

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

NEW CASTLE COUNTY VO-TECH EDUCATION	:	
ASSOCIATION, DSEA/NEA AND PHILLIP THAYER,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>U.L.P. No. 97-09-219</u>
	:	
NEW CASTLE COUNTY VOCATIONAL TECHNICAL	:	
SCHOOL DISTRICT,	:	
	:	
Respondent.	:	

BACKGROUND

The New Castle County Vocational Technical School District (hereinafter “District”) is a public school employer within the meaning of 14 Del.C. §4002(n).

The New Castle County Vo-Tech Education Association, DSEA/NEA (hereinafter “Association”) is an employee organization within the meaning of §4002(h) of the Public School Employment Relations Act, 14 Del. C. Chapter 40 (1982, 1989) (hereinafter “PSERA”). The Association is the exclusive bargaining representative of the District’s certificated, non-administrative employees, within the meaning of 14 Del.C. §4002 (i). Phillip Thayer is a public school employee within the meaning of 14 Del.C. §4002 (m).

On June 15, 1995, the Charging Parties filed an unfair labor practice charge with the Public Employment Relations Board (“PERB”) alleging violations of 14 Del.C. §§4007 (a) (1), (a)(2), (a)(3) and/or (a)(5), 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 unit.

The District filed its Answer on October 10, 1997. The Association's Reply to New Matter was filed on October 21, 1997.

The Executive Director dismissed the charge for lack of probable cause on January 7, 1998. On appeal the dismissal was reversed by the full Public Employment Relations Board on March 20, 1998, and the matter was remanded for hearing.

A hearing was held on June 12, 1998. The parties simultaneously briefed the legal issues, with the final brief received by the PERB on June 22, 1998.

FACTS

Phillip Thayer was initially hired by the New Castle County Vocational-Technical School District in September, 1984. Mr. Thayer has been continuously assigned to Delcastle High School since December, 1988. He was employed during the 1996-97 school year by the District as the sole instructor in the General Mechanics program, which was one of four courses offered at Delcastle High School in the special education career program. Mr. Thayer was the only District employee in the seniority classification of "General Mechanics." His position on the seniority roster had been so posted since at least 1992, without objection from either Mr. Thayer or the Association.

Mr. Thayer testified he has been a member of the Association since 1984. He has served as an Association Building Representative and was the Treasurer for the Association for a two year period beginning in approximately 1987. He also testified his union activities included participating in informational picketing outside of the District offices on one occasion during the spring of 1996. The picketing was in support of the District's custodians (who were represented at that time by a DSEA affiliate) who had been engaged in prolonged and difficult negotiations.

By letter dated January 29, 1997, the Association advised the District it wished to enter into negotiations for a successor to the existing collective bargaining agreement, which was to expire on June 30, 1997. At a District-Association leadership liaison meeting on or about March 10, 1997, Association President Nancy Huebner advised District Superintendent Dr. Dennis Loftus and Assistant Superintendent Dr. Joseph Deardorff that Mr. Thayer would chair the Association's negotiating team.

The two teams met for the first time on April 17, 1997 to establish ground rules for the negotiations. Although Mr. Thayer was the Association's team chairman, a DSEA UniServ Director served as the Association's chief spokesperson throughout the negotiations. Superintendent Loftus did not participate as a member of the District's team, although he testified he was routinely kept apprised of progress and was involved in strategy sessions. Delcastle High School Principal John Moyle was a member of the District's team.

At some point in the 1995-96 academic year, Principal Moyle noted the enrollment in special education career programs was declining. He brought this trend to the attention of District administration during the course of regularly scheduled Administration/Building level meetings. These meetings typically involved Superintendent Loftus, Assistant Superintendent Deardorff, Personnel Director LeeRoy DeShazor, and Building Principal Moyle, for Delcastle High School. Preliminary discussions were held concerning whether it was an appropriate allocation of teacher units to assign full-time teachers to programs with low and declining enrollment. This group met again sometime in late January or early February, 1997, at which time Mr. Moyle recommended reducing the special education career program offerings by half, and specifically recommended that General Mechanics and Food Preparation programs not be offered to 10th grade students during the 1997-98 academic year, and phased out for students enrolled in those programs over the next two years.

