STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

SUSSEX COUNTY VO-TECH TEACHERS'	)	
ASSOCIATION, and JO-AN ATKINSON,	)	
Charging Parties,	)	
v.	)	**ULP. N0. 96-07-183**
SUSSEX COUNTY VOCATIONAL	)	
TECHNICAL SCHOOL DISTRICT,	)	
Respondent	)	

The Sussex County Vo-Tech Education Association (hereinafter "Association" or "Charging Party") is an employee organization within the meaning of 14 Del.C. §4002(h) and the exclusive bargaining representative of the Sussex Vo-Tech. School District's certificated professional employees, including classroom teachers, within the meaning of 14 Del.C. §4002(i). Jo-An Atkinson is a public school employee within the meaning of 14 Del.C. 4002(m). The Sussex Vo-Tech School District (hereinafter "District") is a public school employer within the meaning of 14 Del.C. §4002(n).

On July 9, 1996, the Charging Parties filed the above-captioned unfair labor practice charge alleging conduct by the District in violation of the Public School Employment Relations Act, 14 Del.C. Ch. 40 (hereinafter "the Act"), specifically §§ 4007 (a)(1), (a)(2), (a)(3) and (a)(5). [1]

---

[1] **§4007. Unfair Labor Practices - Enumerated**

(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 District's Answer, filed on July 26, 1996, denies the substantive allegations set forth in the Complaint and contains a section entitled New Matter. In the Response filed with the PERB on August 5, 1996, the Charging Parties deny the New Matter.

Two (2) days of hearing were held on October 1, and October 9, 1996, at which time the parties presented testimony and documentary evidence in support of their respective positions. At the start of the first day of hearing the Respondent, citing the doctrines of res judicata and collateral estoppel, moved to have the Charge dismissed or, alternatively, deferred to the grievance procedure set forth in the collective bargaining agreement.

The Hearing Officer declined to stay the proceeding but directed the parties to submit written argument setting forth their respective positions concerning the Respondent's motion to dismiss or defer the charge.

On October 7, 1996, after considering the parties' submissions, the Hearing Officer dismissed Respondent's motion. Following the close of the hearing on October 9, 1996, the parties submitted closing argument in the form of responsive post-hearing briefs, the last of which was received on March 17, 1997. The following opinion and decision result from the record thus compiled.

BACKGROUND

The current charge is the latest in a continuing and related series of actions involving Jo-An Atkinson and the Sussex Vo-Tech. School District, dating back to 1992, when the District discontinued its Culinary Arts Department and terminated Ms. Atkinson from her position as a Culinary Arts Instructor. When her request to bump

---

(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 bargaining unit.

was denied, a grievance was filed alleging that the District's action constituted retaliation and discrimination motivated by union animus against Ms. Atkinson for her union activities. [2] The grievance was ultimately processed to arbitration. In a decision dated October 29, 1993, Arbitrator Gloria Johnson sustained the grievance. Since the position into which Ms. Atkinson could have bumped, as well as her former position in the Culinary Arts Department, had been abolished, Arbitrator Johnson directed the District to promptly reinstate Ms. Atkinson to a comparable position, with back pay and reinstatement of benefits.

On December 23, 1993, the District filed an action in the Delaware Court of Chancery seeking to vacate the Arbitrator's award. The Association then filed a counterclaim seeking to enforce the arbitration award. By decision dated June 28, 1995, Chancery Court affirmed the arbitration award.

Thereafter, Ms. Atkinson was reinstated and assigned to the Broad Creek School ("BCS") for the 1995-96 academic year as an instructor in the Personal Service Occupations curriculum. [3] Her assignment to BCS required that she be granted an Interim Special Education Endorsement for the Trades and Industries Teaching Certificate which she possessed, at the time. In order to obtain the required Standard Teaching Certificate, Ms. Atkinson was required to complete four (4) college level courses, two (2) At the time of her termination at the completion of the 1995-96 academic year. Ms. Atkinson had successfully completed two (2) of the four (4) required courses and was, therefore, qualified for a Limited Standard Teaching Certificate.

