

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

COLONIAL EDUCATION ASSOCIATION :
and MARY ANN PRY, :
: :
Charging Parties, :
: :
v. : U.L.P. No. 88-05-023
: :
BOARD OF EDUCATION OF THE :
COLONIAL SCHOOL DISTRICT, :
: :
Respondent. :

DECISION

The Board of Education of the Colonial School District ("District") is a public school employer within the meaning of 14 Del.C. section 4002(m). The Colonial Education Association ("Association") is the exclusive bargaining representative of the public school employer's certificated professional employees within the meaning of 14 Del.C. section 4002(h). Mary Ann Pry, President of the Colonial Education Association, is a public school employee within the meaning of 14 Del.C. section 4002(1).

An unfair labor practice charge was filed on May 12, 1988. The

charge alleges that the District, through the comments and actions of its Superintendent, Ray Christian, has interfered with, restrained and/or coerced Ms. Pry because of her exercised right to speak on behalf of and to engage in concerted activities for the benefit of the Association in violation of 14 Del.C. section 4007 (a)(1), and has discouraged membership in the Association by discriminating against Ms. Pry, in violation of 14 Del.C. section 4007 (a)(3).

The District filed its Answer on May 25, 1988. Public hearings were held on July 28 and August 4, 1988. The parties were provided with the opportunity to file post hearing briefs, the final brief being received on September 21, 1988.

FACTS

At all times relevant to this dispute, the Colonial Education Association and the Board of Education of the Colonial School District were parties to a collective bargaining agreement, effective September 1, 1984 through August 31, 1988.

On April 12, 1988, during a regular meeting of the Board of Education, Mary Ann Pry, President of the Colonial Education Association, read from a prepared statement which was critical of budget cuts made by the Board in March. In commenting upon the upcoming contract negotiations between the District and the Association, Ms. Pry queried:

Is it possible that our "amicable" relationship has much future when ... you [Board] ignored this portion of our contract still in effect which required that I be

notified of staff reductions? Under Layoff, Article 21:2.1 - "The Superintendent shall determine the number of positions to be reduced... and shall apprise the President of the Association of the recommended number of positions. This information shall be kept confidential until after Board action".

No, no one called me before or on March 8 [the date of the March Board meeting] to apprise me of any such plan - nor was any other employee group leader so informed...

A Liaison Committee meeting of District and Association representatives was held on April 25, 1988. In attendance were Ms. Pry and the Secretary/Treasurer of the Association, the District Superintendent, the Assistant Superintendent, the Director of Instruction and the Director of Special Services. During a discussion concerning staffing requirements for the 1988-89 school year, Superintendent Christian indicated that Ms. Pry had falsely accused the Board of a contractual violation in her comments at the April 12 Board of Education meeting. He stated that the proper forum for her concern was the Liaison Committee. At this point, Mr. Christian stated that he had some "concerns" which he could discuss with Ms. Pry either in a public meeting, at the Liaison meeting, or in private, apparently providing Ms. Pry with the option of choosing where this discussion would occur. Without further information as to the nature of the Superintendent's "concerns", Ms. Pry indicated that he could proceed. Mr. Christian then voiced his opinion that Ms. Pry had violated the

collective bargaining agreement by not providing him with 24 hours notice of her intended use of an Association day. 1 Some discussion ensued between Ms. Pry and Mr. Christian relating to the specifics of the writing, mailing and receipt of the notification in question. Mr. Christian indicated that he would have denied Pry the use of the Association day had he received timely notice. 2 In response to Ms. Pry's questioning the basis for his intended refusal, Christian responded that her attendance record was such that he felt that she should be in the classroom rather than involving herself in non-teaching activities. He noted that she had been absent from her classes for 23 days to date in the 1987-88 school year. A brief discussion then ensued as to exactly why the 23 days had been used, including a death in the immediate family, personal illness, professional days and Association days. Mr. Christian revealed that he had also reviewed a summary of her attendance record for the 1986-87 school year, during which Pry had been absent from her classes for 21 days. Christian alleged that this evidenced a pattern over which he was concerned. Mr. Christian again referred to Ms. Pry's comments at the April 12 Board meeting wherein she had indicated that through the proposed staffing cuts the Board was evidencing its lack of concern for students. He stated, "Employees being absent from the classroom indicates to me that the employees are insensitive to the needs of children". [transcript,

1 The District provides a total of 20 days per year for Association activities to employees designated by the President of the Association. Use of such days is upon 24 hours prior notice to the Superintendent and the building administrator. Article 6.6.

