

to believe that an unfair labor practice may have occurred. A hearing was held on March 24, 1994. The parties filed post-hearing briefs, the last of which was received on June 16, 1994.

BACKGROUND

Edward Short was hired by the Colonial School District in January of 1967 to teach General Sciences in the New Castle Middle School. He was transferred at his request in 1971 to the position of Guidance Counselor at the William Penn High School. In 1979, Mr. Short was appointed Chairperson of the Guidance Department, a post he held for approximately seven (7) years. His performance evaluations during his assignment to the Guidance Department reflect ratings of satisfactory or better.

A federal court decision desegregating the New Castle County schools, resulted in four (4) reorganized school districts being created in 1982. The Colonial School District was one of the reorganized districts. Prior to 1982, Guidance Counselors at William Penn High School who worked during the summer months were paid a per diem rate determined by their annual salary based on a nine (9) month contract year. Financial constraints resulting from the desegregation order caused the District to reduce the summer pay of the Guidance Counselors to a lesser hourly rate. As a result, fewer Guidance Counselors volunteered for summer work. In a show of solidarity protesting the imposition of the hourly rate, none of the counselors worked during the summer of 1988. An increasing number of counselors volunteered each year thereafter so that by 1991 all of the counselors worked during the summer, except for Mr. Short.

Mr. Short, an outspoken critic of the hourly rate of pay, encouraged his peers not to volunteer for summer work. His opposition is consistent with the position of the Colonial Education Association. Not unexpectedly, the subject of the appropriate rate of pay for Guidance Counselors who work during the summer was an issue of

importance during the contract negotiations culminating in the collective bargaining agreement effective September 1, 1990. During those negotiations, the District rejected the Union's proposal that Guidance Counselors be paid at their regular school year rate for summer work. The following provision was agreed upon as an acceptable compromise:

Article 10: Salaries and Benefits

10.12 Guidance Counselors asked to work beyond the regular school year will be paid at the hourly rate set forth in the contract as a minimum. The Board reserves the right to pay said counselors at a higher rate not to exceed the regular rate of pay. Counselors within the same category and organizational level asked to work beyond the regular school year will be paid the same rate.

In May, 1991, during a discussion with the Deputy Principal of William Penn High School, Kenneth Falgowski, Mr. Short referred to those counselors who volunteered for summer work at the hourly rate as "scabs". A letter reprimanding Mr. Short for his use of offensive and unprofessional language was issued by Building Principal William Roberts. A grievance was filed protesting the reprimand. Unable to resolve the matter through the contractual grievance procedure, the Association filed for arbitration. In a decision dated April 3, 1992, Arbitrator Ira Jaffe sustained the grievance, rescinding the letter of reprimand.

During the summer of 1991, Mr. Short met with Principal Roberts to discuss, among other things, his desires concerning continued professional growth. During their discussion, Mr. Roberts informed Mr. Short of his intention for Guidance Counselors to be available for counseling sessions with parents after school hours without an increase in pay. Mr. Short expressed his unwillingness to participate without increased compensation.

By letter dated August 12, 1993, Principal Roberts advised Mr. Short of his immediate reassignment to the position of Biology teacher in the William Penn High School. Mr. Roberts' letter provides, in relevant part:

... effective with the 93-94 school year, I am changing your assignment at William Penn from Guidance Counselor in the E-1 staff center to Science Teacher (Biology) in the E-2 staff center.

This reassignment is made in accordance with section 20:1.5 of the agreement between the Colonial School District Board of Education and the Colonial Education Association. Your teaching schedule is enclosed.

Mr. Short was not consulted prior to his receiving the letter. Despite repeated requests, he was not advised of the reasons for his reassignment, other than the move was considered to be in the best interest of the school. Believing his involuntary reassignment to be in retaliation for his activities supporting the Association's position concerning the pay rate for summer work by Guidance Counselors and other Association related activities, the Association filed this unfair labor practice charge alleging violations of §§4007 (a)(1), (a)(2), and (a)(3) of the Act, which provide:

- (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 employer in or because of the exercise of 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.
 - (3) Encourage or discourage membership in any employee organization by discrimination in regard to hiring, tenure or other terms and conditions of employment.

