

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

BRANDYWINE BOARD OF EDUCATION, :
Charging Party, :
:
v. : U.L.P. No. 89-09-044
:
BRANDYWINE EDUCATION ASSOCIATION:
AFFILIATE, NOCEA/DSEA/NEA, :
Respondent. :

The Board of Education of the Brandywine School District (hereinafter "District") is a public employer within the meaning of section 4002 (m) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (Supp. 1982, hereinafter "Act"). The Brandywine Education Association (hereinafter "Association") is the exclusive bargaining representative of the public employer's certificated professional employees within the meaning of 14 Del.C. section 4002(h).

The Brandywine Board of Education filed an unfair labor practice charge against the Brandywine Education Association on September 21, 1989. The complaint charges the Association with attempting to interfere with prospective contractual relationships between the District and prospective teachers, thereby effecting a unilateral change in the status quo, in violation of the Association's duty to bargain collectively in good faith under 14 Del.C. section 4007(b)(2).

There being no material dispute of the underlying facts, no hearing was required and the parties agreed to brief the legal issues. The final brief was received on January 12, 1990.

FACTS

The Brandywine Education Association has been the exclusive bargaining representative for the District's teachers since the creation of the District in 1981. The Association and the District are parties to a collective bargaining agreement the term of which extends from September 1, 1987 through August 31, 1991.

During the course of negotiations which resulted in the current agreement, the Association proposed that the following language be added to the Seniority, Lay-off and Recall provisions of the contract:

For the purpose of this Article non-tenured employees terminated at the end of the school year for other than unsatisfactory performance shall be considered to have been laid off subject to the recall provisions of Section 7.3.

This proposal was rejected by the District and was not included in the current agreement. The parties did, however, include a "zipper" clause which provides:

This Agreement incorporates the entire understanding of the parties upon all matters which were or could have been the subject of negotiation. During the term of the Agreement, neither party shall be required to negotiate with respect to any such matter whether or not covered by this Agreement and whether or not

within the knowledge or contemplation of either or both of the parties at the time they negotiated or executed this Agreement. [Article 2.1]

In June of 1989 the Association's President sent the following letter to several universities and colleges:

June 12, 1989

Dear Sir or Madame:

The Brandywine Education Association regrets to inform you that we currently do not recommend that persons seeking employment as teachers make application to the Brandywine School District.

Prospective applicants should know that their length of service in the Brandywine School District may be only one to three years, regardless of their performance or the number of teaching positions available in the District. The District has an on-going practice of terminating the contracts of some non-tenured teachers (those with 1-3 years experience) who receive satisfactory or better evaluations. These teachers are not given any reasons for the termination and, in most cases, they are not given warning prior to the notification of termination. The District, unlike others in the surrounding areas, refuses to place terminated teachers on a recall list or give them any priority when filling vacant positions. Placing these teachers on a recall list would guarantee them reemployment when positions become available because of increased enrollment.

Please post this letter and, if possible, distribute copies of it to student teacher coordinators and prospective teachers at your institution. If you need additional information or have questions about the District's practice, please feel free to contact me at the above address. Thank you for your help in this important matter.

Yours truly,
Margery J. Windolph, President
Brandywine Education Association

A copy of this letter was neither sent to the District nor was the District notified of its issuance.

ISSUE

Did the Brandywine Education Association violate section 4007 (b)(2) [1] of the Public School Employment Relations Act (14 Del.C. Chapter 40 (Supp. 1984)) when it issued a letter to colleges and universities recommending that graduating teachers not seek employment with the Brandywine School District because the District does not place terminated non-tenured teachers who receive satisfactory or better evaluations on a recall list?

