

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

SUSSEX COUNTY VOCATIONAL TECHNICAL)	
TEACHERS' ASSOCIATION,)	
Charging Party,)	
)	
v.)	<u>ULP No. 88-01-021</u>
)	
BOARD OF EDUCATION OF THE SUSSEX)	
VOCATIONAL TECHNICAL SCHOOL)	
DISTRICT,)	
Respondent.)	

The Board of Education of the Sussex County Vocational Technical School District (hereinafter "District" or "Respondent") is a public school employer within the meaning of section 4002(m) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (hereinafter "the Act"). The Sussex County Vocational Technical Teachers' Association (hereinafter "Association" or "Charging Party") is the exclusive bargaining representative of the public school employer's certificated professional employees within the meaning of 14 Del.C. section 4002(h).

An unfair labor practice charge was filed on January 6, 1988 by the Association against the District. The charge alleges that the District has engaged in a series of acts which constitute a pattern of violations of the following statutory provisions:

4007 (a) It is an unfair labor practice for a public school employer 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 under this chapter.
- (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.
- (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

The District filed its Answer and a Counter Charge on January 19, 1988. The Counter Charge alleges that the Association has attempted to gain a bargaining advantage through the filing the original charge, and by so doing, has violated the following statutory provisions:

4007 (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.
- (3) Refuse or fail to comply with any provision of this chapter or with the rules and regulations established by the Board [PERB] pursuant to its responsibility to

regulate the conduct of collective bargaining under this chapter.

An informal conference was held on Thursday, February 4, 1988. The parties were unable to resolve their disputes at that time and a public hearing was subsequently held on Thursday, March 17, 1988. The parties were provided the opportunity to brief the legal issues raised, and the post-hearing briefing period concluded with the receipt of the final brief on May 16, 1988.

The District and the Association are parties to an existing collective bargaining agreement for the term of September 1, 1985 through August 1, 1988.

The Association's charge is based on a series of events occurring over the four month period of September through December of 1987. The actions alleged to be in violation of the Act are detailed below:

During a faculty meeting on September 14, 1987, Education Association President Barry C. Blackwell announced that a vote would be taken among all paid Association members in order to determine whether or not to renegotiate the existing collective bargaining agreement. All of the teaching staff was invited to attend the meeting at which the vote was to be taken. During the school day of September 15, Building Principal Donald Van Sciver advised the Association President that, although he did not wish to embarrass Blackwell publicly in front of the faculty, "closed shops are illegal in Delaware". Principal Van Sciver testified that he made this comment because he believed that inviting all teachers to an Association meeting and then denying non-

members the right to vote was "an extension of the closed shop interpretation". [Transcript, p. 290] He further believed Mr. Blackwell to be uninformed on the existence of a closed shop prohibition. The Association interpreted this comment to be an attempt by Mr. Van Sciver to interfere in internal Association procedures.

On September 16, 1987, a regularly scheduled Liaison Committee meeting was attended by District Supt. James C. Phillips, Assistant Superintendent George L. Frunzi, Association President Blackwell and Association Vice President Barry Cooper. Principal Van Sciver also joined the meeting, although it was not customary that he attend Liaison meetings. The Association has alleged that Principal Van Sciver again pronounced the illegality of closed shops, a comment which allegedly was reiterated by Dr. Frunzi. This allegation was supported only by the testimony of Association witnesses Blackwell and Cooper, while none of the District witnesses had any recollection of these comments being made by Dr. Frunzi during the Liaison meeting.

In a separate incident Mr. Blackwell filed a grievance on September 8, protesting the inclusion of a written reprimand placed in his file by Principal Van Sciver. In his level I decision of September 18, Mr. Van Sciver refused to accept the grievance for a decision on its merits on the basis that: 1) Mr. Blackwell had not discussed the issue informally prior to filing the grievance; 2) the confidentiality provision of the contract was violated by Mr. Blackwell contacting his designated Delaware State Education Association representative; and 3) the grievance procedure had been further violated because the Building Grievance Chair was not first notified. The grievance was appealed to

Level II, where it was heard by Supt. Phillips and resolved on its substantive merits. During the unfair labor practice hearing before the PERB, Mr. Van Sciver acknowledged that he had made a mistake in not hearing the case at Level I. The Association contends that Mr. Van Sciver's rejection of the grievance, for the reasons he stated, was an attempt to institutionalize the District's desired goal of mandating an informal Level I grievance procedure, in direct contradiction of the existing contractual language 1 and without first bargaining the matter with the Association.