On or about March 1, annually, the application period for enrollment in the New Castle County Vocational Technical School District ends, as does the period in which 9th grade students select their career choices for their 10th grade year. Upon reviewing the numbers compiled from these two processes, Principal Moyle noted the declining trend in the demand for special education career programs continued. Only fifteen (15) students were enrolled these programs for their 10th grade year, during

academic year 1997-98. Principal Moyle made a formal recommendation to Superintendent Loftus that the General Mechanics and Food Prep programs be discontinued and phased out, as these were the programs with the lowest rates of enrollment. Dr. Loftus approved this recommendation and presented it to the Board for its formal adoption at its regularly scheduled meeting of April 22, 1997. The Board approved the recommendation to discontinue these programs.

On or about the afternoon of April 22, 1997, Principal Moyle met with Mr. Thayer to verbally notify him that the recommendation had been made to discontinue the General Mechanics program due to low enrollment and that the recommendation would be placed before the Board of Education for its approval.

Dr. Loftus formally advised Mr. Thayer of his termination by registered letter dated May 9, 1997, in accordance with the requirements of 14 Del.C. Chapter 14. The letter advised Mr. Thayer that any request for a hearing must be sent by registered mail directly to Dr. Loftus and received in the District offices within ten days after Mr. Thayer's receipt of the termination notice. Mr. Thayer received the termination notice on May 10, 1997. By letter dated May 20, 1997, he requested a hearing before the Board; this letter, however, was postmarked May 21, and was not received by the District until May 22, 1997. Consequently, Mr. Thayer's request for hearing was denied because it was untimely.

Mr. Thayer was recalled on a half-time basis to teach General Mechanics to eleventh and twelfth grade students in August, 1997. In November, 1997, the District had a full-time vacancy in an Auto Tech position, which it offered to Mr. Thayer, pursuant to his recall rights under the collective bargaining agreement. Mr. Thayer accepted this position. Mr. Thayer asserts, without contradiction, he lost wages in the amount of \$6,729, during the September - November, 1997, period in which he was employed on a half-time basis.

ISSUE

Did the District terminate the employment of Phillip Thayer for his union activities in violation of 14 Del.C. §4007 (a)(1), (a)(2), (a)(3) and/or (a)(5)?

POSITIONS OF THE PARTIES

Charging Parties:

The Charging Parties allege Phillip Thayer was terminated from his employment and subsequently reinstated to half-time status in retaliation for his activities in support of union activities involving Delaware State Education Association, New Castle County Vo-Tech Education Association, and New Castle County Vo-Tech Custodial and Maintenance Association. They argue Mr. Thayer has been active in the NCCVTEA for many years, serving as a Building Representative, Treasurer, and, beginning in early 1997, as its Negotiations Committee Chairman. Mr. Thayer also participated in informational picketing outside of the District offices in support of the custodians during the spring of 1996.

The Charging Parties assert the District engaged in various actions designed to thwart union efforts. These include harassing several custodians through suspension, surveillance and transfers following the picketing in 1996, and initiating negative employment actions against members of the Association's bargaining team, including issuing a negative performance evaluation, discontinuing departmental chairmanship authority and discontinuing the General Mechanics program during the spring of 1997.

Charging Parties further assert the reasons set forth by the District for discontinuing the General Auto Mechanics program for Special Education students, and thereby terminating Mr. Thayer, are a sham, and are unsupported by the evidence presented. As such, those reasons are insufficient to establish the District would have reached the same decision in the absence of Mr. Thayer's protected activity.

Finally, the Charging Parties allege the District denied Mr. Thayer the right to a hearing on his termination on the procedural basis of timeliness. As a timely unfair labor practice charge was filed before PERB, whether or not a timely request for a hearing under the state tenure statute has no bearing on consideration of this charge.

District:

The District asserts Mr. Thayer was laid off due to declining enrollment in the Special Education career programs, generally, and in the General Mechanics program, specifically. It asserts the Charging Parties have failed to establish that Mr. Thayer either engaged in a significant level of protected activity and/or failed to establish the District had knowledge of any protected activity involving Mr. Thayer at the time of his termination.