A hearing was held before the Public Employment Relations Board on March 24, 1994. Responsive post-hearing briefs were filed by the parties with a final brief being received on June 16, 1994.

ISSUE

Whether the involuntary reassignment of Edward Short from the position of Guidance Counselor at the William Penn High School to Science Teacher (Biology) at the William Penn High School effective for the 1993-94 school year violated §§4007 (a)(1), (a)(2) and (a)(3) of the Public School Employment Relations Act, as alleged?

PRINCIPAL POSITIONS OF THE PARTIES

Colonial Education Association:

The Association cites Wilmington Firefighters Association v. City of Wilmington (U.L.P. 93-06-085 (Del.PERB, April 20, 1994)), in which the Board adopts the rationale of the National Labor Relations Board for determining whether an employer has unlawfully discriminated against an employee in retaliation for Union activities as set forth in NLRB v. Wright Line, 251 NRLB 1083, 105 LRRM 1169(9180), enf'd. NLRB v. Wright Line, 662 F.2d 899 (1st Cir., 1981), cert. denied, 455 U.S. 989 (1982).

The Association maintains that the District:

1. Was aware of Mr. Short's Association activities;
2. Had expressed hostility toward his positions;
3. Reassigned Mr. Short in an unprecedented move; and,
4. Offered no explanation or reason sufficient to satisfy its burden of establishing by a preponderance of the evidence that the reassignment would have occurred in the absence of the protected activity.

The Association argues that the evidence is sufficient for the PERB to reasonably infer that the District's action in reassigning Mr. Short to the position of Biology teacher was taken, if not in full then at least in part, with an unlawful discriminatory motive.

Colonial School District:

The District denies the reassignment of Mr. Short was in retaliation for protected Union activity. The District contends that since filing the grievance in

May, 1991, protesting the written reprimand issued to him for referring to several of his peers as "scabs", there is no evidence that he:

1. Filed a grievance;
2. Served as an advocate for a grievant;
3. Testified in support of a grievant;
4. Participated in collective bargaining negotiations; or
5. Served as an officer of the Union.

The District argues that the issue concerning the rate of pay for Guidance Counselors who volunteer for summer work was resolved during the collective bargaining negotiations resulting in the collective bargaining agreement effective September 1, 1990. Not only did the language of section 10:12 remain unchanged in the ensuing Agreement effective September, 1993, the Association did not propose to change the language.

Principal Roberts, who alone was responsible for the disputed reassignment, was unaware of either Mr. Short's continuing opposition to the agreed-upon contract language concerning the summer rate of pay for Guidance Counselors by encouraging individual counselors not to work or that for approximately one (1) year Mr. Short served as the Association's contact person for School Board member Ken Schilling.

The District maintains the assignment of Mr. Short resulted solely from the need to add one (1) Biology teacher at the High School. Because of the difficulty recruiting a qualified Biology teacher prior to the start of classes, it was decided to reassign a teacher to fill the position, if possible. The only eligible teacher within the building, Mr. Short, was reassigned to fulfill the need.

OPINION

The Wright Line rational adopted by the Board in Firefighters (Supra.) applies to alleged violations of §4007(a)(3) of the Act. The facts of this matter do not raise an issue of pretext, "wherein the employer's asserted justification for the adverse action taken is a 'sham', in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon". Firefighters (Supra.).

The detailed analysis of the "dual motive" rationale set forth in the Firefighters decision need not be restated here. In summary, the Charging Party has the burden to establish that the employee's protected conduct was a substantial or motivating factor in the employer's adverse employment action. Once established, the burden shifts to the employer to establish the presence of a legitimate business interest which, despite the employee's protected activity, would have resulted in the same employment decision.