1 Applicable portions of Article IX, Grievance Procedure, are:

A. Purpose

The purpose of this procedure is to secure at the lowest possible level, resolutions of "grievances" as herein defined raised under this Article. All parties concerned are encouraged to keep these proceedings as informal and as confidential as may be appropriate at any level of this procedure.

C. Procedure

In the event a grievance shall arise, an earnest effort shall be made to settle said grievance in the sequence listed below. The time limits have been specified, but may be extended or reduced by mutual agreement.

D. Level One

1. Informal

A teacher who believes that he/she has a potential grievance may first discuss the matter informally with his/her immediate supervisor in an effort to resolve such a potential grievance. ... The filing time limit at Formal Level One shall be ten (10) days after the administrator's response, if Informal Level One is pursued and the teacher is not satisfied with the response receive above, or if no response is given within the three (3) day limit.

2. Formal

In the event Informal Level One is not pursued, the first formal contact will be made within ten (10) days after the occurrence giving rise to the alleged grievance, or within ten (10) days following the date on which the aggrieved party could logically be expected to become aware [sic] of the occurrence giving rise to the alleged grievance.

The third incident cited in support of the charge involves a grievance, filed by the Association, regarding the alleged failure of the District to give full credit to retirees for years of service in calculating a local retirement bonus. A Level II grievance hearing was held before Superintendent Phillips on September 21, 1987. At the conclusion of the hearing, the Supt. advised the grievant that he was denying the grievance because the Board of Education had so directed him. The grievant left the hearing and began calling members of the School Board in an effort to determine whether such a directive had been issued. It is the comments made by two of the Board members during these phone conversations which are alleged to be violative of the Act. Joan Moore, a ten year member of the Board, is alleged to have told the grievant that he should have had more respect after 22 years with the District than to involve the Union in the filing of a grievance. Ms. Moore denies making the alleged comment. She testified, however, that she did ask the grievant how the Association could represent him in a grievance when he was no longer a member of the bargaining unit (he had been retired for a full three months at the time of the conversation). In another phone call, the President of the Board of Education, Howard Elliott, offered to put the grievant on the agenda for the next Board meeting so that the grievant could raise his dispute with the full Board. The grievant testified that Mr. Elliott closed the conversation by advising him, "You come to the Board meeting by yourself and we'll get this thing resolved. We don't need any unions or outside help". Mr. Elliott denies making this final comment. He did testify that when he invited the grievant to appear before the Board, he did not specifically mean for a Level III

grievance hearing. Both Mr. Elliott and Ms. Moore noted that they had knowledge of the grievant's problem prior to receiving his call. The issue involving the calculation of the local pension bonus had been discussed by the full Board of Education and Superintendent Phillips at the September 15 Board meeting.

During the October 7 faculty meeting, Principal Van Sciver expressed concern with the number of grievances which had recently been filed. The District had operated for twenty years without receiving a single formal grievance; however, approximately three to four were received within the first months of school operation in 1987. Mr. Van Sciver further conveyed his desire that anyone with a complaint come talk with him before filing a formal grievance. The Association has alleged that this statement constituted a directive in contradiction of the clear option contained in the collective bargaining. [See note 1] The words used by Mr. Van Sciver were admittedly in terms of his "desire".

On or about November 25, 1987, a discussion was initiated by Principal Van Sciver with Association President Blackwell. This discussion focused on Mr. Van Sciver's interpretation as to when it was appropriate to grieve an alleged procedural defect in the contractual performance evaluation procedure. Specifically, a member of the bargaining unit and the Vice Principal (who was her assigned evaluator) had entered into an oral agreement to waive the contractually established timeframe for the post-observation interview. After entering into this agreement, the teacher began to have second thoughts on the impact of extending the length of time between the actual observation and the completion of the process. The teacher and the

Association President discussed the binding nature of the oral agreement. At no time was a grievance discussed or prepared. Principal Van Sciver testified that, relying on the characterizations of the Vice Principal, he believed that a grievance in this matter could be forthcoming. Acting on this belief, Mr. Van Sciver called Mr. Blackwell into his office and advised him that the Association could not interfere with the evaluation process until it reached its conclusion, at which point it was appropriate to file a grievance. Mr. Blackwell interpreted these remarks to mean that he was not to engage in conversations such as those he had had with the concerned teacher. Mr. Van Sciver testified that his purpose was to advise Mr. Blackwell to wait until the evaluation process was completed before filing any grievances.

