STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

NEW CASTLE COUNTY VO-TECH. ED. ASSOCIATION and PHILLIP THAYER,	)	
Charging Parties,	)	**ULP No. 97-09-219**
v.	)	
NEW CASTLE COUNTY VOCATIONAL TECHNICAL SCHOOL DISTRICT,	)	
Respondent.	)	

PROBABLE CAUSE DETERMINATION

The New Castle County Vo-Tech. Ed. Ass'n. ("Association") is an employee organization within the meaning of Section 4002(h) of the Public School Employment Relations Act ("ACT") 14 Del.C. Chapter 40 (1983). Phillip Thayer ("Thayer") is a public employee within the meaning of Section 4002((m), of the Act. The New Castle County Vo-Tech. School District is a public school employer within the meaning of Section 4002(n), of the Act.

Charging Parties filed the above-captioned unfair labor practice charge with the Public Employment Relations Board ("PERB" or "Board") on September 29, 1997. The charge alleges violations of Article 4007, Unfair Labor Practices, (a)(1), (2). (3) and (5), 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 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.
(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit.

BACKGROUND

The Unfair Labor Practice Charge alleges the following:

1. Thayer was initially hired as an Auto Mechanics Instructor in September, 1984, and was assigned to the Special Needs Auto Mechanic Program at the Delcastle High School.

2. Thayer also taught Auto Mechanics at the Ferris School and Howard High School during the period 1984-1989.

3. Although Thayer continued as the Special Needs Auto Mechanic Instructor at Delcastle High School, in February, 1989, the Respondent unilaterally changed Thayer's classification from Auto Mechanics Instructor to General Mechanics Instructor. Thayer was the only employee in the General Mechanics Instructor classification.

4. Thayer assisted in the organization of the Respondent's custodians and, during the period of his employment, was active in the Association.

5. In January, 1997, Thayer became the spokesperson of the Association's bargaining committee.

6. The first bargaining session between the Association and the Respondent occurred in April, 1997.

7. Four days later, Thayer was informed that the General Mechanics Program was being phased out, resulting in his termination.

8. By letter dated May 9, 1997, the District's Superintendent, Dennis Loftus, advised Thayer that his employment was to be terminated effective June 30, 1997.

9. Other similarly situated employees with less seniority who were not active in the Association continue to work.

10. At the time the Charge was filed, Thayer had been recalled and was working on a half-time basis.

The Answer filed by the District, provides:

1. Thayer was hired as an instructor of General Mechanics, Special Education, effective September 4, 1984.

2. In 1992, the District created a new seniority classification entitled "General Mechanics" and placed Thayer into that classification.

3. The 1992 seniority roster was posted in 1992 and every year, thereafter. At no time prior to 1997 did Thayer or the Association object to the placement of Thayer in the General Mechanics classification.

4. By letter dated January 29, 1997, the President of the Association informed the District of its desire to initiate collective bargaining negotiations. (Answer, Ex. "C")

5. A ground rules meeting was held on April 17, 1997. The first substantive bargaining occurred on May 7, 1997.

6. As the result of a study commenced in early March, 1997, concerning the staffing needs for the 1997-98 academic year, the Principal at the Delcastle High School recommended the discontinuation of the General Mechanics program, based upon a decline in the number of students selecting General Mechanics.

7. After the Principal's recomendation was accepted, Thayer was informally advised of his situation.

8. By letter dated May 9, 1997, Thayer was formally notified as required by Chapter 14 of Title 14 of the Delaware Code.

9. The General Mechanics Program will be completely eliminated following the 1997-98 academic year.

Under New Matter, the District alleges the following:

1. Because Thayer failed to contest the District's intent to terminate his services effective June 30, 1997, within the ten days provided by statute, he is estopped from challenging the existence of a valid business reason for terminating Thayer.

In its Response To New Matter, the Petitioners deny that Thayer is estopped from challenging the termination of his employment through the unfair labor practice procedure.

