STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

LAKE FOREST EDUCATION ASSOCIATION,	:	
Petitioner,	:	
v.	:	U.L.P. No. 92-07-076
LAKE FOREST BOARD OF EDUCATION,	:	
Respondent.	:	

BACKGROUND

On July 2, 1992, the Petitioner ("Association") filed an unfair labor practice complaint with the Public Employment Relations Board ("PERB"). The complaint charges the Respondent ("Board") with having committed certain acts in violation of §§ 4007(a)(1) and (a)(2) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (Supp. 1982) ("Act").

Section 4007, Unfair Labor Practices - Enumerated, provides in relevant part:

> (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 guaranteed under this chapter.
> >
> > (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.

The substantive allegations contained in the complaint provide:

> 4. During the Fall of 1991, in her role as representative-at-large, Ms. Reed-Moore posted three notices on the mailboxes of teachers at the Lake Forest High School regarding meetings of the Lake Forest Board of Education. The purpose of the Notice was to encourage teachers to attend meetings of the Board of Education to express their views on matters of interest to the teachers, including a plan for early openings of schools proposed by James VanSciver, Superintendent of the District, and a program concerning failure analysis, pursuant to which

the Superintendent appeared to be targeting for discipline teachers whose students received low grades.

5. Ms. Reed-Moore had actively expressed opposition to the early opening plan and was attempting to encourage the Board to move quickly concerning the failure analysis issue.

6. The assistant principal, Daniel Forsee, removed one of the notices from the mailbox area and kept it. He advised Ms. Reed-Moore that she should not encourage teachers to attend District Board meetings and that she should not solicit comments from teachers regarding the early opening issue.

7. In early February, Dr. VanSciver requested Ms. Reed-Moore to attend a meeting with him.

8. Ms. Reed-Moore attended the meeting, accompanied by former Association President, Cindy Kramer, on March 3, 1992.

9. Although private meeting rooms were available in the District offices across the street, the meeting was held in the school library in the presence of third parties.

10. There were six individuals present on behalf of the District, including Superintendent VanSciver, Director of Curriculum Arthur Gilbert, Business Manager Michael Thompson, Building Principal Robert Burrows, and Assistant Principals Richard Strouck and Dan Forsee. When Ms. Reed-Moore and Ms. Kramer entered the room, the District representatives were seated along one side of the table. Superintendent VanSciver then read a prepared statement to Ms. Reed-Moore and Ms. Kramer, a transcript of which is attached hereto as Exhibit A. When he reached the end of the statement, the District representatives all rose and walked toward the door, preventing any response by Ms. Reed-Moore and Ms. Kramer.

11. The Association is aware of no precedent for such a disciplinary meeting with a bargaining unit member. Many teachers, especially non-tenured teachers, have been intimidated by the manner in which Ms. Reed-Moore has been singled out for discipline by the Superintendent in the manner previously described. As a result of the Superintendent's conduct, the Association has experienced difficulty in persuading teachers to come forward to testify in grievance proceedings, teachers fear that if they testify against school district they will be subject to retaliation by the Superintendent.

12. On March 24, 1992, the Association filed a grievance concerning the meeting held on March 3, 1992.

13. The grievance was heard by Superintendent VanSciver on June 9, 1992. Ms. Reed-Moore received a performance evaluation this spring. At the June 9th meeting the Superintendent asked Ms. Reed-Moore if there was any reference to the March 3, 1992, meeting on her latest annual performance appraisal. When she replied that there was no such reference, he stated that he could have had a reference to the meeting included if he wished to do so. On information and belief, the Superintendent had instructed Ms. Reed-Moore's evaluator to lower her ratings, but the evaluator refused to do so.

14. On June 10, 1992, Superintendent VanSciver denied the grievance regarding the March 3, 1992 meeting.

15. The denial of the grievance is being appealed to the next level of the grievance process.

16. The actions of the District, through Superintendent VanSciver and Assistant Principal Forsee, throughout the 1991-92 school year, constitute a course of conduct intended to intimidate and coerce employees in violation of §§4007(a)(1) and (a)(2) of the Act.

On July 15, 1992, the Respondent filed its Answer to the complaint essentially denying the substantive allegation and raising the following affirmative defenses:

17. This unfair labor practice charge is barred by the statute of limitations contained in Rule 5.2 of the Rules and Regulations of the Public Employment Relations Board. That provision requires that any complaint for an unfair labor practice shall be brought within ninety (90) days of the alleged violation.