---

[2] Prior to her termination at the end of the 1991-92 academic year, Ms. Atkinson had served the Association in various capacities for a number of years, most recently as President.

[3] BCS is an intensive learning center offering special services for students from Sussex County 14 years of age and older with learning and/or behavioral problems.

On July 9, 1996, Charging Parties filed the current unfair labor practice charge alleging a series of incidents of harassment, discrimination and retaliatory treatment of Ms. Atkinson at BCS. The allegations culminate with the decision by the District to discontinue the Personal Service Occupations curriculum at the close of the 1995-96 school year and terminate her employment. Charging Parties maintain that, considered together, these incidents constitute a pattern of conduct in violation of Sections 4007 (a)(1), (a)(2), (a)(3) and (a)(5), of the Act. and request that the Public Employment Relations Board order the District to:

1. Cease and desist from engaging in conduct which tends to interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed by the Act;

2. Cease and desist from refusing to bargain in good faith;

3. Reinstate Atkinson to her position of instructor at Broad Creek School;

4. Remove from her personnel file a discipline letter dated April 16, 1996;

5. Post a notice notifying its employees that it has committed the aforementioned unfair labor practices;

6. Pay all reasonable costs and expenses incurred by Petitioners in processing this charge; and

7. Provide such other relief as the Board deems just and proper.

On July 18, 1996, the termination hearing requested by Petitioner Atkinson was held before James D. Griffin, Esquire, the Hearing Officer appointed by the District. Following the Board of Education's adoption of the Hearing Officer's recommendation that Ms. Atkinson be terminated, she appealed the decision of the District to the State Superior Court.

At the time of the unfair labor practice hearings in October, 1996, the appeal was pending before the Superior Court. On February 25, 1997, the Court issued its decision, concluding: . . . . "the Board of Education's decision to terminate Appellant

based on a reduction of education services is supported by substantial evidence and therefore the Board's decision is affirmed".

ISSUE

Whether the incidents relied upon by the Petitioners constitute a violation of 14 Del.C. §§ 4007 (a)(1), (a)(2), (a)(3) and (a)(5) of the Act, as alleged?

PRINCIPAL POSITIONS OF THE PARTIES

Charging Parties: Charging Parties contend that a series of incidents occurring during the 1995-96 school year, culminating in the elimination of the Personal Services Occupations curriculum and the resulting termination of Petitioner Atkinson, constitute impermissible retaliation and discrimination against Atkinson because of her activities on behalf of the Association.

Charging Parties contend that the evidence establishes a prima facie case of union animus which the District has failed to successfully rebut.

In February, 1996, Ms. Atkinson and a colleague each received a written reprimand after leaving early from an attention deficit disorder conference and not returning to school. Charging Parties contend the District refused to process the grievance filed by Ms. Atkinson's and, in doing so, effected a unilateral change in the contractual grievance procedure, a mandatory subject of bargaining, in violation §4007 (a)(5), of the Act.

District: The District contends that Charging Parties have failed to establish a prima facie case of unlawful employer motivation. Should the Hearing Officer decide otherwise, the District argues that a lack of student interest in the Personal Service Occupations curriculum was the reason for discontinuing the program and the termination of Ms. Atkinson was precipitated by the decrease in educational services and her relative lack of skill and ability when compared to the individuals teaching

the remaining courses. The District contends that both actions would have occurred regardless of Ms. Atkinson's involvement in protected union activity.

The District denies the alleged violation of §4007 (a)(5), maintaining the grievant, rather than the District, failed to process the grievance.

DISCUSSION

Both Section 8(a)(3) of the National Labor Relations Act and Section 4007 (a)(3) of the Public School Employment Relations Act prohibit an employer from encouraging or discouraging membership in an employee organization by discrimination in regard to hire, tenure or other terms and conditions of employment.