To satisfy its initial burden, the Charging Party must establish: (1) the employee engaged in protected activity; (2) the employer was aware of the employee's activity; and (3) the protected activity was a substantial or motivating factor for the employer's action.

In the two and one-half (2 1/2) years immediately preceding his reassignment, Mr. Short's Association related activity can be categorized as follows: (1) continuing opposition to the hourly rate paid summer work at less than the regular school year rate; (2) encouraging Guidance Counselors not to volunteer for summer work; (3) filing a grievance in May, 1991, protesting his written reprimand; and (4) serving as the Association's contact person for School Board Member Schilling.

Principal Roberts testified it was essential that Guidance Counselors work during the summer months in order to prepare for the next school year. Mr. Short's opposition to Guidance Counselors "volunteering" to work at less than the rate of pay

established by the contract for the regular school year had been ongoing for some ten (10) years. Mr. Roberts acknowledges that Mr. Short's promotion of his point of view was so strenuous that at one point Mr. Roberts was concerned that a physical confrontation between Mr. Short and other Guidance Counselors might result. Considered as a whole, the evidence supports a finding that Mr. Roberts was aware of Mr. Short's continuing efforts to encourage the Guidance Counselors to refuse summer work. Considering the intensity of the issue, to conclude otherwise would be naive.

Not all conduct by an individual employee, however, is protected activity under the law. Whether Mr. Short's conduct constituted protected activity and, if so, whether that conduct was a motivating factor for his reassignment is questionable. Despite the Association's arguments to the contrary, the contractual language is clear on its face and establishes the District's right to set the summer rate of pay for Guidance Counselors below that paid during the regular school year. The record further indicates that the District did pay Guidance Counselors during the summers of 1991, 1992 and 1993 at the lower summer rate without legal or contractual challenge by the Association. These facts cast serious doubts on whether Mr. Short in continuing to advocate that Guidance Counselors refuse to work summers was furthering the Association's position. Further, Principal Roberts testified that he had no knowledge of Mr. Short's role as an Association liaison with School Board Member Schilling. Finally, the filing of a grievance which was processed in accordance with the contractual grievance procedure and sustained by the arbitrator does not, in and of itself, establish a basis for concluding that subsequent actions by the employer were motivated by union animus.

Even considering the evidence in a light most favorable to the Charging Party, the record at best supports a tenuous correlation between Mr. Short's conduct and the District's motivation for his reassignment.

The second prong of the Firefighters test provides the employer the opportunity to prove that the same action would have occurred in the absence of the protected activity. Principal Roberts testified of the need for an additional Biology teacher at William Penn High School as a result of increased enrollment. The need was explicitly identified on July 20, 1993, at one of the eight (8) meetings scheduled by Assistant Superintendent Dr. George Meney for the purpose of reviewing the "enrollment and staffing" status. District Exhibit #1.

Mr. Roberts testified the alternative of significantly increasing the number of students in the existing Biology classes and the elimination of one (1) lab class was unacceptable from an educational standpoint.

Dr. Henry Rose, Director of Human Resources for the District, affirmed Mr. Robert's decision to add one (1) Biology teacher at William Penn High School on July 22, 1993. District Exhibit #2. Mr. Roberts immediately checked with the principals of each of the three (3) middle schools ¹ in the District, who advised him they had been unsuccessful in their efforts to recruit qualified science teachers. Mr. Roberts testified that historically Science teachers were less available and, therefore, more difficult to recruit than are Guidance Counselors.

In reviewing the qualifications of the teachers at the High School where the opening existed, as has been the practice of the District under Dr. Meney, Mr. Roberts determined that only Mr. Short was eligible to fill the vacant Biology position by virtue of his prior certification to teach science and the fact that he had previously done so at the New Castle Middle School. Mr. Roberts chose not to pursue transferring a Biology teacher from another school because of the resulting ripple effect, the short time frame until the opening of school and his desire to not merely transfer the problem elsewhere.

¹ William Penn is the sole High School in the Colonial School District.

