

STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

COLONIAL EDUCATION ASSOCIATION, :
 :
 Charging Party, :
 :
 v. : U.L.P. No. 95-02-119
 :
 BOARD OF EDUCATION OF COLONIAL :
 SCHOOL DISTRICT :
 :
 Respondent. :

FACTS

The parties, through their attorneys, submitted the following stipulation of facts dated April 4, 1995:¹

1. The Colonial Education Association ("CEA") c/o Susan Fioravanti, 1102 First State Boulevard, Wilmington, Delaware 19804 (telephone number (302)995-6091) is an employee organization within the meaning of 14 Del.C. §4002(h) and is the exclusive bargaining representative of the Colonial School District's classroom teachers, guidance counselors, school nurses, librarians, visiting teachers, psychologists, subject chairpersons, and other professional personnel who do not otherwise fill an administrative post.
2. The Board of Education of the Colonial School District ("CSD"), 318 Basin Road, New Castle, Delaware 19720 (phone number (302)323-2748), is a public school employer within the meaning of 14 Del.C. §4002(n).
3. John Briggs is a music teacher who has been employed by CSD its predecessor for more than 20 years, and is currently employed at Gunning Bedford Middle School. On January 27, 1995,

¹The attachments to the stipulation are part of the formal record; however, they and references to them are omitted from the stipulation set forth in the decision.

a disciplinary meeting concerning Mr. Briggs was held at Gunning Bedford Middle School and was attended by DSEA representative Deborah Stevens, Mr. Briggs, Gunning Bedford Middle School Principal Kenneth Falgowski, and Gunning Bedford Middle School Assistant Principal Ron Brown. A memorandum dated January 17, 1995, from Mr. Falgowski summarized CSD's accusations against Mr. Briggs. Mr. Briggs was given a copy of Mr. Falgowski's memorandum on January 20, 1995.²

On January 30, 1995, CSD Director of Human Resources Dr. Henry Rose met with Mr. Briggs, Ms. Stevens, and Ms. Barbara Poorman to continue CSD's investigation of CSD's allegations of sexual harassment against Mr. Briggs. Dr. Rose announced that he had appeared unannounced at the Gunning Bedford Middle School and that he questioned the student who made the complaint and the two witnesses. Dr. Rose read the notes from his interview of the students but he refused to identify any of the student witnesses against Mr. Briggs. Dr. Rose offered to provide copies of his investigation notes to Ms. Stevens, but did not do so.

5. On or about January 31, 1995, CSD informed Mr. Briggs that he was being suspended for three days without pay on February 1, 2 and 3, 1994, "[f]or conduct that is considered to be insubordinate, unprofessional, and gives the appearance of sexual harassment directed towards female students."

6. Mr. Briggs denied the allegations regarding the December 19, 1994, incident discussed in Mr. Falgowski's January 17, 1995 memorandum. Since CSD has failed to disclose any of the names of any student witnesses mentioned in Mr. Falgowski's January 17, 1995 memorandum, DSEA has been unable to interview them or to explore any possible motives they might have for making the allegations.

7. After Mr. Briggs was advised of CSD's decision to discipline him, he filed a grievance under the CEA/CSD collective bargaining agreement, which provides that "No employee shall be disciplined, reprimanded or reduced in pay except for just cause."

² Mr. Falgowski's memorandum of January 17, 1995, addresses three incidents: (1) October 11, 1994; (2) December 19, 1994; and (3) December 21, 1994.

8. Delaware State Education Association ("DSEA") Uniserv Director Deborah Stevens is representing Mr. Briggs in the grievance proceeding.
9. By letter dated February 2, 1995, Ms. Stevens asked Dr. George Meney, CSD Assistant Superintendent, for certain information.
10. By letter dated February 10, 1995, Dr. Meney refused to supply the information requested by Ms. Stevens except for the investigation procedures.
11. Under 14 Del.C. §4003(2) and (3), CSD teachers have the right to file grievances through CEA and to engage in other concerted activities for their mutual aid and protection.
12. On February 14, 1995, CEA filed an unfair labor practice charge ("the charge") alleging that CSD's refusal to provide the information requested by Ms. Stevens was interfering with the ability of CEA/DSEA to properly evaluate and process Mr. Briggs' grievance, and that, accordingly CSD had committed unfair labor practices under 14 Del.C. §§4007(a)(1) and (a)(5).³
13. After the charge was filed, CSD produced copies of notes and memoranda prepared by Dr. Rose, Barbara Poorman, Susan Fols, Mr. Falgowski, Mr. Brown, and Ruth Ann Callum. CSD has represented that it has produced all of its investigation materials, and that it has no written complaints of sexual harassment and no written statements prepared by students. In all of the documents produced, the names of all student witnesses were redacted.

BACKGROUND

On February 15, 1995, the Petitioner requested that the PERB process the charge on an expedited basis citing legal authority supporting its position requiring the identity of the students. On February 17, 1995, the District submitted rebuttal to the legal authority submitted

³Section 4007, Unfair Labor Practices - Enumerated, provides, in relevant part:

(a) It is 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; (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit.

by the Association. On February 22, 1995, the Association filed a reply to the new matter set forth in the District's answer including additional argument and authority supporting its position.