The National Labor Relations Board has recognized two (2) types of union animus: (1) a "pretextual" case in which the legitimate business reason allegedly relied upon by the Employer as justifying the disputed employment action is a sham, in that it either did not exist, or was not relied upon at the time the action was taken; and (2), a "dual motive" case involving not only a prohibited motive of discrimination and/or retaliation against an employee for engaging in protected activities but also a valid business interest supporting the adverse action. Wright Line, 251 NLRB 1083, 105 LRRM 1169 (1980), enforced NLRB v. Wright Line, 662 F.2d (1st Cir., 1981), cert. denied, 455 US 989 (1982)

Based upon the similarities between section 8(a)(3) of the National Labor Relations Act and section 4007 (a)(3) of the Police and Firefighters Employment Relations Act, the PERB adopted the rationale of National Labor Relations Board in Wright Line. (Supra). Wilmington Fire Fighters Assn., Local 1590 v. City of Wilmington, Del. PERB, ULP No. 93-06-085 (April 20, 1994). [4]

---

[4] Section 4007(a)(3) of the Public School Employment Relations Act is identical to Section 1607(a)(3) of the Police Officers and Firefighters Employment Relations Act. The PERB has previously held that a decision issued under one of the three (3) public

In the Firefighter decision (Supra.), the PERB Hearing Officer also adopted the procedural guidelines set forth by the National Labor Relations Board in Wright Line (Supra.) for considering allegations of union animus. The burden of proof is initially upon the Charging Party to establish what equates to a prima facie case of unlawful employee motivation. The essential elements which must be proved include: (a) the affected employee engaged in activity protected by the statute; (b) the employer had knowledge of the employee's involvement in the protected activity; and (c), the employee's protected conduct was a substantial or motivating factor in the employer's initiating the adverse action. If the charging party succeeds in establishing a prima facie case of union animus, the burden shifts to the employer to prove that the same action would have occurred despite the employee's involvement in protected activity. The shifting burden requires the employer to prove what amounts to an affirmative defense.

In its decision dated February 25, 1996, resolving Ms. Atkinson's appeal of the District's decision to terminate her employment at the conclusion of the 1995-96 academic year, the Delaware Superior Court concluded that the District's decision to terminate Ms. Atkinson based upon a reduction in education services following the elimination of the Personal Service Occupations curriculum was supported by substantial evidence. By application of the doctrine of collateral estoppel, the Court's decision is binding upon the PERB. As a result, the existence of a valid business reason for the termination of Ms. Atkinson is not in issue. Consequently, the Association's argument of pretext cannot prevail.

However, the issue of union animus was not before Court. Therefore, it is possible under the balancing test of Firefighters (Supra.) for a prima facie case of union animus to sustain a violation of section 4007 (a)(3), of the Act despite the

---

employment relations statutes constitutes binding precedent for identical provisions under the other two (2) statutes. Firefighters (Supra.)

under the other two (2) statutes. Firefighters (Supra.)

presence of a valid business reason for the elimination of the Personal Service Occupations curriculum and Ms. Atkinson's resulting termination.

It is undisputed that prior to her termination in 1992, Ms. Atkinson was involved in protected activity and that her reinstatement to BCS in the fall of 1995 resulted from the arbitrator's finding that her prior termination constituted discrimination motivated by union animus.

Ms. King, the Program Coordinator and ranking administrator at BCS during the 1995-96 academic year, testified that although generally aware of circumstances of Ms. Atkinson's difficulties with the District and her reinstatement to BCS, she was unaware of the extent of Ms. Atkinson's involvement in Association affairs prior to 1992. However, Ms. King reported directly to Dr. Carol Schreffler, with whom she acknowledged conferring on regular basis during her involvement in most of the incidents which form the basis of this Charge. Only the Assistant Superintendent and the Superintendent, both of whom were involved in the prior termination of Ms. Atkinson and who had participated in various steps of the prior proceedings, rank above Dr. Schreffler in the administrative hierarchy of the District. It would be naive to conclude other than that responsible and involved representatives of the Employer were knowledgeable about Ms. Atkinson's involvement in protected activity.