2 At some point during this discussion, the Assistant Superintendent clarified that the contract allowed the Association to use its Association days and that the Superintendent was not empowered by contract to deny the use of such days.

p. 74, Christian] Ms. Pry responded, "You have obviously taken my remarks very personally, and they were not meant in that sense. I have a role as Association President, which obviously does take me out of my classroom on certain days". [transcript, p. 17, Pry] Mr. Christian then questioned whether her role as Association President was important to her students.

At this point, the Assistant Superintendent interrupted and suggested that the discussion was becoming personal in nature and would be more appropriately continued in a private meeting. Mr. Christian chose to continue discussing Ms. Pry's absences from her classroom. He stated that Pry should be delegating more of the Association days as was her choice as Association President and that by choosing personally to use the Association days she was depriving her students of their instruction. Mr. Christian also noted that no substitute could replace a teacher in his/her classroom. The Assistant Superintendent again suggested that the discussion be continued in private. The Association's Secretary/Treasurer commented that she was upset by the Superintendent's questioning of Pry's professionalism and dedication as a teacher.

At this point the Committee meeting returned to its agenda. At the conclusion of the meeting, Mr. Christian instructed Ms. Pry to make an appointment with him and to bring an Association representative with her.

Superintendent Christian and Assistant Superintendent Jack Graybeal met with Ms. Pry and DSEA representative Howard Weinberg on May 4, 1988. At the beginning of the meeting, Mr. Christian presented a detailed analysis of all of Ms. Pry's absences over her 22 year

teaching career in the Colonial School District. He commented that he found her record to be "atrocious" and that excessive absenteeism could be considered neglect of duty (a statutorily dischargeable offense). He further stated that the District was concerned about employee attendance and had fired custodians for dereliction of duty. He noted that it would be even more appropriate to dismiss teachers for this reason because of their direct connection with the education and welfare of the students.

Ms. Pry presented information on her chronic medical conditions and pointed out that they had impacted her attendance throughout her teaching career. Mr. Christian commented that if she knew she had to be absent for medical reasons then she needed to cut down on other out of class time under her control. He suggested that she should cut down on or cut out her use of Association days. Assistant Superintendent Graybeal noted that he had been Ms. Pry's Building Principal for a number of years and had never called her in to discuss her attendance because he did not feel it adversely affected her work performance. Mr. Christian commented that if Mr. Graybeal had had a copy of the District's attendance analysis, Mr. Graybeal surely would have made an issue of Ms. Pry's absences.

Mr. Weinberg's suggested that Mr. Christian had engaged in criticism of Ms. Pry on a personal level in response to public comments made by the Association President and directed at incidents the Association believed to be either in violation of the collective bargaining agreement or negatively impacting teachers' working conditions. Superintendent Christian responded that, in the same manner as the Association attended Board meetings and criticized the

District, he had every right to make this issue a public matter as well. Mr. Christian stated unequivocally that he had thought a great deal about the comments he wanted to make at the Liaison Committee meeting, that he had said exactly what he intended to say and that he would do it again.

Following the May 4 meeting, Superintendent Christian sent a summary memo to Ms. Pry, advising her that he believed her absenteeism to be so excessive that it was necessary to bring it to her immediate attention. He directed her to "make every effort to curtail the use of other days [those unrelated to personal illness] over which you have some control". The letter concluded by noting that if there was no improvement during the 1988-89 school year, additional action would be taken, including but not limited to requiring a doctor's excuse for each illness related absence.

At the next administrative personnel meeting (on or about May 10) Mr. Christian provided each building principal with a list of persons in their buildings who had exhausted his/her allotted paid sick leave. He instructed his staff to "counsel these people and to indicate to them that we have to have them in the classroom". Administrators were directed to write follow-up letters a copy of which was to be sent to the Superintendent. Union representatives were permitted to accompany persons required to attend such meeting. All of these counseling sessions were conducted by administrators other than the Superintendent.