The District argues Mr. Thayer's failure to submit a timely request for a statutory hearing under the state tenure statute estops Mr. Thayer from challenging the existence of a valid business reason for his termination. In the alternative, it argues the evidence establishes there was a declining trend in the number of special education students requiring placement in special education career programs. This trend resulted in the discontinuation of two out of four of these programs, including the General Mechanics program which Mr. Thayer taught.

The District asserts that although it knew it would need Mr. Thayer's services on a part time basis during the 1997-98 school year, it had no choice but to terminate him at the end of the 1996-97 school year, in accordance with the collective bargaining agreement. Under this agreement, Mr. Thayer had recall rights to any position for which he was certified to teach, and he was, accordingly, offered and accepted, a full-time Auto Tech position in November 1997.

OPINION

The issue in any case of alleged violations of 14 Del.C. §4007 (a)(1) and (a)(3), asserting union animus, is whether the effected employee's conditions of employment were adversely affected by the employer in order to retaliate or coerce the employee for engaging in protected activities. The law requires that an employee be afforded protection from retaliation where he or she has engaged in activity which is protected under the statute. The Public School Employment Relations Act specifically provides to employees the rights to "organize, form, join or assist any employee organization..."; to negotiate collectively and grieve through representatives of their choosing; to engage in other lawful concerted

activities for the purpose of collective bargaining or other mutual aid or protection; and to be represented by their exclusive representative without discrimination. 14 Del.C. §4003.

The evidence in this case does 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." Wilmington Firefighters Association, Local 1590 v. City of Wilmington ("WFFA")(ULP 93-06-085, PERB Binder II, p. 937 (1994)). The present charge involves the concept of "dual motive", as established by the National Labor Relations Board in Wright Line (251 NLRB 1083 (1980), enforced in NLRB v. Wright Line (662 F.2d 899 (1st Cir., 1981))), and adopted by the Delaware Public Employment Relations Board in WFFA, (Supra.). The Charging Party bears the burden of establishing a *prima facie* case 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. Colonial Ed. Assn. v. Colonial School District, Del.PERB, ULP 93-11-095 (PERB Binder II, p. 1071 (1994)).

In order to establish a *prima facie* case of unlawful employer retaliation, the charging party must first establish three facts, namely:

1. The employee engaged in protected activity;
2. The employer had knowledge of the employee's involvement in protected activity;
3. The employee's protected activity was a substantial or motivating factor for the employer's adverse action(s). Goldtex v. NLRB, 145 LRRM 2326 (4th Cir., 1994).

Proof of these elements support an inference the employee's protected conduct was a motivating factor in the adverse personnel action, and consequently, may constitute a statutory violation.

In the instant case, it is undisputed Mr. Thayer has been involved with the Association since his initial employment in 1984. He served for approximately two years as its Treasurer, in or around 1987. He also served as a Building Representative for Delcastle High School, a position he held at all times relevant to this charge. He served as the Chairman of the Association's negotiations committee during the period of negotiations for the current collective bargaining agreement. All of these Association

responsibilities and actions taken pursuant thereto fall within the parameters of Mr. Thayer's protected rights to join and assist an employee organization, and to negotiate collectively through an exclusive bargaining representative.

The Charging Parties further assert Mr. Thayer "also assisted in the organization of the [District's] custodians." Mr. Thayer testified, without specificity, that he engaged in activities relating to the custodian's union. He testified he participated in picketing on one occasion during the spring of 1996, outside of the District offices, along with a substantial number of other persons, including a large number of custodians from Delcastle High School. Association President Nancy Huebner testified "several [DSEA] Locals" participated to give support to the custodians in an effort to inform the general public that the custodians were working without a contract. Informational picketing constitutes concerted activity for the purpose of collective bargaining and lawful mutual aid within the meaning of 14 Del.C. §4003.

Consequently, the Charging Parties have established that Mr. Thayer engaged in concerted and collective activities which are protected by the Act.