It is, therefore, only necessary for the Charging Parties to establish that Ms. Atkinson's involvement in protected activity was a substantial or motivating factor for the Employer's actions in order to satisfy its burden of establishing a prima facie case of union animus.

The evidence of record, primarily the testimony of Ms. Atkinson and Ms. King concerning the incidents set forth in the complaint, establish the following:

1. While all other faculty members at BCS were instructed to report at 7:30 a.m. on the first day of the 1995-96 academic year for coffee and the introduction of new

staff members Petitioner Atkinson was instructed to report at 9:00 a.m. Ms. King had no recollection or explanation how or why this situation occurred.

2. Mary Beth Lewis, the teaching assistant assigned to Ms. Atkinson was the daughter of the School Board President who, as a Board member, had participated in the 1991-92 collective bargaining negotiations at which Ms. Atkinson claims she was responsible for the removal of the District Superintendent from the District's negotiating team.

Ms. Atkinson also considers the assignment of Mary Beth Lewis as her teaching assistant and her frequent removal from the classroom to perform unrelated duties thereby making Ms. Atkinson's teaching job more difficult an act of retaliation by the District for her involvement in protected activity.

According to the undisputed testimony of Ms. King, her decision to assign Ms. Lewis as the teaching assistant to the new teacher of the Personal Service Occupations curriculum, occurred prior to Ms. Atkinson's appointment to the position. Ms. King testified that as Ms. Lewis had established a rapport with the students at BCS and was familiar with the behavior management system in place at the school. For these reasons she was considered the ideal assistant for the new teacher, regardless of whom that might be

For this reason, the position of Ms. Lewis' father as the School Board President and his involvement in the 1992 collective bargaining negotiations is irrelevant.

The record also confirms that a significant portion of Ms. Lewis' missed class time was related to her daily responsibilities involving the driver's education program. Other teaching assistants were periodically removed from classes to perform additional duties, including Jessica Edwards who performed responsibilities involving the book store; Kathy Kaiser who prepared and served breakfast each morning; Troy Ricketts who was involved with the Driver's Education program, field

trips and the school store; and, Scott Layfield who was frequently assigned to various classes, as needed.

The record further establishes that, whenever feasible, the required office work was distributed among all of the teaching assistants. Although Ms. Lewis may have been utilized more frequently than other teaching assistants it is undisputed that, for the most of the time involved, Ms. Atkinson's class consisted of two (2) or three (3) students, a lesser number than in most of the other classes.

3. With regard to the District's failure to provide Ms. Atkinson with a copy of the District's Policies and Procedures Manual prior to the start of the school year, Ms. King testified that Ms. Atkinson neither informed her that she did not have a manual nor did she request a copy, in which case a manual would not have been promptly provided. In the absence of credible evidence establishing intent resulting from a prohibited motive rather than a mere administrative oversight, as Ms. King claims, this incident is inconsequential, at best.

4. Ms. Atkinson testified that in addition to the course outline for the Personal Service Occupations which she received, she also requested to see the lesson plans and the planning books of the previous teacher. Despite her request, neither was provided.

Ms. King testified that because the prior teacher of the Personal Service Occupations curriculum was no longer assigned to BCS at the start of the 1995-96 academic year, the lesson plans from the prior year were not available. Furthermore, she made no attempt to obtain them because, in her professional opinion, they were unnecessary for Ms. Atkinson to effectively prepare and teach the Personal service Occupations courses

While the daily lesson plans of the former teacher may have simplified Ms. Atkinson's preparation there is no evidence she was denied access to them based on union animus.