ISSUE

WHETHER THE DISTRICT, THROUGH THE COMMENTS AND ACTIONS OF ITS SUPERINTENDANT CRITICAL OF THE ATTENDANCE RECORD OF THE ASSOCIATION PRESIDENT, VIOLATED 14 DEL.C. SECTIONS 4007 (a)(1) AND/OR (a)(3)? 3

POSITIONS OF THE PARTIES

Association:

The Association asserts that Mary Ann Pry was singled out for arbitrary and unequal treatment relating to her attendance record because of her union activities. It argues that even if Superintendent Christian's actions represented an increased interest in absenteeism, Ms. Pry was still treated differently in that she was confronted directly by the Superintendent, in a meeting rather than being "counselled" by her building administrator as were other teachers who had exhausted their sick leave allotments. Charging Party notes that the Superintendent acknowledged that Ms. Pry's position as Union President was the reason for his not delegating responsibility for handling the attendance issue to Ms. Pry's building administrator, as was the District's practice.

Further, the Association avers that the Superintendent's method of reprimand constituted a calculated strategy employed in retaliation

3 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 guaranteed under this chapter.
- (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

for Ms. Pry's comments criticizing the District's administration made during the Board of Education meeting two weeks earlier. The District contends that the District intended by its actions to send a clear message to employees: "If you choose to be active in the union, you will be disciplined by the Superintendent for problems which are dealt with at the building level when others are involved.

District:

The District asserts that the Association has failed to show that the action taken by Mr. Christian was anything other than a legitimate work related effort to deal with what he believed to be an attendance problem. The District further contends that when an employer comes forward with evidence of a legitimate justification for criticizing an employee, the burden is on the employee not simply to establish an improper motive, but to also affirmatively establish a persuasive reason why the employer rejected the legitimate motive and chose the improper motive.

The District argues that the discussion of Pry's record at the Liaison Committee meeting resulted from Ms. Pry's election to discuss it there rather than in private. It relies on the fact that Ms. Pry did not attempt to terminate the discussion during the course on the discussion.

The District also refutes the allegation that Mr. Christian's comments were made in retaliation for Ms. Pry's comments at the April Board of Education meeting. It notes that Mr. Christian was made aware of her absentee record in mid-March and that the discussion of Pry's

attendance record was triggered by a discussion of the contractually required notice for the use of an Association day.

Finally, the District maintains that Superintendent Christian's comments concerning Ms. Pry's absences had nothing to do with singling her out for disparate treatment but rather resulted from his decision to deal directly with her (rather than delegating this task to the Acting Principal in her building) in anticipation of an adverse reaction by the Association.

OPINION

It is an unfair labor practice for an employer or its designee to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under the Public School Employment Relations Act. 14 Del.C. section 4007(a)(1). These protected rights include the right of employees to engage in concerted activities for the purpose of collective bargaining and to be represented by their chosen exclusive bargaining representative. 14 Del.C. section 4003. It is clear from the content of Mary Ann Pry's public comments at the April 12 Board of Education meeting that, as President of the Association, she was representing to the Board the concerns of the Association membership. Her comments cannot reasonably be construed as personal attacks upon the Board or members of the Administration.

It is also clear that Mr. Christian drew a nexus between Ms. Pry's comments and her use of Association days. During his testimony Mr. Christian directly linked his "concern" with Ms. Pry's attendance

to her public comments criticizing the District:

...you [Pry] indicated at a recent meeting that the Board and administration were in violation of the contract and the fact that we did not notify you of the pending cuts. And, I indicated to her that I thought she did that publicly for whatever purpose, knowing that we did not violate the contract, but knowing that we probably would not make any comments, because very seldom do we respond to the criticism that comes to the public board meeting. So, knowing we would not make a comment, that she used this forum to make an indication that we had violated the contract...

...I am also of the opinion that the fact that she violated the contract and the fact that I did not get the 24 hour notice of her request for a union day, or Association day, that I wanted to bring that to, to her attention and expressed my concern, which I felt was the place to do it.

...She then asked me why I would have disapproved it, or why I would have denied it. And, I indicated I would have denied it because I have always had concern about teachers being in the classroom as much as possible, and I said that your attendance record, or your absentee record this year is such that I felt she should be in the classroom instead of doing something else. [Transcript, Christian, p. 71-73]

Section 4007 (a)(3) prohibits employers from disciplining employees because of union activity. This does not prohibit employers, however, from applying their established rules and disciplinary standards to union activists just as they would to any other employee.