On March 6, 1995, a teleconference was held involving Teresa Farris, Esquire, representing the Association, Maureen M. Blanding, Esquire and David Williams, Esquire, representing the District, and Charles Long and Deborah Murray-Sheppard representing the Public Employment Relations Board. Among the agreements reached were the following:

- a. The Association will immediately supplement its most recent position statement of February 22, 1995, by supplying additional case citation(s).
- b. The District will have the opportunity to provide additional written argument to be submitted not later than Monday, March 20, 1995.
- c. The Association will then have the opportunity to submit rebuttal argument not later than Monday, March 20, 1995.

ISSUE

Whether the District's refusal to provide the Association with the names of the students involved in each incident supporting the disciplining of John Briggs and the names of student witnesses, if any, constitutes a violation of Section 4007(a)(1) and (a)(5), if the Act, as alleged?

PRINCIPAL POSITIONS OF THE PARTIES

DISTRICT: The District maintains the Association's right to information is not absolute but limited to reasonable discovery necessary for an informed and intelligent evaluation of the charges against Mr. Briggs. From the documentation reflecting the content of the student interviews and the substance of the meetings with Mr. Briggs, all of which have been shared with the Association, the District maintains the Association is capable of adequately representing Mr. Briggs without knowing the identity of the students.

More importantly, the District argues that in this matter the privacy rights of the students outweigh the Association's need to know the identity of the students.

Association: The Association argues that the identification of the students is necessary and relevant information without which it cannot fulfill its statutory obligation to represent Mr. Briggs.

The Association contends that the District has failed to establish any prevailing privacy interest of the students which justifies its refusal to disclose their identity.

DISCUSSION

The PERB has addressed the broader question of a school district's duty to furnish relevant information necessary for a collective bargaining representative to fulfill its statutory obligation to represent bargaining unit members.

In the case of Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School District Board of Education, (Del. PERB, U.L.P. No. 85-06-005, slip op. at 19-20 (Feb. 6, 1986)), the PERB held:

The statutory duty of representation necessarily encompasses the right to conduct a reasonable investigation which, if not otherwise privileged, includes access to relevant information necessary for the bargaining representative to intelligently determine facts, assess its position and decide what course of action, if any, to pursue. The duty to furnish such information extends beyond the negotiations to the day to day administration of the collective bargaining agreement. To conclude otherwise would render the entire representation process meaningless.

The narrower issue raised by the facts of this matter raises a question of first impression under the Public School Employment Relations Act. Relying on the case of Green v. Board of School Commissioners of the City of Indianapolis, (7th Cir., 716 F.2d 1191 (1983)), the District argues that effective safeguards were incorporated into its investigation making identification of the students unnecessary for the Association to investigate and effectively counsel and/or represent Mr. Briggs in the grievance procedure.

The investigative procedures adopted by the District include interviews of the students by the Building Principal, Mr. Falgowski. Several weeks later the students were again interviewed by the Director of Human Resources, Dr. Rose, who determined their account of the incidents as told to him was essentially the same as previously reported to Mr. Falgowski. Dr. Rose also

concluded that the students had no motive to concoct the allegations and he considered their accounts credible.

The Green case, upon which the District relies, is distinguishable from the current dispute upon both the facts and the issue. Green raised an issue concerning the constitutional due process rights of a school bus driver for sexual assault. In Green, the court concluded:

The School Board had good reason to keep the identity of the children secret. They were frightened of Green and the thought of having to recount to a roomful of strangers the occasions when Green had grabbed or touched their breasts and legs or attempted to lie on top of them in the back of the bus. There is no chance that all of the children fabricated their stories for fun or because they disliked Green because each child gave her statement to a police investigator employed by the School Board and was interviewed individually to avoid the risk of collusion. Also each recorded her statement in her own words. The statements reflect this: the same phrases and stories do not appear in each. And each child's statement was signed by one of her parents who reviewed it in the presence of the child and the investigator.

At issue in the current matter is the right of an exclusive bargaining representative under a state collective bargaining statute to information necessary for it to fulfill its obligation to represent a bargaining unit member who received a three (3) day disciplinary suspension for alleged sexual harassment involving incidents of a lesser magnitude than those involved in the Green case.

In two (2) out of the three (3) instances cited in Mr. Falgowski's letter of January 17th, the record provides no basis for concluding that the students were afraid or otherwise distressed in any way by the incidents in question.

In deciding to involve the students in the investigation, the District apparently ignored the safeguards explicitly set forth in a District policy, entitled COLONIAL SCHOOL DISTRICT - GUIDELINES FOR CONDUCTING INVESTIGATIONS OF COMPLAINTS OF SEXUAL HARASSMENT, which provides, in relevant part:

3. The investigator shall outline the questions before conducting any interviews. (emphasis added).....
7. The investigator must obtain parental consent before interviewing student witnesses. It is advisable to give the child's parents/guardian the opportunity to be present at the interview. (emphasis added)

Unlike Green, the students did not provide written statements. Therefore, the absence of questions prepared in advance, as required by the District's policy, is relevant for there is no basis for concluding whether the substance of prior interviews influenced questions asked in subsequent interviews so that, although inadvertent, leading questions may have tainted the interview process.

