

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

HELENE ROSS,	:	
	:	
Charging Party,	:	ULP 10-12-779
	:	
v.	:	Probable Cause Determination
	:	& Order of Dismissal
CHRISTINA EDUCATION ASSOCIATION,	:	
	:	
Respondent.	:	

Appearances

Helene C. Ross, pro se
Jeffrey M. Taschner, Esq., General Counsel, Delaware State Education Association

BACKGROUND

Helene C. Ross (“Charging Party”) is a public school employee within the meaning of 14 Del.C. §4002(m). She is employed by the Christina School District and her position falls within the bargaining unit currently represented by the Christina Education Association, DSEA.

The Christina Education Association (“Association”) is the exclusive bargaining representative of the bargaining unit of certificated non-administrative employees of the Christina School District within the meaning of 14 Del.C. §4002(i).

On or about December 8, 2010, Charging Party filed an unfair labor practice charge alleging the Association violated 14 Del.C. §4007 (b)(1), (2), (3) and 14 Del.C. §4003 (2), (3), and (4) which provide:

§4007 (b) It is unfair labor practice for a public employee or for an employee organization or its designated representative to do

any of the following:

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (2) Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative.
- (3) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

§4003 School employees shall have the right to:

- (2) Negotiate collectively or grieve through representatives of their own choosing.
- (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.
- (4) Be represented by their exclusive representative, if any, without discrimination.

Charging Party alleges the Association “failed or refused to provide proper representation” to Charging Party, in violation of its statutory duties.

On or about January 7, 2011, the Association filed its Answer denying the material allegations set forth in the Charge. The Association’s Answer did not include new matter and requested the Charge be dismissed because it was without merit.

On or about January 13, 2011, Charging Party filed additional documents and information in support of her Charge.

This decision is based upon the pleadings.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

- (a) Upon review of the Complaint, the Answer and the Response the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred.

If the Executive Director determines that there is no probable cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board shall decide such appeals following a review of the record, and , if the Board deems necessary, a hearing and/or submission of briefs.

- (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, Del. PERB Probable Cause Determination, ULP 04-10-453 V PERB 3179, 3182 (2004).

The pleadings in this matter do not reveal any material disputes of fact. There is a significant documentary record which was included in the pleadings. The record establishes the following basic chronological evolution of the issue:

- On or about March 18, 2010, Charging Party filed a grievance contesting procedural violations and the context of a 48 Hour Meeting held on March 11, 2010. This grievance was denied at Step 1, by decision dated March 29, 2010. The Grievance was heard at Step 2 by the District's Director of Human Resources on April 16, 2010, and was denied in a written response dated April 23, 2010.
- On or about April 1, 2010, Charging Party filed a second grievance contesting a one day suspension without pay which she was assessed as a result of the March 11, 2010, 48 Hour Meeting. On April 23, 2010, Charging Party

requested the grievance be advanced to Step 2, because she did not receive a timely Step 1 response.

- By an email dated May 5, 2010, the DSEA's UniServ Director advised

Charging Party:

Please read 3.5 entitled Specific Procedure it explains the levels and timelines. You have 10 working days from the date you receive Josette's *{District's Human Resource Director}* letter to file for proceeding to arbitration (3.5.4). Our attorney will review the *[sic]* and the CEA Executive Committee have to approve to send the case to arbitration. You have the right to come to the Executive Committee and explain why you want to move to arbitration. Depending on the date you received Josette's letter please let me know so we don't miss the timeline.

- Timelines related to the further processing of the grievances were extended by mutual agreement of the Association and District representatives on May 6, 2010.
- Charging Party met with the DSEA UniServ Director and a CEA building representative on June 23, 2010 to discuss moving the grievances to Step III.
- By e-mail dated July 7, the DSEA UniServ Director advised Charging Party "Level 3 has been filed, I sent you the email below. Claudia *{Association President}* is out of town until today some time and Jeff is off this week, I will contact you after I speak to them." Later that day, the UniServ representative sent a second email in which he advised that Demand for Grievance Arbitration form had to be submitted which required review and signature of DSEA's legal counsel (who was on vacation). The email concluded, "As soon as the Demand for Grievance Arbitration *[sic]* I will send it to you. I also have to get a copy to the ChEA."
- The Association's Local President contacted Charging Party by email dated

July 12, 2010, in which she advised that she had spoken to the UniServ Director (“Brown”) and that the District had agreed to extend the deadline for advancing the grievances to arbitration. The email states in relevant part:

... Mr. Brown will contact you with the next step, which will be to meet with the CEA Executive Board and present your case. Mr. Taschner {*DSEA general counsel*} and Mr. Weinberg {*DSEA Executive Director*} will not be present for this meeting. I will let Mr. Brown continue with the information so we are not both doing the same thing. Mr. Taschner will be in contact with you if this goes to arbitration.

- Charging Party was advised by email dated July 15, 2020 that a meeting had been scheduled with the Association’s Executive Board. The stated purpose of this meeting was for the Board to determine whether to approve sending Charging Party’s grievances to arbitration. Charging Party was advised, “you may present your case to the executive board on Thurs., Aug.19 at 10:30 a.m. at Gauger.”
- Charging Party presented her case to the Association’s Executive Board on August 19, 2010, and provided the committee with many documents in support of her position.
- By letter dated August 30, 2010, the Association President notified Charging Party as follows:
 - CEA reviewed your case for arbitration. We met with you on Aug. 25 to hear your explanation. After, the meeting we felt that your case could not be won in arbitration. A vote was taken and it was unanimous not to move forward with one abstention... In summary, we don’t really believe you made the case...