DISCUSSION

The authority to dismiss an unfair labor practice charge for lack of probable cause to believe that an unfair labor practice may have occurred is found in Article 5.6 of the Rules and Regulations of the Public Employment Relations Board, which provides:

> 5.6 Probable Cause Determination
>
> (a) Upon review of the Complaint, Answer and 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 there is no probable cause to believe that an unfair labor practice may

> have occurred, the party filing the charge may request the Board to review the Executive Director's decision in accord with the provisions set forth in Regulation 7.4. The Board shall decide such appeals following a review of the record, and, if the Board deems necessary, a hearing and/or submission of briefs.

In resolving issues of alleged violations of 14 Del.C. §4007(a)(3), involving union animus, the PERB has adopted the analysis set forth by the National Labor Relations Board (NLRB) in Wright Line, 251 NLRB 1083, 105 LRRM 1169 (1980), enforced NLRB v. Wright Line, 662 F.2d 899 (1st Cir., 1981), cert. denied, 455 US 989 (1982). Wilmington Firefighters Association, Local 1590 v. City of Wilmington, Del.PERB, ULP 93-06-085 (PERB Binder II, p.937 (1994)). In Wright Line, the NLRB determined that allegations of union animus involve circumstances of either "pretext" or "dual motive". Pretext occurs when the employer's stated reason for taking the adverse action is clearly a sham, in that the purported rule or circumstance advanced by the employer did not exist, or was not, in fact, relied upon. Dual motive cases result when allegations of discrimination resulting from involvement in protected activity are met with the employer's reliance on a legitimate business purpose.

Here, the District maintains the reduction of employee Thayer to half-time status for the 1997-98 academic year and his planned termination at the close of the 1997-98 school year result not from union animus, as the Charging Parties contend, but rather from a legitimate business decision by the District to phase out the General Mechanics program due to a lack of student interest and the resulting decline in enrollment.

The pleadings in the current matter raise an issue of dual motive. In adopting the analysis established by the NLRB in Wright Line as the standard of review to be applied in considering alleged violations of §4007 (a)(3), of the Act, the PERB held:

> In deciding "dual motive" cases, the charging party has the burden of proving that the employee's protected conduct was a substantial or motivating factor in the employer's adverse employment action. Even if this is the case, the employer can avoid being found in violation of the Act by proving that its action was based upon the employee's unprotected conduct as well and would have occurred even absent the protected conduct. In cases involving such complex motives, the interest of the employees in concerted activity must be weighed against the employer's legitimate business interests. In evaluating these respective interests, the NLRB adopted a shifting burden test of causality in Wright Line. The burden of proof is initially upon the charging party to establish that the employee's conduct was protected by the Act and that this conduct was a substantial or motivating factor in the employer's adverse actions. The charging party is not required to prove that the employer's action rests solely on discriminatory purposes. In order to establish what equates to a *prima facie* case of unlawful employer motivation, the employee must establish that the employee engaged in protected activity, that the employer had knowledge of the employee's protected activities, and that employee's activity was a substantial or motivating factor for the employer's actions. Goldtex v. NLRB, 145 LRRM 2326 (4th Cir., 1994). Proof of these elements warrants an inference that the employee's protected conduct was a motivating factor in the adverse personnel action and that a violation of the Act occurred.

Once the charging party establishes its *prima facie* case, the burden shifts to the employer to prove that the same action would have been taken even in the absence of the employee's protected activities. Wright Line (Supra.) This shifting of the burden to the employer recognizes the fact that it is the employer who has best access to proof of its motivations. The employer can rebut the prima facie case either by

establishing by a preponderance of the evidence that prohibited motivations played no part in its decision or by demonstrating that the same action would have occurred for a legitimate business reason, regardless of the employee's protected activity. NLRB v. Transportation Management Corp., 462 US 393, 113 LRRM 2157 (1983). The shifting of the burden to the employer to show that the same personnel action would have taken place in the absence of union activity merely requires the employer to make out what equates to an affirmative defense. Wright Line (Supra., at note 11). The Supreme Court held the shifting of the burden to the employer once the charging party has established its prima facie case to be reasonable. Transportation Management, (Supra.). The Court determined it was fair the employer "should bear the risk that the legal and illegal motives cannot be separated because he knowingly created the risk and because the risk was created not by innocent activity but by his own wrongdoing." Id.