The second element which must be established is that the employer had knowledge the employee engaged in the protected activity. Mr. Thayer held the position of Association Treasurer at least eight years ago. Superintendent Loftus testified he is generally not aware of whether individual teachers are or are not members of the Association unless they participate in either negotiations or are a member of the Association's Executive Board and participate in District/Association liaison meetings. Until the 1997 negotiations, Dr. Loftus testified he had no direct contact with Mr. Thayer acting in the capacity of an Association representative. Delcastle High School Principal John Moyle testified he knew that Mr. Thayer was one of the Association's Building Representatives for Delcastle High School. He further testified that as the Step One grievance decision-maker for Delcastle, he has received only three grievances in the past two years. Although he had no specific recollection of Mr. Thayer's involvement in any of these grievances, he testified Mr. Thayer may have been involved in one of them. Mr. Thayer provided no testimony or other evidence as to the extent of his involvement or level of profile with

District Administration in his capacity as one of the Association Building Representatives for Delcastle High School during the period in question.

Neither Dr. Loftus nor Principal Moyle had any specific recollection of the informational picketing involving the District's custodians in the spring of 1996. Principal Moyle testified that he does not interact with the custodial staff other than to request their services, as necessary, through the Supervisor of Buildings and Grounds. He specifically testified he had no knowledge of Mr. Thayer being involved in any organized activity involving the custodians. Dr. Loftus generally recalled the custodians had changed exclusive representatives, had been without a contract for two to three years, and had ultimately decertified their representative, approximately two to three years ago. He had no specific knowledge of Mr. Thayer being involved with the custodians' organizing or negotiating efforts.

Based on the evidence and testimony presented regarding Mr. Thayer's involvement with the custodians and their efforts to organize, the record fails to support the Charging Parties' contention that the employer had knowledge of Mr. Thayer's involvement. Furthermore, Mr. Thayer's testimony that District officials engaged in actions designed to harass custodians for their organization efforts and involvement in concerted and protected activity, was not considered in reaching the decision below as these allegations were both unsubstantiated and untimely.

Dr. Loftus did not dispute (although he had no specific recollection) that he was advised by Association President Huebner at a District/Association Liaison meeting on or about March 10, 1997, that Mr. Thayer would be the Association's Negotiations Chairman during the pending negotiations. The teams met for the first time to establish ground rules for the negotiations on or about April 17, 1997. Principal Moyle, who was also a member of the District's negotiating team, testified he did not know Mr. Thayer was on the Association's team until on or just before this first meeting of the negotiating teams.

The evidence and testimony presented support the conclusion the District had limited knowledge of Mr. Thayer's activities in support of the Association. Specifically, Principal Moyle was aware Mr. Thayer was one of the Association's Building Representatives for Delcastle High School. Dr. Loftus became aware that Mr. Thayer would be the Association's negotiations chairman at some time on or after March 10, 1997, while Mr. Moyle did not have this information until on or about April 17, 1997.

The third element Charging Parties must establish is that Mr. Thayer's protected activities, of which the District was aware, were a substantial or motivating factor in the District's decision to discontinue the General Mechanics program. The Association relies heavily on the timing of Mr. Thayer's termination notice, which he verbally received from Mr. Moyle on April 21 or 22, 1997, just a few days after the first negotiation session. The Charging Parties assert the coincidence of Mr. Moyle's recommendation to terminate Mr. Thayer, coupled with Mr. Thayer's heightened profile as negotiations Chairman, is dispositive of the issue of the District's motivation.

The proximity in time between an employee's protected activity and adverse employment actions has been accepted to support the inference that an unfair labor practice has been committed. WFFA, (Supra, p. 958). Such inferences, however, must be supported by substantial evidence which is adequate, in a reasonable mind, to support the conclusion reached.

The District produced sufficient evidence to establish a decreasing enrollment trend existed in the number of special education students who required placement in career programs designed specifically for special education students. As of the beginning of the 1996-97 academic year, Delcastle High School offered four special education career programs, including General Mechanics (which Mr. Thayer taught), Food Preparation, General Construction, and Supermarket Careers. Enrollment figures for these programs during the 1996-97 school year indicate that across all three years in which the programs were offered (i.e., sophomore, junior and senior years), General Mechanics and Food Prep had the lower enrollment levels. Association Exhibit 3. Principal Moyle testified initial administrative discussions were held during the 1995-96 academic year concerning the declining special education career program enrollment. At the close of the application period on or about March 1, 1997, it was projected there would only be fifteen 10th grade special education students who would require enrollment in the special education career programs. At this point, Principal Moyle recommended that two of the four programs be phased out. As a result General Mechanics and Food Preparation were recommended for elimination because of their lower enrollment numbers. District witnesses consistently stated the decision was made based on numbers and student interest, and was not based upon relative evaluations of the quality or performance of the teachers or the programs in question.