In section 4007 (a)(3) cases the critical question becomes whether the employer acted because the employee was engaging in protected union activity or because the employee was subject to such action as part of a valid business concern. Clearly the burden is on the charging party to prove by a preponderance of the evidence that the action taken resulted from the employee's engaging in protected activity. Here the the complained of action was directly counter to the employer's customary method of dealing with similar situations. Superintendent Christian's reprimand of Ms. Pry occurred almost immediately following her public comments criticizing the employer. The employer prefaced his disparaging comments by reference to the employee's protected activity. Prior to the Liaison meeting, The Superintendent had discussed the content of his comments concerning Ms. Pry's attendance record with the Assistant Superintendent, who had advised him against using this personal information during the meeting. The Superintendent chose to proceed with his planned course of attack and in a later meeting actually told Association representatives that he had thought about his methods, had done exactly as he intended and would do it again in the same situation. While the District may be genuinely concerned with its employees attendance, the Superintendent's castigation of the Association President during a meeting attended by both administration officials and association members was in direct opposition to the manner in which attendance concerns were handled both before and since this incident. Credible testimony established that up to this point, attendance had been handled at the building level, with notices emanating from the District office to individual employees at the point that allotted sick leave was exhausted. Subsequent to

reprimanding Ms. Pry during the Liaison meeting, Mr. Christian prepared cumulative absence notices on all employees who had exhausted their sick leave and directed building administrators to meet with these persons. Only in the Association President's meeting with the Superintendent was there a discussion of absenteeism potentially constituting dereliction of duty (a dischargeable offense). Mr. Christian testified that he wished to make Ms. Pry aware that dereliction of duty had served as the basis for an employee's termination in the past. Considering the totality of the employer's conduct, there can be little doubt but that the action taken was in direct response to the employee's union activities.

Finally, the District and the Association negotiated a provision in their collective bargaining agreement which grants to the Association the use of 20 release days per year for Association business. Use of these days is by delegation of the Association President. There is no evidence to suggest that Ms. Pry had improperly used Association days. Having agreed to permit the Association to use these release days, the District may not now discipline an employee as a result of the proper use of such days nor threaten an employee regarding the future use of Association days.

For the reasons discussed above, the Colonial Board of Education is found to have violated 14 Del.C. sections 4007 (a)(1) and (a)(3).

CONCLUSIONS OF LAW

1. The Board of Education of the Colonial School District is a public employer within the meaning of 14 Del.C. section 4002 (m).

2. The Colonial Education Association is an employee organization within the meaning of 14 Del.C. section 4002 (g).

3. The Colonial Education Association is the exclusive representative of the certificated professional employees of the Colonial School District within the meaning of 14 Del.C. section 4002 (h).

4. Mary Ann Pry is a public school employee within the meaning of 14 Del.C. section 4002 (1).

5. By the actions of its Superintendent in coercing the Association President because of her protected right to act collectively, the District has engaged in conduct in violation of 14 Del.C. section 4007 (a)(1).

6. By and through the actions and comments of its Superintendent the District has engaged in conduct in violation of 14 Del.C. section 4007 (a)(3).

REMEDY

PURSUANT TO 14 DEL.C. SECTION 4006 (h)(2), THE BOARD OF EDUCATION OF THE COLONIAL SCHOOL DISTRICT IS ORDERED TO:

A) Cease and desist from:

- 1) Engaging in conduct which tends to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under the Public School Employment Relations Act.
- 2) Engaging in conduct which tends to discourage membership in an employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

- B) Take the following affirmative actions:
- 1) All documents (other than official attendance records) resulting from or related to Mr. Christian's comments at the April 25 Liaison meeting and/or the May 4, 1988 follow-up meeting are to be removed from the personnel file of Mary Ann Pry and/or all other permanent District records.
 - 2) Within ten (10) calendar days from the date of receipt of this decision, post a copy of the Notice of Determination in each school within the District, in places where notices of general interest to teachers are normally posted. This notice shall remain posted for a period of thirty (30) days.

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: October 25, 1988