The two specific acts complained of in the current charge are the alleged removal of a notice posted by Ms. Reed-Moore in the "fall of '91" and some advice allegedly given by Mr. Daniel Forsee. (Paragraphs 4, 5 and 6 of the charge). The other specific act was a meeting held by Dr. Van Sciver and other members of the Administration on March 3, 1992. Clearly both acts alleged in the charge have occurred more than ninety (90) days prior to the filing of the current charges. [1]

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[1] Rule 5.2 provides, in relevant part:

(a) A public employer, a labor organization, or one or more employees may file a complaint alleging a violation of 14 Del.C. §4007 or 19 Del.C. §1607. Such complaints must be filed within ninety (90) days of the alleged violation. This 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 an unfair labor practice within the limitations period.

A copy of the Answer was also mailed directly to the Petitioner.

On July 21, 1992, the Petitioner filed the following response to the affirmative defense raised by the Respondents:

> 17. The unfair labor practice charge is not barred by the statute of limitations. Dr. VanSciver's conduct at the grievance hearing and his response to the grievance violated 14 Del.C. §4007 (a)(1). These actions by Dr. VanSciver took place within the ninety (90) day limitation period. The entire series of events constituted a continuing violation and pattern of illegal conduct. The actions of Dr. VanSciver and Mr. Forsee support the Association's contention that the District's intent in its dealings with Ms. Reed-Moore was to interfere with, restrain and coerce District employees in the exercise of their rights under the Public School Employment Relations Act and to dominate and interfere with the formation, existence and administration of the Lake Forest Education Association. In addition, since the Association was and is pursuing its contractual remedies for the March 3, 1992, actions of the District, and since the PERB's policy is to defer to contractual remedies, the running of the limitations period is tolled pending exhaustion of the contractual grievance and arbitration process.

On August 11, 1992, the Petitioner amended its complaint by deleting all of paragraph 6, the last sentence from paragraph 13 and renumbering the paragraphs accordingly.

PRELIMINARY ISSUE

Whether the complaint is untimely for the reason that it was filed outside the ninety (90) day period required by Rule 5.2 of the PERB's Rules and Regulations?

OPINION

The authority for the Executive Director to dismiss a complaint based upon the pleadings is set forth in Article 5, Unfair Labor Practice Proceedings, which provides:

5.6 Decision or Probable Cause Determination

> (a) Upon review of the Answer, the Complaint 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 will decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or the submission of briefs.

In the present instance, certain allegations set forth in the complaint concerning the substance of the matter are denied by the Respondent. The essential allegations necessary for the limited purpose of ruling on Respondent's Motion to Dismiss the petition, however, are not in dispute. They are:

1. The posting of the notices by Ms. Reed-Moore occurred in the fall of 1991.

2. In early February, 1992, Dr. VanSciver requested that Ms. Reed-Moore attend a meeting with him.

3. The meeting was held on March 3, 1992.

4. A grievance protesting the meeting was filed on March 24, 1992.

5. On June 9, 1992, a grievance meeting was held with Dr. VanSciver.

6. On June 10, 1992, Dr. VanSciver answered the grievance.

7. Dr. VanSciver's answer was appealed to the next level of the grievance procedure and had not yet been heard prior to the filing of the unfair labor practice complaint on July 2, 1992.

Clearly, the posting of notices in the fall of 1991 and the meeting held March 3, 1992 predate the filing of the unfair labor practice complaint by more than the

ninety (90) day period required by Rule 5.2. The complaint is, therefore, untimely filed unless, as the Association argues, (1) the entire sequence of events constitutes a continuing violation; and/or (2) the running of the number of days within which an unfair labor practice must be filed was tolled by the filing of the grievance on March 24, 1992.

Concerning the Petitioner's first argument, the single act of attending the March 3, 1992, meeting with Ms. Reed-Moore and her union representative does not constitute "continuing conduct" toward Ms. Reed-Moore by the District representatives in violation of §4007 (a)(1) and (2) of the Act.

The petition, as amended August 11, 1992, alleges no acts by Assistant Principal Daniel Forsee, other than his presence at the March 3rd meeting, in violation of the Petitioner's protected rights. The amended complaint alleges only that in the fall of 1991, Ms. Reed-Moore posted three notices on mailboxes of teachers at the Lake Forest High School. With the deletion of paragraph 6 from the original complaint there was, in fact, no "incident" in the fall of 1991 involving Assistant Principal Forsee, as alleged.