The timing of Principal Moyle's verbal notice to Mr. Thayer that Dr. Loftus would recommend to the Board of Education that the General Mechanics program be phased out was influenced by the requirements of Delaware education law. Section 1410 of Title 14 requires that where a Board of Education wishes to dispense with the services of any teacher, such notice must be given annually on or before May 15. The Board of Education was scheduled to meet on the evening of April 22, 1998, during which meeting they were to be presented with the Administration's recommendation to reduce the number of special education career programs by half as in response to a declining need for these programs. In order to meet the May 15, 1997, statutory deadline, the Board was required to consider its staffing and program levels for the next academic year at some point prior to May 15 and subsequent to the administration having the opportunity to consider the enrollment and career choices finalized on March 1, 1997. Furthermore, Dr. Loftus' testimony that certificated employees could not be reduced from full-time to part-time teaching status without terminating their services and recalling them to part-time status was unrefuted.

Mr. Thayer testified the timing of the verbal notice of the discontinuation of the General Mechanics program and the first meeting of the negotiating teams was "too precise" for him to believe other than that there was a connection between the two. He also testified other members of the Association's negotiating team were subjected to adverse employment actions, as a result of their involvement in negotiations. The record is void of any evidence corroborating these assertions. Alleged circumstances which merely raise a suspicion that an employer may have acted on prohibited motives are not sufficient to support an inference on which a *prima facie* case of union animus can be established. WFFA (Supra., p. 959)

Based on the evidence presented, the record requires a finding that the Charging Parties have failed to establish a *prima facie* case of union animus, or that the District otherwise acted in violation of 14 Del.C. §4007(a)(1) and/or (a)(3). Having concluded Mr. Thayer's protected activities did not influence the District's decision to discontinue the General Mechanics program, it is unnecessary to consider the issue of whether this Board has jurisdiction to determine whether a legitimate business

reason existed where a hearing under 14 Del.C. §1410 was not denied because the request was not timely filed.

Furthermore, the record contains no testimony or documentary evidence as to how Mr. Thayer's termination constituted either domination, interference with or assistance in the formation, existence, or administration of a labor organization or a refusal by the District to bargain in good faith. Accordingly, the charges that the District violated 14 Del.C. §4007(a)(2) and/or (a)(5) are dismissed without further consideration.

DECISION

The record fails to establish retaliation for Phillip Thayer's protected activity was a motivating or substantial factor in the District's decision to discontinue the General Mechanics program, which resulted in the termination of and subsequent rehiring on a part time basis of Phillip Thayer.

Having so concluded, there is no basis for finding a violation of either 14 Del.C. §4007(a)(1), (a)(2), (a)(3), or (a)(5), as alleged.

CONCLUSIONS OF LAW

1. The New Castle County Vocational Technical School District is a public school employer within the meaning of 14 Del.C. §4002(n).
2. The New Castle County Vo-Tech Education Association, DSEA/NEA is an employee organization within the meaning of 14 Del.C. §4002(h).
3. The Association is the exclusive bargaining representative of the District's certificated, non-administrative employees, within the meaning of 14 Del.C. §4002 (i).
4. Phillip Thayer is a public school employee within the meaning of 14 Del.C. §4002 (m).
5. Consistent with the foregoing opinion and findings, it is determined the employer's conduct, as specified, does not constitute a violation of 14 Del.C. §4007(a)(1), as alleged.
6. Consistent with the foregoing opinion and findings, it is determined the employer's conduct, as specified, does not constitute a violation of 14 Del.C. §4007(a)(2), as alleged.

7. Consistent with the foregoing opinion and findings, it is determined the employer's conduct, as specified, does not constitute a violation of 14 Del.C. §4007(a)(3), as alleged.

8. Consistent with the foregoing opinion and findings, it is determined the employer's conduct, as specified, does not constitute a violation of 14 Del.C. §4007(a)(5), as alleged.

WHEREFORE, this charge is dismissed.

IT IS SO ORDERED.

/s/Deborah L. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD

Principal Assistant/Hearing Officer

Delaware Public Employment Relations Bd.

DATED: 28 July 1998