5. Nor does the record support Ms. Atkinson's claim that d uring the her first two (2) months at the Broad Creek School, her disciplinary referrals were intentionally not processed or that appropriate feedback was not provided.

Ms. King testified that disciplinary referrals are routinely processed in the same manner regardless of whether they are initiated by a teacher or the teaching assistant. Employer Exhibits 8 and 9 establish that numerous disciplinary referrals involving students from Ms. Atkinson's class were processed, including some from Ms. Atkinson.

6. On November 8, 1995, Ms. King met with Ms. Atkinson for the purpose of discussing several incidents in which Ms. Atkinson left students alone unsupervised and one (1) incident in which a student under Ms. Atkinson's supervision sent an obscene E-mail. On November 22, 1995, Ms. King issued a written reprimand to Ms. Atkinson for these incidents. Ms. Atkinson claims the written reprimand was inconsistent with established disciplinary procedure and that no similar corrective action was taken against another teacher for leaving students unattended.

Addressing the E-Mail incident first, the document itself establishes that it was sent by the student twenty-three (23) minutes prior to the end of the class period rather than ten (10) minutes, as Ms. Atkinson claims. Considering this fact, Ms. King's concern that permitting twenty-three (23) minutes of unsupervised teaching time during one class period is not unreasonable.

Concerning the issue involving lack of supervision for the students involved, Ms. King maintains she was simply enforcing BCS Policy No. 18 which provides, in relevant part: " . . . . All teachers are required to be in their classroom when students are scheduled for class. If it is necessary for a teacher to be elsewhere, it is the teacher's responsibility to have the class covered. At no time should any student be unsupervised".

Whether Ms. King followed the prescribed procedure when placing a copy the disciplinary memo in Ms. Atkinson's personnel file, the allegation that another teacher who periodically sends unruly students into the hallway where they are unsupervised and the conflicting testimony concerning precisely how far Ms. Atkinson was removed from her classroom during the her absence are valid considerations to be considered in addressing the propriety of the written reprimand.

However, the PERB has previously held that the unfair labor practice forum is not a substitute for the negotiated grievance procedure. Indian River Ed. Assn. v. Board of Ed., Indian River School Dist., Del. PERB, U.L.P. No. 88-11-027 (1988). The proper forum for contesting the written reprimand issued on November 22, 1995, was the negotiated grievance procedure. Having failed to exhaust the available contractual remedy, Charging Parties cannot substitute an unfair labor practice charge filed seven (7) months after the incident.

7. Ms. Atkinson alleges that despite numerous requests during her first five (5) months at BCS, Ms. King failed to have her computer properly networked with the school's other computers causing numerous communication problems.

According to Ms. King, when first advised she referred the matter to her secretary for resolution. Hearing nothing further, she had no reason to believe the problem remained uncorrected. Ms. King testified, and Ms. Atkinson acknowledged, that the problem affected only the ability to receive and send group correspondence. This type of correspondence could be accomplished by using the computer terminal of the teaching assistant, however, which was also located in Ms. Atkinson's classroom.

8. On October 26, 1996, after observing Ms. Atkinson's class for approximately thirty (30) minutes Ms. King evaluated her performance as unsatisfactory. Ms. Atkinson defends the quality of her teaching methods and further maintains Ms.

King failed to subsequently develop an Individual Improvement Plan, as required by the Department of Public Instruction following an unsatisfactory rating.

Immediately prior to assuming the administrative position of Program Coordinator, Ms. King was a teacher in the Sussex Vo-Tech School District for five (5) years. Before that she taught in the Indian River and Woodbridge School Districts. She possesses a Bachelors degree in Elementary Teacher Education, including certification in special education, a Masters Degree in Education, Secondary, Special Education, Transition and Vocation and has completed approximately seventy (70) additional credits.

