STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

MARQUETTA MIXON,	:	
	:	
Charging Party,	:	
	:	
v.	:	**ULP No. 11-06-809**
	:	
CHRISTINA SCHOOL DISTRICT, DONNA ROYER, SHARON PINKNEY AND GARCIA GARNETT,	:	**Probable Cause Determination**
	:	
Respondents.	:	

Marquetta Mixon ("Mixon") is a public employee within the meaning of §4002 (m) of the Public School Employment Relations Act ("PSERA") 14 Del. C. Chapter 40 (1983).

The Christina School District ("District") is a public school employer within the meaning of §4002(n) of the PSERA. Donna Royer ("Royer"), Sharon Pinkney ("Pinkney") and Garcia Garnett ("Garnett") are public school employees of the District within the meaning of §4002(m) of the Act. Royer and Garnett are managerial and supervisory employees of the District.

On June 17, 2011, Charging Party filed an unfair labor practice charge alleging conduct by the Respondents in violation of §§4007(a)(1), (a)(2), (a)(3), (a)(4) and (a)(6) of the PSERA, which provide:

> §4007(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.

(4) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint, or has given information or testimony under this chapter.

(6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

Mixon alleges the District retaliated against her for her actions relating to an organizational effort by the United Automobile, Aerospace and Agricultural Implement Workers of America ("UAW"), specifically by removing notices of a UAW informational meeting which Mixon had posted in the Transportation Department break room after receiving permission from the District's Public Relations Officer; raising unwarranted objections concerning Mixon's approved leave of absence on June 14 and 15, 2011; and falsely and publicly accusing Mixon of violating several traffic signals while driving a District school bus.

On June 29, 2011, the District filed its Answer to the Charge alleging Mixon did not receive permission to post the flyer from either Garnett or Royer (who were authorized to give permission). The District also asserts Mixon placed copies of the UAW notice inside approximately 200 school buses operated by the District. Not until June 8, 2011, after the posted notices had been removed, did Garnett learn that the Manager of Public Information for the District, Wendy Lapham, had given Mixon permission to post the notices in the break room only. Respondent alleges that Mixon was simply informed by Pinkney that communications must be approved before posting but denies that Mixon was reprimanded for the posting.

The Distrit denies interfering with Mixon's scheduled leaves of absence in June, 2011, but admits that Mixon initially requested a leave of absence for June 10 and June 13, 2011. After her request had been approved, the District alleges Mixon cancelled her request. Royer mistakenly cancelled Mixon's other approved leave request for June 14 and June 15, 2011. When the error

was discovered, the District asserts in its Answer that a substitute bus driver was promptly located and Charging Party's approved leave request for June 14 and 15 was immediately reinstated.

The District asserts that Garnett was informed by the Assistant Superintendent that he had observed Mixon run two red lights earlier that particular day. Garnett met with Mixon simply to remind her to obey all traffic laws. The District denies Mixon was reprimanded.

In a section of its Answer entitled "New Matters", the District denies that either it or its agents interfered with Mixon's activities and further asserts those activities are prohibited under §4007(5),[1] of the PSERA. Further, the District asserts Mixon experienced no adverse consequences as a result of the purported retaliation.

On or about July 12, 2011, Mixon filed her Response to New Matter in which she maintains that the allegations contained in that section of the Answer entitled New Matter constitute legal conclusions to which no response is necessary. If a response is required, each allegation is denied. Mixon denies placing any flyers inside individual school buses or running two red lights at a time she asserts she would have been traveling on Interstate 95 (where there are no traffic lights) prior to picking up her first student passenger of the day.

DISCUSSION

Regulation 5.6 of the Rules of the Delaware Public Employment Relations Board requires:

> (a) Upon review of the Complaint, the Answer and the 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 that there is no probable

[1] Although Respondent's Answer does not specifically cite §4007(b)(5), it is presumed this was its intention since §4007(b)(5) concerns employee unfair labor practices. This section provides: "Distribute organizational literature or otherwise solicit public school employees during working hours in areas where the actual work of public school employees is being performed in such a way as to hinder or interfere with the operation of the public school employer. This paragraph shall not be construed to prohibit the distribution of literature during the employee's lunch hour or duty free lunch period or in such areas not specifically devoted to the performance of the employee's official duties.

> cause to believe that an unfair labor practice has occurred, the party filing the charge may request that the Board 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.
>
> (b) If the Executive Director determines that an unfair labor practice may have occurred, he shall where possible, issue a decision based upon the pleadings; otherwise, he shall issue a probable cause determination setting forth the specific unfair labor practice which may have occurred.

For purposes of reviewing the pleadings to determine whether probable cause exists to support the Charge, factual disputes revealed by the pleadings are considered in a light most favorable to the Charging Party in order to avoid dismissing a valid charge without the benefit of receiving evidence in order to resolve factual differences. *Flowers v. DART/DTC*, PERB Probable Cause Determination, ULP 04-10-453, V PERB 3179, 3182 (2004).

Concerning alleged violations of §4002(a)(1), and §4002(a)(2), in *Sussex Vo-Tech Teachers Assn. v. Bd. of Ed.*, ULP No. 88-01-021 (Del.PERB, PERB I 287, 976 (1998), PERB held:

> . . . where an (a)(1) and/or an (a)(2) violation is alleged, direct evidence that an employee was actually intimidated, coerced or restrained is unnecessary for a finding that an unfair labor practice was committed. Rather, an objective standard is to be applied when determining whether the conduct in question reasonably tended to interfere with either the free exercise of employee rights or the administration of a labor organization. *Wilmington Firefighters Assn, Local 1590 v. City of Wilmington ULP No. 93-06-085 (Del PERB, I PERB 937, 976(1994).*

The conduct attributed to the District by Mixon, if proven, could be construed as retaliation or discouragement of membership in an employee organization. Whether such violation occurred is subject to argument concerning whether the alleged conduct by the District, if proven, comes within the purview of 14 Del.C.§4007(a)(3) and (a)(4), as alleged.

The test for union animus (an alleged violation of §4007(a)(3)) is well-established. The Charging Party has the burden to establish a *prima facie* case that: 1) the employee was engaged in protected activity; 2) the employer was aware of the employee's activities; and 3) the protected activity was a substantial or motivating factor in the employer's action. If that is established, the burden shifts to the employer to establish the presence of a legitimate business interest which, despite the protected activity, would have resulted in the same decision. *Colonial Ed. Assn. v. Colonial School District,* ULP 93-11-095, II PERB 1071, 1077 (Del.PERB, 1994), citing *Wilmington Firefighters Assn. v. City of Wilmington*, ULP 93-06-085, II PERB 935, 954 (Del.PERB, 1994).

If any of the alleged violations are substantiated, there may also be a derivative violation of 14 Del.C. §4007(a)(6).

DETERMINATION

The pleadings raise factual issues which, when considered in a light most favorable to the Charging Party, support a finding of probable cause to believe that a violation of 14 Del.C. §4007(a)(1), (a)(2) (a)(3), (a)(4) and (a)(6) may have occurred.

A prehearing conference will be promptly scheduled to facilitate the further processing of this matter.

Date: August 8, 2011

Charles D. Long, Jr.,
Hearing Officer
Del. Public Employment Relations Board