Finally, in December of 1987, Mrs. Bennett, a data processing teacher and bargaining unit member, met with Principal Van Sciver to discuss her concerns regarding the lack of communication between the administration and her department, as it related to the reported filling of a vacancy. During the course of their discussion, Mr. Van Sciver allegedly asked Mrs. Bennett if either the Association's Chief Negotiator or President "had tried to pressure" her into filing a grievance. The Association contends that this evidences the District's, and specifically, Mr. Van Sciver's, intent to change the contractual grievance procedure and to interfere in the internal administration of the Association.

The Association alleges that each of these events constitutes a violation of the Act and that the totality of these actions clearly evidences a continuing pattern of violations.

ISSUE

DID THE SUSSEX COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT, BY AND THROUGH ITS VARIOUS ACTIONS, VIOLATE SECTIONS 4007(a) (1), (2), (3) AND (5) OF THE PUBLIC SCHOOL EMPLOYMENT RELATIONS ACT?

DO SUCH ACTIONS EVIDENCE CONDUCT SUFFICIENT TO CONSTITUTE A CONTINUING PATTERN OF VIOLATIONS OF THE ACT?

OPINION

The first issue to be resolved is whether incidents occurring outside of the 90 day statute of limitations, established by PERB Rule 5.2(a) 2, are proper subject matter for an unfair labor practice charge. Rule 5.2 (a) expressly provides that events occurring prior to the limitations period are not prohibited from being introduced as evidence if they are relevant to the alleged commission of an unfair labor practice occurring within the period. This does not, however, leave an open gate through which charges for which the statute of limitations has tolled may be brought for resolution based on their merits. Accordingly, we shall herein consider the events which

2 Rule 5.2 (a) states:

A public employer, a labor organization, or one or more employees may file a complaint alleging a violation of 14 Del.C. section 4007 or 19 Del.C. section 1607. Such complaints must be filed within ninety (90) days of the alleged violation. The limitation shall not be construed to prohibit introduction of evidence of conduct or activity occurring outside the statutory period, providing the Board or its agent, finds it relevant to the question of commission of any unfair labor practice within the limitations period.

occurred within the 90 day period of October 8, 1987 through January 6, 1988, 3 which are alleged to constitute unfair labor practices. Events occurring prior to October 8, 1987, shall be considered only insofar as they may be relevant to the resolution of the timely charges.

Applying this ruling, the Sussex County Vo-Tech Teachers' Association has properly alleged the occurrence of two incidents:

- 1) On or about November 25, 1987, Principal Van Sciver initiated a discussion with the President of the Association in which he informed the President that the Association should not interfere with the evaluation process until the process was completed; and
- 2) In a discussion occurring in December, 1987, initiated by a teacher concerned about a communication problem between the administration and her department, Principal Van Sciver questioned the teacher as to whether or not she was being pressured, by either the Association President or the Chief Negotiator, into filing a grievance in the matter.

3 In computing the applicable time period, the following regulations apply:

1.1 Computation of Time

- (a) In computing any period of time proscribed by or allowed by the Act, these Regulations or an Order of the Board, the day of the act or event after which the designated period of time begins to run shall not be included. The last day of the period so computed is to be included, unless it is a Saturday, Sunday or legal holiday.

Accordingly, January 6, 1988 is the 90th day of the period, as this the date on which the Complaint was filed with the Public Employment Relations Board. October 9, 1987 is ninety days prior to January 6, 1988. Therefore, because the rule provides the statute of limitations does not begin to run until the day following the act which allegedly violates the statute, the applicable period in this case begins on October 8, 1987.

These actions are alleged to have violated 14 Del.C. section 4007 (a) (1), (2), (3) and (5).

The Charge alleges that the District has engaged in conduct which interferes with, restrains and/or coerces employees in the exercise of their statutory rights, and/or which interferes with the administration of the Association, a labor organization under the Act. 14 Del.C. sections 4007 (a)(1) and (a)(2). The burden is on the Association to factually support these allegations. Direct evidence that any employee was actually intimidated, coerced or restrained, however, is unnecessary. Rather the test is whether the conduct reasonably tended to interfere with the either the free exercise of employee rights or administration of the labor organization. 4 An objective standard is required in evaluating the "reasonable tendency" of the actions to interfere, restrain or coerce.