The issue of the performance rating reflects the differing perceptions of Ms. Atkinson and Ms. King concerning effective teaching methods. Considering Ms. King's credentials and her position of Program Co-ordinator at the Broad Creek School, there is no reason for this Board to question her evaluation of Ms. Atkinson's classroom performance.

Although contrary to the established procedure, the failure by Ms. King to provide the required Individual Improvement Plan does not transform either the evaluation or the result into an act of retaliation resulting from union animus.

Furthermore, like the issue involving the written reprimand of November 25, 1996, Ms. Atkinson's concerns about the unsatisfactory performance rating were best addressed through the contractual grievance procedure rather than in the unfair labor practice charge filed eight (8) months after the fact.

9. On December 14, 1995, six (6) students from two (2) other classes were assigned to Ms. Atkinson for instruction in corrective reading. Ms. Atkinson did not receive the same preparation as was provided to the other two (2) corrective reading teachers prior to their initial involvement in the program. Ms. Atkinson claims Ms. King embarrassed her when she visited the classroom and requested the students to

be patient because of Ms. Atkinson's lack of training and experience in teaching corrective reading.

Ms. King testified she was attempting to make the corrective reading program more educationally productive by expanding the two (2) corrective reading classes taught by other teachers during 7th and 8th periods which contained nine (9) students each, into three (3) classes of six (6) students.

Ms. King also testified the corrective reading program is highly structured and that Ms. Atkinson was provided with the series guide, a program overview, the necessary teaching materials and the training tapes for her use, if she so desired.

The evidence of record does not support a finding that either assigning Ms. Atkinson to teach corrective reading or advising the students that Ms. Atkinson was new to the program and encouraging them to work with her constitutes an act of retaliation for her participation in protected activity.

10. In January, 1996, Ms. Atkinson's pay was reduced by ten per cent (10%), allegedly at the direction of Department of Public Instruction because at the time she held only a temporary teaching certificate. In fact, the temporary certificate required only a $400.00 salary reduction. Kevin Carson, Assistant Superintendent, testified that as soon as the District became aware of the error it was corrected.

11. In February, 1996, Ms. Atkinson and two (2) colleagues requested and received approval to attend an offsite instructional conference concerning attention deficit disorder. When Ms. Atkinson and one (1) of her colleagues arrived at the conference they were not registered. Neither employee had sufficient funds or a credit card to pay the registration fee. When the third (3) participant failed to arrive by 9:30 a.m., both left the conference. They neither returned to work nor advised the District of the situation. As a result of the incident neither was paid for the day despite their willingness to use a personal day. A written reprimand was also placed in each of their personnel files.

Ms. King could offer no explanation as to why the three (3) teachers were not registered for the seminar. She considered the failure of the two teachers who left the course without either returning to school or subsequently reporting what they had done to be a serious matter. Despite their request to use a personal day and receive pay, the two (2) teachers who left the conference without returning to school for the balance of the day were not paid for the day and a written reprimand was placed in their respective personnel files.

Although the degree of discipline is not at issue here, the District's decision to impose some degree of penalty in response to the uncontested facts is not so palpably unreasonable as to render its motivation suspect.

12. Following the prior incident, Ms. Atkinson and her colleague filed a grievance protesting the written reprimand. On May 2, 1996, the grievants' met with Ms. King, their immediate supervisor, as required by the collective bargaining agreement, to discuss the incident. Failing to resolve the matter the two (2) teachers filed a written grievance dated May 3, 1996, with the building principal. The unfair labor practice complaint alleges that rather than raising the issue of timeliness at the various steps of the grievance procedure the District simply refused to process the grievance.

A question subsequently arose concerning when the ten (10) day filing period commenced and whether a meeting was required prior to the District's issuing the first step grievance answer.