Concerning the conduct attributed to Superintendent VanSciver, the allegation he attempted to influence Ms. Reed-Moore's spring performance evaluation by requiring the evaluator to lower her ratings was also deleted from the amended complaint. The only remaining statement attributed to Dr. VanSciver at the June 9th grievance meeting concerned his ability to have included a reference to the March 3rd meeting in Ms. Reed-Moore's spring performance evaluation, if he so desired.

Whether or not Dr. VanSciver could have rightfully included a reference to the March 3rd meeting in Ms. Reed-Moore's spring performance evaluation is immaterial to a resolution of the dispute concerning the merits of the March 3rd

meeting, itself. [2] Dr. VanSciver's alleged statement of capability, standing alone, constitutes neither a *per se* violation of the Act nor a pattern of continuing conduct originating with the March 3rd meeting sufficient to bring the meeting within the required ninety (90) day filing period.

So too with Dr. VanSciver's written answer to the grievance filed by Ms. Reed-Moore protesting the fairness of the March 3rd meeting. The grievance provides:

> Statement of Grievance:
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> The meeting held in March 3, 1992 was inaccurate and the grievant was reprimanded without just cause in a public place. Also, any complaint by a parent was not processed through the proper channels.

The requested remedy is that:

> Action Requested:
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> All papers pertaining to the March 3, 1992 meeting be destroyed. Any meetings with the Superintendent will be held in held in private with the grievant and her Association representative. Any further problems with the grievant by parents, teachers, etc., will be brought to her attention through the proper channels. She will not be reprimanded for carrying out her duties as a representative of the Association.

In his answer of June 10, 1992, Dr. VanSciver, included, inter alia, the following comments:

> 1. The meeting was not held in a public place but in the school library, after school.

According to the pleadings, Ms. Reed-Moore was accompanied to the March 3rd meeting by her Union representative. Each representative of the District who was present possessed some supervisory relationship to Ms. Reed-Moore. Considering these circumstances, it cannot reasonably be concluded that the meeting was conducted in public in the sense that disinterested third parties were involved.

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[2] In fact, no reference to the March 3rd meeting was included in Ms. Reed-Moore's performance evaluation

In his grievance answer, Superintendent VanSciver also addressed each of the other elements of the requested remedy to which he agreed, as follows:

> 2. All papers relating to this meeting will be destroyed.
>
> 3. .... any further problems with the grievant by parents, teachers, etc. will be brought to her attention through proper channels.
>
> 4. She will not be reprimanded for carrying out her duties as a representative of the Association.

Dr. VanSciver's written answer addressed each element of the grievance and essentially granted each element of the requested remedy. His answer cannot be considered either a *per se* violation of the Act or impermissible conduct continuing from the March 3, 1992 meeting.

Secondly, the Petitioner's claim that the filing of the grievance on March 24, 1992, tolled the period established by Regulation 5.2 for the filing of an unfair labor practice complaint is without merit. The evolution of the PERB's conditional deferral policy was recently reviewed in Delaware State Troopers' Association v. Division of State Police, et. al. (Del.PERB, ULP No. 92-06-075 (8/4/92)). Motions to defer, when granted, result in the suspension of further processing of an unfair labor practice complaint pending exhaustion of the negotiated grievance and arbitration procedure.

Disputes concerning the interpretation or application of the collective bargaining agreement are properly subject for the contractual grievance and arbitration procedure agreed to by the parties for this purpose. An unfair labor practice, on the other hand, is statutory in origin and its processing governed by the PERB Rules and Regulations promulgated pursuant to its authority under §4006(h)(1) of the Act. The dispute concerning the March 3, 1992 meeting is properly a subject for the negotiated grievance and arbitration procedure. A grievance was filed and was being processed at the time the unfair labor practice complaint was filed.

There is no authority for the proposition that the filing of a contractual grievance prior to the filing of an unfair labor practice complaint under §4007 of the Act automatically tolls the ninety (90) day period required by Rule 5.2 for the filing of an unfair labor practice complaint. A ruling to the contrary would enable a petitioning labor organization to exercise its contractual right to negate the requirements of section 5.2 of the PERB's Rules and Regulations, adopted pursuant to statute.

DECISION

Based upon the foregoing discussion, the petition is untimely under the Regulation 5.2 of the Rules and Regulations of the Public Employment Relations Board.

It is, therefore, determined that pursuant to the authority granted at 14 Del.C. §4008(b), there is no probable cause to determine that an unfair labor practice within the meaning of §4007(a)(1) or (a)(2) of the Act has occurred.

The petition is, therefore, dismissed.

IT IS SO ORDERED.

August 16, 1992

Charles D. Long, Jr.

CHARLES D. LONG, JR.
Executive Director
Delaware PERB