In this case, it is statements made by an Administrator which form the basis of the charge. Such statements must, either on their face or through the surrounding circumstances, reasonably tend to interfere with employee rights or to exercise undue influence and/or coercion of employees or the Association in order for such statements to rise to the level of a violation of section 4007 (a) (1) and/or (2). NLRB v. Peterson, 6th Cir., 157 F.2d 514 (1946). It is this attendant threat of reprisal or promise of benefit which violates the Act and separates violative statements from those protected by free

4 This holding is consistent with the test established by the National Labor Relations Board in NLRB v. Ford (6th Cir., 170 F2d 735 (1948)). While recognizing the distinctions that exist between the public and private sectors, experience gained in the private sector is sometimes valuable in evaluating issues presented. Seaford Education Association v. Board of Education, Del.PERB, ULP No.2-2-84S (1984).

speech under the Constitution. Seaford Education Assn. v. Seaford Bd. of Education, Del.PERB, U.L.P. No. 88-01-020 (7/13/88).

Applying this test to the facts in this case, in the first incident Principal Van Sciver advised Association President Blackwell that the Association should not interfere with the grievance process until it was completed. The voluminous record in this case is void of any accompanying statements which could reasonably be interpreted as tending to interfere with, restrain or coerce either individual employees in the exercise of their rights or the Association in its internal administration. What is clear from the record is that each of the participants came to this encounter with a very different set of perceptions relating to this specific incident. Mr. Blackwell interpreted the statement to be a reprimand for discussing the evaluation process in direct response to a question from the affected teacher. The record, however, fails to establish that Mr. Van Sciver had prior knowledge of the discussion between Blackwell and the teacher. Rather, Van Sciver testified that his comments were based on the perceptions and characterizations of his Vice Principal, who was the evaluator in this instance. Her mistaken prediction that a grievance might be forthcoming was based on her knowledge that the evaluated teacher was "upset" with the evaluation. In order for Mr. Van Sciver's comment to be found to tend to interfere, coerce or restrain an employee or the Association, one must either read into the statement or otherwise attach to it an implied threat or promise of benefit. Neither the statement itself nor the surrounding circumstances suggest that this would be a reasonable construction of this message.

Additionally, the communication occurred between the Association President and the Building Principal. The reaction on which the Association relies to evidence the coercive effect of this statement on employees in exercising their right to file a grievance, resulted from the reporting of the incident by the Association President to an individual employee. The District cannot be held responsible for the manner in which encounters are characterized by Association representatives. The contention that the District was acting upon an evident "anti-union animus" is simply not factually supported in this case.

The incident involving Ms. Bennett and Mr. Van Sciver's discussion also fails to meet the established test. Mr. Van Sciver's question as to whether pressure was being exerted by the Union to file a grievance in the matter is not accompanied by any coercive statements or circumstances. Ms. Bennett testified that while she was "surprised" by the question, it would not have discouraged her from filing a grievance and she did not think that Mr. Van Sciver was indicating any dissatisfaction that she had previously discussed the issue with Association representatives. If the affected participant in this discussion did not read coercion or undue influence into the question, this Board is unwilling, on review, to attach to it a meaning not contemplated by either participant at the time of the utterance.

Secondly, the Association has alleged that District actions violate section 4007(a) (3) of the Act. The express terms of this prohibition preclude an employer from discriminating "in regard to hiring, tenure or other terms or conditions of employment" with the intent of either encouraging or discouraging membership in the labor

organization. Critically missing from the evidence and testimony presented is any mention of such discrimination. Having failed to establish the requisite discrimination, the employer cannot be found to have violated section 4007(a)(3).

Thirdly, this Board has established through prior decisions that the duty to bargain terms and conditions of employment extends and applies during the term of an agreement. Smyrna Education Assn. v. Bd. of Education, Del.PERB, ULP No. 87-08-015 (October 26, 1987).

Unilateral changes in mandatory subjects of bargaining have been found to be unlawful whether they occur during a period of negotiations or during the term of an existing agreement. The critical question which must be preliminarily answered in this case, however, is did the Sussex County Vocational Technical School District, by its actions, effectuate a unilateral change in the existing terms and conditions of employment as established in the current collective bargaining agreement.

The SCVTTA argues the District has evidenced a clear intent to vacate the contractual language which provides a grievant with the option to initially pursue his/her claim either formally through the filing of an official grievance or informally by first discussing the dispute with the building principal. To support this allegation, the Association relies on the following incidents:

- 1) In telephone conversations with Board of Education members, a grievant, James Millman, was allegedly told by one Board member that he should have had more respect than to involve the Association in his dispute involving his local pension rights. The President of the Board of Education is alleged to have told Mr. Millman that he could have "gotten it straightened out" if Millman had come before

the Board without the Association.

2) The Principal refused to accept a Level One grievance because the grievant had not first discussed the matter with the Principal and because a copy of the grievance had been sent to the Delaware State Education Association responsible for assisting SCVTTA members.