The resolution of issues involving procedural arbitrability is reserved to the contractual grievance procedure and the exclusive jurisdiction of the arbitrator. The Board's discretionary deferral policy requires that incidents involving issues of contract interpretation are to be deferred to the contractual grievance and arbitration procedures, subject to a limited number of specific conditions. Whether the issues raised by the Charging Parties involving the grievance procedure are

properly subjects for deferral to the grievance and arbitration procedure is irrelevant. Ms. Atkinson testified that after discussing the grievance answer with her union representatives it was decided not to appeal the grievance but rather to file an unfair labor practice charge and "just put it all in together". [5]

The conscious decision by Charging Parties not to appeal the step one (1) grievance answer does not constitute a unilateral change by the District of the negotiated grievance procedure.

13. The complaint alleges that Assistant Superintendent, Dr. Carson, ignored Ms. Atkinson on August 31, 1995, while she was in the office of his Administrative Assistant completing paperwork related to her assignment to BCS. Dr. Carson testified that during the days immediately preceding the opening of school he is extremely busy attending to related matters. He acknowledged that for this reason he may have been preoccupied and not acknowledge Ms. Atkinson, as alleged.

The testimony of Dr. Carson is plausible. More importantly, however, the incident does not involve hiring, tenure, or other terms and conditions of employment and is, therefore, irrelevant.

14. On April 30, 1996, Ms. Atkinson was advised by letter dated April 26, 1996, that because of low student interest the District intended to eliminate the Personal Services Occupations program at the end of the 1995-96 academic year. The Board's decision ultimately resulted in the termination of her employment. Ms. Atkinson testified that unlike her termination in 1992, she was not advised of her bumping rights in 1996. She maintains that she did not avail herself of the contractual bumping provisions in 1996 because she was the only teacher listed in the seniority

---

[5] The instant case is distinguishable on its facts from Indian River Ed. Assoc. v. Bd. of Ed., Del.PERB, 90-09-053 (7/19/91) wherein the District refused to schedule the the grievance at various levels of the contractual grievance procedure following appropriate appeals by the Union.

category entitled Personal Service Occupations and, therefore, believed there was no other teacher in her group whom she might be qualified to bump.

Had she been known that her T&I Special Education Endorsement Teaching Certificate was the same as the T&I Exploring Occupations Certificate held by two (2) other BCS teachers, Ms. Wright and Mr. Branson, she would have attempted to exercise her contractual bumping rights.

Assistant Superintendent Carson testified the T&I Special Education Endorsement Certificate for which the District applied on behalf of Ms. Atkinson was listed in the Certification Manual published by the Department of Public Instruction. This document did not list the T&I Exploring Occupations for Handicapped Children Certificate possessed by Ms. Wright and Mr. Branson.

It is undisputed that both types of certificates are the same for the purpose of bumping privileges. Although there is insufficient evidence upon which to conclude that the District intentionally attempted to mislead or deprive Petitioner Atkinson of her contractual bumping rights, considering the apparent difference between her certification and that of Ms. Wright and Mr. Branson, fairness requires that Ms. Atkinson should have been advised of her bumping rights under the collective bargaining agreement. Despite the fact that she was not, the Board's decision to accept the recommendation of Hearing Officer Griffith to terminate Ms. Atkinson is neither arbitrary nor capricious.

Article VII, Reduction in Force, section 1.b. provides, that although certification and seniority identify the pool of teachers eligible to bump, the Board retains the right to determine the most qualified teacher based upon the criteria set forth, therein.

Ms. Wright possesses a Masters Degree in Business Administration plus sixty (60) credits and teaches primarily Administrative Support Services, an area in which

she had worked for approximately twenty-one (21) years prior to joining the Sussex Vo-Tech. School District.

Mr. Branson, teaches General Maintenance and possesses a Bachelors Degree in Occupational Vocational Teacher Education plus fifteen (15) additional credits in addition to extensive practical experience in the vocational areas offered in the General Maintenance Services course.