Despite the fact that his certification had expired, Mr. Short was eligible for a Limited Standard Certificate permitting him to teach Biology while qualifying for recertification by completing six (6) college level credits in Biology and teaching theory and application over a two (2) year period. Although he acknowledges that recertification would involve only one attending classes (1) night per week or attending summer classes, Mr. Short objects to doing so for the reason that it would interfere with either his part-time or summer employment.

The Association correctly maintains that circumstantial evidence may properly be considered in evaluating the employer's actual motive. In this regard, the Association argues that Mr. Short's certification to teach Science had expired, that this was the first opportunity for the District to reassign Mr. Short outside the Guidance Department, the favorable performance evaluation received annually by Mr. Short, that Mr. Roberts had never reviewed Mr. Short's performance as a teacher, that the position of Biology teacher was never advertised nor was Mr. Short ever told of the reason for his reassignment, were considered.

The Association's position that this was the first opportunity to transfer Mr. Short is disputed. Regardless, it is the facts surrounding the specific reassignment to the Biology position in 1993 which are controlling in resolving this charge. Mr. Roberts testified that his primary concern in reassigning Mr. Short was to fill the Biology position. He was not concerned with the loss of a Guidance Counselor as he believed from experience that he could more easily fill that position. He considered the evaluations of Mr. Short's performance in the position of Guidance Counselor as a positive indicator that Mr. Short would be an effective teacher. Consequently, the allegation that Mr. Roberts had never reviewed Mr. Short as a teacher is immaterial. Further, Mr. Roberts' explanation as to why he did not advertise the Biology position was not refuted.

The Association's most persuasive argument is the District's failure to explain to Mr. Short the reason(s) for his reassignment. Mr. Roberts testified simply that he is neither required by the contract nor is it his practice to explain or justify his decisions. While it is his prerogative, it should be apparent that the continuing failure to convey to affected employees the underlying logic for involuntary transfers will undoubtedly result in future grievances and charges of this type.

The Association's arguments supporting the inference which the Board must reach for the Association to prevail do not persuasively rebut the direct evidence of record, most importantly the unrefuted requirement for an additional science teacher to teach Biology at the High School, the relatively short time frame within which the District was required to act, the relative availability of qualified Biology teachers versus Guidance Counselors, and the fact that Mr. Short was the only teacher at the High School eligible for reassignment to the Biology position.

DECISION

The record confirms the presence of a legitimate business reason which would have resulted in the reassignment of Mr. Short even had he not engaged in protected activity. The record fails to establish that the reassignment of Mr. Short was in retaliation for or primarily motivated by his participation in protected activity.

Having so concluded, there is no basis for finding a violation of either §4007 (a)(1), (a)(2) or (a)(3) of the Act, as alleged.

CONCLUSIONS OF LAW

1. The Colonial School District is a public employer within the meaning of §4002(n) of the Public School Employment Relations Act, 14 Del.C. Chapter 40.

2. The Colonial Education Association is an employee organization within the meaning of §4002(h) of the Public School Employment Relations Act, 14 Del.C. Chapter 40.

3. The Colonial Education Association is an exclusive bargaining representative within the meaning of §4002(i) of the Public School Employment Relations Act, 14 Del.C. Chapter 40.

4. Consistent with the foregoing opinion and findings, it is determined that the employer's conduct, as specified, does not constitute a violation of §4007(a)(1) of the Act as alleged.

5. Consistent with the foregoing opinion and findings, it is determined that the employer's conduct, as specified, does not constitute a violation of §4007(a)(2) of the Act as alleged.

6. Consistent with the foregoing opinion and findings, it is determined that the employer's conduct, as specified, does not constitute a violation of §4007(a)(3) of the Act as alleged.

WHEREFORE, the Charge is hereby dismissed.

IT IS SO ORDERED.

Dated: August 31, 1994

/s/ Charles D. Long, Jr.
CHARLES D. LONG, JR.
Executive Director
Delaware PERB