3) The Principal stated at a general faculty meeting that he wanted anyone with a grievance to talk to him before filing a formal grievance.

4) In November, the Principal advised the Association President that Association representatives should not talk to teachers about grievances relating to performance evaluations until after the evaluations were finalized.

The first three incidents noted above occurred outside of the relevant limitations period established in this decision. The Association argues that the Principal's statement to the Association President must be viewed in context of the three prior incidents. Rather, we conclude that it is necessary to consider the prior incidents only if the fourth could reasonably be construed to be an improper action; in this case, if it constituted evidence of a unilateral change in the grievance procedure. This encounter between the Principal and the Association President consisted solely of a brief verbal interaction behind the closed door of the Principal's office. Each of the participants left the discussion attributing a different meaning to the comments exchanged, as previously discussed. Evidence was not introduced to show that this conversation was followed by any action or discussion by either party. The record will simply not support a finding that the

District instituted a procedure other than the one to which the parties agreed and memorialized in the existing collective bargaining agreement.

Finally, the Charge alleges that the District has engaged in a series of actions which are violative of sections 4007 (a)(1), (2), (3) and (5) of the Act and which constitute a continuing pattern of violations, evidencing an "anti-union animus which tended to interfere with the employees rights to organize and present grievances through representatives of their choosing without discrimination for engaging in such representation". The PERB will not reach back and resurrect untimely events in order to prove a pattern or practice. The two incidents filed in a timely manner do not constitute sufficient evidence of a continuing pattern of "anti-union animus" tending to interfere with the rights of either individual employees or the Association.

While none of the alleged actions have risen to the level of an unfair labor practice violative of the Act, it is clear that the District (and/or its representatives) has engaged in "brinksmanship". Whether this has been through naivete or as a result of a planned strategy, should this continue it is inevitable that the relationship of the parties will suffer.

COUNTERCHARGE

On January 19, 1988, the District filed a Countercharge against the Association. This countercharge alleges that the Association filed the original charge, which was without foundation in fact or in law, in

an effort to gain an unfair advantage in the upcoming contract negotiations. This District maintained that the filing of the unfair labor practice charge violates sections 4007 (b) (2) and (b) (3) 5 of the Act.

The District was unable to produce evidence to support its contention that the charge was filed other than in good faith. Neither was it proven that the filing of this charge would work to the advantage of the Association in the upcoming negotiations.

Accordingly, the countercharge is dismissed.

CONCLUSIONS OF LAW

1. The Board of Education of the Sussex County Vocational Technical School District is a Public Employer within the meaning of 14 Del.C. section 4002(m).

2. The Sussex County Vocational Technical Teachers' Association is an employee organization within the meaning of 14 Del.C. section 4002(g).

3. The Sussex County Vocational Technical Teachers' Association is the Exclusive Bargaining Representative of the certificated

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- 5 Sections 4007 (b)(2) and (b)(3) read as follows:
- (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 representative 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.

professional employees of the Sussex Vocational Technical School District within the meaning of 14 Del.C. section 4002(j).

4. There is insufficient proof to establish that the District has engaged in conduct which violates 14 Del.C. section 4007(a)(1).

5. There is insufficient proof to establish that the District has engaged in conduct which violates 14 Del.C. section 4007(a)(2).

6. There is insufficient proof to establish that the District has engaged in conduct which violates 14 Del.C. section 4007(a)(3).

7. There is insufficient proof to establish that the District has engaged in conduct which violates 14 Del.C. section 4007(a)(5).

8. There is insufficient proof to establish that the District has engaged in conduct which constitutes a pattern of continuing violations of 14 Del.C. Chapter 40.

9. There is insufficient proof to establish that the Association has engaged in conduct which violates 14 Del.C. section 4007(b)(2).

10. There is insufficient proof to establish that the Association has engaged in conduct which violates 14 Del.C. section 4007(b)(3).

WHEREFORE, THE UNFAIR LABOR PRACTICE FILED BY THE SUSSEX VOCATIONAL TECHNICAL TEACHERS' ASSOCIATION IS HEREBY DISMISSED.

THE COUNTERCHARGE FILED BY THE SUSSEX VOCATIONAL TECHNICAL SCHOOL DISTRICT IS HEREBY DISMISSED.

IT IS SO ORDERED.

Charles D. Long, Jr.

CHARLES D. LONG, JR.
Executive Director, PERB

Deborah L. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
Principal Assistant/Hearing Officer, PERB

DATED: July 13, 1988