Ms. Atkinson, on the other hand, has no degree and no prior relevant practical or teaching experience in the specific areas taught by either Ms. Wright or Mr. Branson. Ms. Atkinson recognized that although she was contractually qualified to submit a request to bump, she was not assured that her request would be granted. She also acknowledged that, at least on paper, she was not as qualified as Ms. Wright and had no prior experience in the area of general maintenance.

As previously discussed, it is not the function of the PERB to resolve disputes involving the interpretation and/or application of the collective bargaining agreement. However, consistent with the Superior Court's conclusion in its decision of February 25, 1997, that Ms. Atkinson "is not certified or qualified for any existing teaching position within the District", the evidence of record compiled at the unfair labor practice hearing likewise establishes that Ms. Atkinson was not qualified to displace either Ms. Wright or Mr. Branson.

Article V, Unfair Labor Practice Proceedings, Section 5.2, Filing of Charge, of the Board's Rules and Regulations provides, in relevant part:

> A public employer, labor organization and/or one or more employees may file a complaint alleging a violation of 14 Del.C. §4007, and 19 Del.C. § 1607. Such complaint 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, provided the Board or its agent finds it relevant to the commission of an unfair labor practice within the limitations period.

In construing this provision, the Board has held:

> Incidents falling outside the ninety (90) day statutory period cannot constitute the basis for an unfair labor practice. Their only relevance is that they may be cited as evidence of a predisposition for or a continuing pattern of union animus existing prior to events occurring within the ninety (90) day period. AFSCME, Council 81, Local 439 v. University of Delaware, Del.PERB, ULP 95-08-150 (1995).

The three (3) incidents set forth in the complaint which occurred within the ninety (90) day period immediately preceding the filing of the charge are: (1) the written reprimand for leaving the attention deficit the disorder conference without returning to school; (2) the alleged failure to process the resulting grievance; and (3), the decision to terminate the Personal Service Occupations curriculum and terminate the employment of Ms. Atkinson.

The National Labor Relations Board has properly concluded that circumstances which merely raise a suspicion that an employer may have acted on prohibited motives are not sufficient to support an inference of union animus. Educated conjecture, alone, is insufficient. NLRB v. Garner Tool and Dye, 494 F. 2d 263 (8th Cir., 1974).

Consistent with the foregoing discussion, the evidence of record concerning the incidents occurring outside the ninety (90) day statute of limitations fails to

establish the prima facie case of union animus which is necessary in order to require the application of the balancing test set forth in Firefighters, (Supra.)

CONCLUSIONS OF LAW

1. There has been no violation of 14 Del.C. §4007 (a)(3), as alleged. The incidents alleged in the Complaint which occurred outside the ninety (90) day statute of limitations fail to establish by a preponderance of the evidence that Ms. Atkinson's involvement in protected activity was a substantial or motivating factor contributing to the incidents occurring within the statute of limitations, specifically the processing of the grievance protesting the written reprimand for leaving the attention deficit disorder conference, discontinuing the Personal Service Occupations curriculum and Petitioner Atkinson's termination.

2. Therefore, Charging Parties have failed to establish a prima facie case of union animus so that it is unnecessary to apply the balancing test set forth in Firefighters (Supra.) and the legitimate business reason for the District's to eliminate the Personal Service Occupations curriculum and terminate Ms. Atkinson is controlling.

3. The evidence fails to establish that the District engaged in conduct interfering with, restraining or coercing any employee in or because of the exercise of any right guaranteed by the Act, in violation of section 4007 (a)(1), as alleged.

4. The evidence fails to establish that the District dominated, interfered with or assisted in the formation, existence or administration of a labor organization, in violation of section 4007 (a)(2), as alleged.

5. The evidence fails to establish that the District unilaterally altered the contractual grievance procedure in violation of section 4007 (a)(5) of the Act, as alleged.

WHEREFORE, the unfair labor practice charge is dismissed.

September 26, 1997
(Date)

/s/ Charles D. Long, Jr.
Charles D. Long, Executive Director
Delaware Public Employment Relations Board