POSITIONS OF THE PARTIES

DISTRICT:

The District charges that the Association's letter represents an attempt to interfere with prospective contractual relationships between the District and prospective teachers, and represents an attempt to unilaterally alter the status quo in derogation of the Association's duty to bargain in good faith under 14 Del.C. section 4007(b)(2). The District charges that the Association has attempted on two prior occasions to accomplish the same goal, i.e., requiring the District to place on the appropriate recall list all terminated non-tenured teachers who received an evaluation of satisfactory or above: First when the BEA filed an unfair labor practice charge in 1986 in which it unsuccessfully sought to establish the existence of a clear past

[1] 14 Del.C. section 4007(b)(2) provides:

- (b) It is an unfair labor practice for a public school employee or for an employee organization or its designated representative to do any of the following:
- (2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.

practice [2]; and secondly, by the referenced proposal at the bargaining table during the negotiation of the current agreement. The District asserts that the letter clearly attempts to alter the status quo by attempting to reduce the quantity and quality of teacher applicants. The District further argues that this attempt to compel a change in the recall policy also violates Section 2.1, Negotiation of Agreements, of the parties current collective bargaining agreement.

The District contends that because the letter contains an obvious threat which has a "reasonable tendency" to coerce the District into changing its recall and rehiring practices, it does not fall within the parameters of protected speech under the Constitution.

The District also argues that the BEA's action was clearly "...for the purpose of inducing, influencing, or coercing a change in the conditions, compensation rights, privileges or obligations of a public school employment...", a purpose which defines an illegal strike under the Act. 14 Del.C. section 4002(o). [3]

[2] In Brandywine Affiliate, NCCFA/DSEA/NEA v. Board of Education (Del.PARB, U.L.P. No. 85-06-005) the Association alleged that the District had unilaterally altered the status quo during the term of a collective bargaining agreement by not placing 17 non-tenured teachers (with annual performance ratings above "unsatisfactory" who were terminated at the end of the 1984-85 school year) on the recall list. The PARB found that there was insufficient proof to establish the existence of a past practice requiring that these non-tenured teachers be placed on a recall list. The decision of the District not to renew the contracts of these employees and not to place them on the recall list was found to be a proper exercise of the District's authority under 14 Del.C. section 4001, et seq.

[3] 14 Del.C. section 4002 (o) provides:
"Strike" means a public school employee's failure, in concerted action with others, to report for duty, or his or her willful absence from his or her position, or his or her stoppage or deliberate slowing down of work, or his or her withholding in whole or in ...(note continued on page 6)

While not opposed to the publication and/or dissemination of its hiring practices, the District does object to the BEA's recommendation that prospective teachers not apply for positions. It argues that the Association clearly has the ability to alter the status quo by decreasing the number of qualified applicants to the extent that the District is forced to retain more non-tenured teachers.

Association:

The Association rejects the District's contention that the letters were sent for the purpose of attempting to unilaterally alter the applicable contractual provisions. BEA asserts that it is incapable of effecting a unilateral change in this matter because the recall of teachers can only be accomplished by the District. It argues that the Board is attempting to impose a "gag rule" on the Association on the theory that dissemination of any information which has the potential for adverse impact on the District necessarily has a tendency to force a change in the relevant contractual provisions.

The Association maintains that the underlying question here is whether the dissemination of factual information can be prohibited simply because it might pressure the District into changing its current practice. BEA further asserts that the letter is concerted activity

Note [3] continued ... part from the full, faithful and proper performance of his or her duties of employment, or his or her involvement in a concerted interruption of operations of a public school employer for the purpose of inducing, influencing or coercing a change in the conditions, compensation rights, privileges or obligations of public school employment; however, nothing shall limit or impair the right of any public school employee to lawfully express or communicate a complaint or opinion on any matter related to terms or conditions of employment.

of the type expressly authorized by 14 Del.C. section 4003(3). [4] It further argues that, because of the express strike prohibition of section 4016, only the exercise of methods of persuasion such as employed here are available to employee organizations for exerting pressure and encouraging change.

The BEA asserts that its action does not constitute coercion but rather is an exercise in free speech. It concludes that should the Brandywine Board of Education alter its recall policy out of concern that the circulation of the BEA letters will make it more difficult to recruit teachers, its action would be a reasoned response to marketplace employment factors and not a reaction to force, threats or intimidation by the Association.

