencies. (N.T. 523, 525)

9. On February 17, 2010, Daniels sent Hekking a letter similar to that sent to other teachers 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 11)

10. 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 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. 529-539, 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 March, 2010 Hekking sought information on representation by PSEA from its website. She became PSEA's main contact person at the School. She exchanged several e-mails with Kelby Waltman, the PSEA organizer. She also approached several staff members to talk about representation. (N.T. 11-12, 19, 50)

16. On or about April 6, 2010, Waltman 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)

17. On or about April 16, 2010 Waltman set up a conference call with Hekking 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. Hekking was part of the six to eight people in the room, as was Constance Frownfelter-Brooks. (N.T. 13-15).

18. Ms Hekking spoke in favor of union representation. (N.T. 15)

19. Hekking became a member of the organizing committee, along with Deborah Bender, Constance Brooks and Ruth Wallace. (N.T. 56, 348)

20. PSEA began to seek union authorization cards from employes 1of 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 Hekking 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)

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

22. On June 2, 2010, CEO Daniels, sent Hekking a letter notifying her that her employment was ended. The letter stated,

> This correspondence is to inform you that, effective today, your employment with Achievement House Charter School is ended. You will be paid for all work up to and including June 2, 2010, your last day of employment.
>
> Pursuant to School Policy, you are instructed to return all documents, equipment, computers, cell phones, student contact information, and records to the school on or before June 10, 2010.
>
> You are not to return to the school, under any circumstances, without first scheduling a visit with the CEO.

(N.T. 58-59, Complainant's Exhibit 4)

23. Ryan Schumm of Charter Choices, a private company, has provided accounting services and financial management services for the School since 2006. Charter Choices provides similar services to 27 charter schools. (N.T. 472, 475)

24. Schumm was present during the termination meeting of Hekking. (N.T. 480)

25. Schumm prepared a memorandum dated June 2, 2010 summarizing the meeting at which Hekking was terminated. At that meeting, Daniels told Hekking that her services "were no longer needed and that the school was making changes in the Special Education Department." (N.T. 474, Respondent Exhibit 24)

26. On June 1, 2010, Daniels created a memorandum regarding the deficiencies in Hekking's performance before her termination. Daniels created this memorandum on the advice of counsel to memorialize the cause for Hekking's termination.

    As of the last day of her employment with AHCS, the following is summative list of concerns:

- Disorganized in record keeping: violates IDEA record keeping requirements. In the case load of one special ed teacher with 23 students, 18 of the families did not have parent signatures for IEP's and NORIP.

  All special ed records disorganized: out of chronological or any other order. Many entries missing or non-compliant.

- Failure to notate IEP updates and NOREP's into the Provost Student Management Records after an initial failure to do this was corrected with the help of Richard Reeves in February/March 2010. In May, it was discovered that this task was still not being maintained by her office.

- Disruptive to the operation: Many instances of off campus two hour lunches with various employes staying at these lunches without pre-authorization with other employes.

- Parents routinely not included in IEP conferences scheduled by Ms. Hekking.

(N.T. 561, 577-578, Respondent Exhibit 26)

27. Daniels informed Hekking that he was terminating her on at-will basis because he did not want to tarnish her reputation with a for cause firing. Daniels testified that the School did not have to give a reason for terminating Hekking because she, and all the other employes were "at will" employes. (N.T. 563)

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

29. 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 complainants who claimed they were terminated in violation of PERA: Deb Bender, Constance Brooks and Hekking. (N.T. 570-571)

DISCUSSION

Evelyn Hekking'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. Hekking 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

Hekking 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. Hekking was the employe who first contacted PSEA in March, 2010 with questions on organizing the School's employes She then attended a PSEA informational meeting where a PSEA organizer explained what was involved in obtaining PSEA representation. There was a second meeting with PSEA and at that meeting she spoke in favor of PSEA representation and then made telephone calls to the other School employes in support of the 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 Hekking's employment. He testified that he did not know Hekking was involved with the PSEA until the School received her Complaint of Unfair Practices. He had not been told of her seeking PSEA information, unlike the cases of Deborah Bender and Ruth Wallace, where Sue Ellen Stiver told Daniels of their interest in PSEA. Hekking offered no opposing evidence that would cast doubt on Daniels' testimony that he did not know of her activity.

As an alternative means of proving employer knowledge, Hekking 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 the School is a cyber school with the majority of the employes, as well as all of the students, not present in the main office in Bryn Mawr. Furthermore, the seven employes who were at the main office did not engage in open organizing. Instead, they restricted their communication in support of the union to their off hours and with the aid of their own computers.

Accordingly, absent the proof of Daniels' knowledge of Hekking's protected activity, the second element of the **St. Joseph's Hospital** test is missing, which means the charge must be dismissed.

Motivation

For the sake of a thorough discussion, the third element of the **St. Joseph's Hospital** test, the motivation for Hekking's termination, will be discussed. 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).

Hekking, 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).

Hekking 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 discharge; the resulting shutdown of the campaign and the close timing between her union activity and her termination.

In Hekking's favor, two factors stand out to raise the inference that Daniels' decision to terminate her was motivated by anti-union animus: Daniels' anti-union state of mind and the close timing between Hekking's protected activity and her termination. 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 between her union activity and her termination. Hekking engaged in protected activity in April and was terminated in June.

In the School's favor, Daniels testified credibly that he terminated Hekking for reasons unrelated to her protected activity. Hekking argues that Daniels testimony does not "adequately explain" for its decision to terminate her. His explanation perhaps would not meet a just cause analysis under a grievance arbitration, but that is not the relevant standard in this unfair practice proceeding. The School produced evidence that Daniels used Hekking's job performance as the reason to terminate her. The reasons were not invented for the sake of this unfair practice hearing but were written into a memorandum at the time of Hekking's termination.

Furthermore, the School points out that Hekking and the three other PSEA supporters were not the only employes who were terminated. The School ended the employment of six of the seven employes in the School's special education's department, which comprised 25% of the student enrollment and whose deficiencies were a focus of CEO Daniels' attention. Given that the employer did not single out Hekking and the three other union supporters but also terminated others as part of an improvement of operations in special education, it is difficult to conclude that the School targeted Hekking.

Second, as for the resulting shutdown of the PSEA organizing drive as a factor from which anti-union animus could be inferred, the causal relationship between the terminations and the shutdown is not so clear. While it is true that organizers were terminated, it is also true that PSEA did not achieve its target of 65% level of support from the employes. It is not clear from the evidence which occurred first, the terminations or PSEA's decision to end the organizing campaign.

Given this record, it is difficult to conclude that Hekking met her burden of proving that her termination was motivated by anti-union animus. Absent proof of this third element of the **St. Joseph's Hospital** test, her charge alleging a violation of Section 1201(a)(3) of PERA must be dismissed.

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 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 "the totality of the circumstances" of this case are considered as a whole it must be concluded that a reasonable person 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 Hekking 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. Hekking 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 Eveyln Hekking, 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