The instant charge cites four specific reasons as the basis for the alleged union animus: (1) the District's unilateral reclassification of employee Thayer in February, 1989, to a classification in which he was the sole incumbent; (2) employee Thayer's active participation in Association affairs since 1989, specifically, his role in organizing the custodian's bargaining unit; (3) serving as a building representative; and (4), serving as the Chief spokesperson for the Association during the collective bargaining negotiations commencing during the spring of 1997.

The reclassification of employee Thayer in 1989 does not constitute valid support for the alleged union animus. The effective date of the reclassification occurred outside the 180 day statute of limitations for filing an unfair labor practice charge, as set forth in PERB Regulation 5. If Charging Parties believed the reclassification was improper it was incumbent upon them to protest the action at the time it occurred.

There is no allegation that Thayer was treated differently from other similarly situated employees. The mere fact that he was active in the Association is insufficient to establish a nexus between his participation in protected activity and his current job status, much less, that such participation was a substantial or motivating factor contributing to the adverse action at issue here.

Nor is there reason to believe employee Thayer's role, if any, in organizing the custodians was a substantial or motivating factor contributing to his termination. The District denies knowledge of Thayer's role in organizing the custodians. More important, however, the custodians of the New Castle County Vo-Tech School District were initially organized by the American Federation of State, County and Municipal Employees (AFSCME) sometime prior to the consolidation of the suburban school districts with the City of Wilmington which occurred in 1975, approximately nine years before employee Thayer was first employed by the District. In May, 1995, AFSCME was decertified and replaced as the certified bargaining representative of the custodians by the Delaware State Education Association (DSEA), which also represents the teachers bargaining unit. The certification of DSEA occurred approximately 1 1/2 years before the decision by the District to eliminate the General Mechanics program at the close of the 1997/98 school year. In July, 1996, the custodians decertified DSEA and are currently unrepresented.

Considered within the context of the aforementioned history, the Respondent's denial of any knowledge that Thayer was involved in organizing the custodians, the absence of alleged union animus toward employee Thayer by the District prior to April, 1997, and the application of the statute of limitations, the role of employee Thayer, if any, in organizing the custodians cannot reasonably be construed as support for the charge of union animus.

Nor does the grievant's participation as the chief spokesperson during the 1997 negotiation support the charge of union animus. The initial communication to

the District from the Association's President, dated January 29, 1997, requesting that negotiations commence in April, 1997, does not identify the composition of the Association's bargaining team. Specifically, it does not identify Thayer as the chief spokesperson. The review of the curriculum requirements by the prinicpal at the Delcastle High School commenced in March 1997, prior to the April 17, 1997, meeting during which the negotiation teams agreed to the ground rules to govern the upcoming negotiations. Bargaining over substantive issues did not commence until May 7, 1997, well after the April notice to the grievant of the District's decision to phase out the General Mechanics Program.

The pleadings provide no reason to believe a causal connection exists between the grievant's role as the chief spokesperson for the Association during the 1997 collective bargaining negotiations and his pending termination at the close of the 1997/98 school year.

DECISION

Considered in a light most favorable to Charging Parties, the allegations contained in the instant unfair labor practice charge fail to establish the required nexus necessary to support a finding of probable cause to believe that an unfair labor practice in violation of 14 Del.C. §4007(a)(3), may have occurred.

Nor do the allegations set forth in the Charge reasonably support a finding that the District has engaged in conduct in violation of 14 Del.C. §§ 4007(a)(1), (a)(2) or (a)(5), as alleged.

Consistent with the foregoing discussion, and pursuant to PERB Rule 5.6, Decision or Probable Cause Determination __, section (a), the Charge is dismissed.

January 7, 1998

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