OPINION

In order for the District to sustain its charge that the Association has failed to bargain in good faith, it must prove that the Association effected a unilateral change in a mandatory subject of bargaining, as alleged. The parties do not dispute that under the status quo that existed prior to the issuance of the BEA letter, non-tenured teachers who were terminated for reasons other than unsatisfactory performance were not placed on the District's recall list. There is no evidence on the record to substantiate the allegation that this status quo has changed. The decision whether to

[4] 14 Del.C. section 4003, School employee rights, provides:
School employees shall have the right to:
...(3) Engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.

recall or rehire non-tenured teachers rests within the District's exclusive authority, both prior to and after the issuance of the letter. In fact, the Association is without means to unilaterally alter this authority. However distasteful it might be, an attempt to interfere with the recruitment of applicants is not synonymous with effectuating a unilateral change in the scope of the recall policy.

In Brandywine Education Association v. Bd of Education (Del. PERB, U.L.P. No. 85-06-005 (2/5/86)) the PERB found it unnecessary to determine whether or not the termination of non-tenured teachers, without recall rights, was a mandatory subject of bargaining. Similarly in this case, because it has been determined that there is insufficient proof of an actual change in the status quo, it is unnecessary to determine whether there existed the duty to bargain which attaches only to a mandatory subject of bargaining.

The District's argument that because the letter contains an "obvious threat" it has a "reasonable tendency" to coerce the District into changing its recall and rehire practices, and therefore is not protected as free speech is also unsubstantiated. In Seaford Education Assn. v. Bd. of Education (Del. PERB, U.L.P. No. 88-01-020 (7/13/88)), the PERB held that speech was not protected if it contained threats of reprisal or force or the promise of benefits as defined within the context of the prevailing labor relations setting and/or economic relationship. While Seaford (Supra.) dealt with an employer's communication directly with the employees, the standard established therein is also applicable to the representations made here by the labor organization through its President. The letter issued by the Association accurately describes the current practice within the

District. Its recommendation that prospective applicants not apply was clearly designated as the opinion of the Association. The letter cannot be reasonably construed as containing an "obvious threat" to the applicants. Nor is there either an explicit or implicit threat of reprisal or force to the District.

The District argues that the effect of the BEA's letter also violates Article 2.1 of the current collective bargaining agreement. This issue is outside of the PERB's statutory mandate and has no bearing on the application of the Act in this matter. Indian River Education Association v. Bd. of Education, Del.PERB, D.S. No. 89-03-035 (7/28/89).

Collective bargaining is a continuous process. While the Association's letter may not have enriched the parties' relationship and may have created more harm than benefit, a single communication of this type is not a sufficient foundation upon which to sustain a charge of refusal to bargain in good faith.

Because the District's charge is unsupported by the record, there is no need to consider whether the BEA's letter comes within the free speech protections of the Constitution.

CONCLUSIONS OF LAW

1. The Board of Education of the Brandywine School District is a public employer within the meaning of 14 Del.C. section 4002(m).
2. The Brandywine Education Association Affiliate, NOCEA/DSEA/NEA is an employee organization within the meaning of 14 Del.C. section 4002(g).
3. The Brandywine Education Association is the exclusive

bargaining representative of the certificated professional employees of the Brandywine School District within the meaning of 14 Del.C. section 4002(h).

4. The Brandywine Education Association did not engage in conduct in violation of its duty to bargain in good faith under 14 Del.C. section 4007(b)(2) by its issuance of a letter recommending that graduating teachers not apply to the Brandywine School District because of its recall and rehire practice.

5. The Brandywine Board of Education's charge that the Brandywine Education Association engaged in conduct in violation of 14 Del.C. section 4007(b)(2) is hereby dismissed.

IT IS SO ORDERED.

Deborah L. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD

Principal Assistant/Hearing Officer

Delaware PERB

Charles D. Long, Jr.

CHARLES D. LONG, JR.

Executive Director

Delaware PERB

DATED: February 21, 1990