A union's duty to fairly represent members of the bargaining unit is based on its exclusive position as the certified bargaining representative, as defined at 14 Del.C. §4002(i). The United States Supreme Court (in applying similar language under the

National Labor Relations Act) recognized the exclusivity of the certified bargaining representative in *Vaca v. Sipes* (386 US 171 (1967)). Acting in its exclusive capacity, a union that is the certified bargaining representative has both power and control over the terms and conditions of employment and therefore over the working lives of the bargaining unit members. *Williams v. Norton, et al.*, ULP 85-10-006, I PERB 159, 167 (PERB, 1986);

In drafting the Public School Employment Relations Act, the Delaware legislature expressly incorporated both the doctrine of exclusivity and the duty of fair representation. 14 Del.C. §4004(a) states:

The employee organization designated or selected for the purpose of collective bargaining by the majority of the employees in an appropriate bargaining unit shall be the exclusive representative of all employees in the unit for such purpose and shall have the duty to represent all unit employees without discrimination. 14 Del.C. §4004(a).

This mandate clearly requires that the exclusive representative shall not discriminate against or among those whom it is obligated to represent.

A breach of the duty of fair representation occurs “only when a union’s conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith ...” *Vaca*, *Supra.*; *Williams*, *Supra.*, p 167; *Morris v. DCOA & DOC*, ULP 99-12-272, III PERB 2161 (PERB, 2001); *Flowers v. Herbert*, ULP 05-02468, V PERB 3411, 3413 (PERB, 2005).

In considering an allegation that a union has violated its duty of fair representation, PERB has held: “. . . in order to meet its statutory obligation to represent its members without discrimination an exclusive employee representative has a duty to act honestly, in good faith and in a non-arbitrary manner. These factors form the basis for every fair representation case . . .” Although a union is afforded significant latitude in

fulfilling its statutory duties, these factors constitute the standard by which complaints alleging a breach of the duty of fair representation are resolved. *Alicia A. Brooks v. AFSCME Local 640*, ULP 09-08-701, VII 4483, 4489 (PERB, 2010). The test is one of good-faith.

A wide range of reasonableness must be allowed a union in serving the bargaining unit it represents. *Williams*, *Supra.*, p. 167. The union has the duty to “serve the interests of all members without hostility... toward any, to exercise good faith and honesty, and to avoid arbitrary conduct.” *Vaca*, *Supra.* Consequently, the question in reviewing an union’s acts or omissions is whether the substantiated allegations reveal “hostile discrimination based on irrelevant and invidious considerations or whether they show good faith within the wide range of reasonableness granted to the bargaining agent.” *Ford Motor Car v. Huffman*, 345 U.S. 330, 338 (1953).

The United States Supreme Court held in *Vaca v. Sipes* that a union may not arbitrarily ignore a meritorious grievance or process it in a perfunctory manner. This does not, however, mean that an individual employee has an absolute right to have her grievance taken to arbitration. *Vaca*, *Supra.*, p. 195. The Supreme Court has also held that discretion must be afforded to a union in order to assure the effective functioning of collective bargaining. *Electrical Workers (IBEW) v. Foust* 442 US 42 (1979). A union has the right under the statutory framework to decline to take a grievance to arbitration for many reasons; but it may not refuse to do so for no reason. The courts have generally deferred to the union’s decision not to take a grievance to arbitration where that decision is based upon an assessment of the merits of the grievance.

In this case, the Charging Party has not asserted or set forth facts which would support a finding that the Association acted in a discriminatory manner when it declined to take her grievances to arbitration. It is undisputed that the Association responsibly

secured an extension in which to consider the merits of the grievances in order to make its decision. Charging Party was afforded the opportunity to present her arguments and evidence to the Association's Executive Board, which made the decision.

The pleadings also do not support the conclusion that the Association's decision not to take Charging Party's grievances to arbitration was made in an arbitrary manner or that the Association acted in bad faith. Charging Party contests the accuracy of the dates recited in the President's August 30, 2010 letter and contends the Association did not respond within the three days dictated by the by-laws. Neither of these concerns override the fact that the letter clearly sets forth that the executive board heard and considered the merits of the grievances and concluded the case could not be won at arbitration. That decision constitutes a valid, non-discriminatory reason, within the Association discretion, to decline to exercise its right to take these grievances to arbitration.

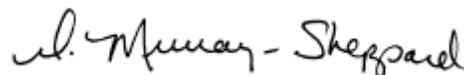
Even when considered in a light most favorable to the Charging Party, the pleadings in this case fail to establish probable cause to support the conclusion that any of the alleged violations of the statute may have occurred.

DETERMINATION

Considered in a light most favorable to Charging Party, the pleadings fail to establish probable cause to believe that an unfair labor practice, as alleged, may have been committed by the Christina Education Association.

Accordingly, the Charge is hereby dismissed in its entirety.

DATE: March 4, 2011



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.