The students were individually interviewed on two (2) occasions without prior notice first by the Building Principal and second, by the Director of Human Resources. The rank of these administrators alone created an unequal environment placing the students at a perceived if not real disadvantage. Yet, the record contains no evidence that consistent with the District's policy the parents of the students were advised of the situation much less encouraged to be present during the interviews. To have done so the District could have provided adult support for the students during the interviews thereby, in effect, leveling the playing field without compromising the integrity of the interview process.

Having raised the defense that adequate safeguards were incorporated into its investigative procedures so that identification of the students is unnecessary, the District assumed the burden of proof with regard, thereto. For the reasons stated, it has failed to carry its burden.

Alternatively, the District argued that "clearly there are certain privacy interests at stake" which constitute privileged information not available to the Association. The privacy interest upon which the District relies is the privacy rights of the students, themselves. The District, however, fails to identify either the source or the scope of the privacy interests upon which it relies.

Other than the case of Detroit Edison Co. v. NLRB, (440 U.S. 301, (1979)), the District cites no source establishing or supporting the student's right to privacy. Like Green (Supra), the Detroit Edison case is distinguishable from the current matter in several important respects.

Factually, the issue in Detroit Edison involves the right of a bargaining representative to obtain the results of validated psychological aptitude tests administered to employees of a private

sector employer. There, the United States Supreme Court determined that, unlike the current matter, the employer had a legitimate and substantial interest in not divulging the requested information since to do so would have an extensive negative impact including invalidating future test scores and compromising the professional ethics of the psychologists involved.

Unlike the substantial interest of the employer relied upon by the court in Detroit Edition, the Colonial School District has established no substantial privacy right of the students in this matter which outweighs the right of the Association to relevant information necessary for it to adequately fulfill its statutory duty of representation.

To the contrary, the Association specifically asserts that:

... the witnesses would not be exposed to any publicity by being identified. At most, they would be interviewed by Ms. Stevens or another Association representative in the presence of and with the permission of their parents. It would be the District's decision whether to call them to testify against Mr. Briggs at any hearing since it would be the District's burden to prove its allegations of wrongdoing.

The Association's position provides safeguards and privacy considerations unaddressed by the District during the course of its investigation. Knowledge of the students' identity by an authorized representative of the Association would not expose the students to public exposure, a major concern of the court in Green. The record provides no basis for concluding that the Association's request poses an unreasonable threat to the well-being of the students or unreasonably intrudes into their inherent right of privacy should such a right, in fact, exist.

The District's dilemma is of its own making. Despite the fact that at least one (1) adult school employee witnessed each incident, the District chose to interview the students involved. To permit the District to privately interview the students and, based in part upon the substance of those discussions, discipline Mr. Briggs for sexual harassment without identifying the students to his exclusive bargaining representative improperly withholds from the Association necessary and relevant information to which it is entitled under the Act.

Without knowing the identity of the students, the Association was left with no alternative other than to rely upon the recollection of Mr. Briggs, the records provided by the District and the subjective conclusions of its administrators. The District's position unnecessarily hindered the Association's ability to objectively assess the merits of the grievance thereby interfering with the Association's duty to represent a member of the bargaining unit and the member's right to be represented by a representative of his own choosing.

Having so concluded, it is necessary to determine to which students the disclosure requirement applies. Attachment E to the Stipulation of Fact contains the notes of the administrators who participated in the student interviews and from which the names of all students have been deleted. The District argues that the identity of the female student involved in the incident of December 21, 1994, is known to all parties. The record confirms that the name of this student appears in Mr. Falgowski's follow-up memorandum to the meeting of January 17, 1995. For this reason, the identity of this student is not an issue.

The Association is entitled to know the identity of the students involved in the incidents of December 19, 1994 and October 11, 1994, and to any other incident upon which the District relies to establish just case for the disciplinary suspension of Mr. Briggs and of the student witnesses to each.

DECISION

The District's refusal to inform the Association, upon request, of the identity of the students involved and the student witnesses to the alleged incidents of sexual harassment resulting in the three (3) day suspension of Mr. Briggs, constitutes a violation of Sections 4007(a)(1) and (a)(5) of the Act, as alleged.

REMEDY

The District is to immediately provide the authorized representative of the Association with the names of the students involved and the witnesses to the alleged

incidents of sexual harassment occurring on December 19, 1994 and October 11, 1994, and of any other incidents resulting the three (3) day disciplinary suspension of Mr. John Briggs.

IT IS SO ORDERED.

/s/ Charles D. Long, Jr. _____
CHARLES D. LONG, JR.
Executive Director
Del. Public Employment Relations Bd.

DATED: April 25, 1995