

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

SMYRNA EDUCATORS ASSOCIATION, DSEA/NEA	:	
	:	
Charging Party,	:	<u>ULP No. 20-06-1234</u>
	:	
V.	:	
	:	
BOARD OF EDUCATION OF THE SMYRNA SCHOOL DISTRICT,	:	PROBABLE CAUSE DETERMINATION AND ORDER OF DISMISSAL
	:	
	:	
Respondent.	:	

Appearances

*Patricia P. McGonigle, Esq., General Counsel, Delaware State Education Association,
for Smyrna Educators Association, DSEA/NEA*

*James H. McMackin, III, Esq., Morris James, for Board of Education
of the Smyrna School District*

BACKGROUND

The Board of Education of the Smyrna School District (“District”) is a public school employer within the meaning of 14 Del. C. §4002(q) of the Public School Employment Relations Act, 14 Del. C. Chapter 40 (“PSERA”).

The Smyrna Educators Association, DSEA/NEA (“SEA” or “Association”) is an employee organization within the meaning of 14 Del. C. §4002(i). It is the exclusive representative, within the meaning of 14 Del. C. §4002(j), of a bargaining unit of Smyrna School District employees. The bargaining unit includes certificated non-administrative, paraprofessional, administrative, and custodial and maintenance employees of the District.

SEA and the District are parties to a current collective bargaining agreement which has a term of July 1, 2018 through June 30, 2021.

On June 9, 2020, SEA filed an unfair labor practice charge with the Delaware Public Employment Relations Board (“PERB”) alleging conduct by the District in violation of 14 Del. C. §4007(a)(1), and (a)(2), which state:

- (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.

SEA charges the District attempted to interfere with and/or restrain the Association and its members from exercising their statutory and contractual rights. Specifically, the Charge alleges the Superintendent and Assistant Superintendent issued “unprofessional, harassing and intimidating” emails to SEA’s President, Grievance Chairperson, and DSEA UniServ Director in response to the filing of a meritorious grievance.

On June 22, 2020, the District filed its Answer to the Charge admitting the facts alleged in the charge but denying SEA’s legal conclusions and assertions of violations of the PSERA. The District also asserted the alleged conduct does not constitute a statutory violation.

SEA responded on June 23, 2020, denying the District’s legal conclusion.

This probable cause determination is based on review of the pleadings submitted by the parties.

FACTS

The following facts are alleged in the Charge and admitted in the District’s Answer. The facts are set forth with the same particularity with which they were alleged and admitted.

On March 12, 2020, Governor John Carney declared a State of Emergency (“SOE”)

in response to the COVID-19 public health crisis. Pursuant to the SOE, public schools in the Smyrna School District were closed beginning Monday, March 16, 2020.

During the first two weeks of the SOE, custodian and maintenance employees (including part-time custodians) worked in the District's school buildings, undertaking a deep clean of the facilities. During this time period, teachers and other education support professionals were not present in the buildings, nor were they engaged in distance learning with students.

Article C2.5 of the parties' current collective bargaining agreement states:

Any employee who works during a declared state of emergency will be paid for the day, in addition to payment at the employee's regular rate for hours actually worked during the declared state of emergency.
Charge Exhibit 1.

On April 21, 2020, SEA and the District entered into a Memorandum of Understanding ("MOU") governing pay for custodians during the declared SOE due to COVID-19 ("COVID SOE"). The MOU provides that for the first two weeks of the COVID SOE, custodians and maintenance employees would be paid in accordance with Article C2.5 of the parties' collective bargaining agreement. The MOU amended Article C2.5 as follows:

Any employee who works during a **weather-related** declared State of Emergency will be paid for the day, in addition to payment at the employee's regular rate for hours actually worked during the declared State of Emergency. **If any employees are required to work during a declared State of Emergency that is not weather related, the District and SEA shall meet and mutually agree to a plan for compensating the affected employees.** *Charge Exhibit 2.*

Full-time custodians and maintenance employees received the additional pay for work undertaken during the first two weeks of the COVID SOE in their May 8, 2020 paychecks. According to the District's Finance Director, the paychecks included their regular pay for the period of April 12 - 25, 2020 (80 hours) plus an additional 80 hours to

reflect the additional payment for the 80 hours worked during the first two weeks of the COVID SOE, March 15 - 28, 2020.

Part-time custodians did not receive the additional payment for the March 15 – 28, 2020 period in their May 8, 2020 paychecks.

On or about May 6, 2020, SEA President, Fran Strosser sent an email to the District’s Finance Director and Assistant Superintendent Deb Judy inquiring about payment for the part-time custodians.¹

By email of May 11, 2020, Assistant Superintendent Judy responded, “Providing part timers with overtime would be unprecedented and not something we would like to do.”

On May 19, the SEA President again emailed the Finance Director and Assistant Superintendent Judy to request the District reconsider its position as part-time custodians had worked along with full-time custodians to conduct the deep cleaning of the District’s facilities during the first two weeks of the COVID SOE. SEA President Strosser apologized in the email for her eight day delay in responding to Assistant Superintendent Judy’s May 11 email.

President Strosser again emailed the Finance Director and Assistant Superintendent Judy on May 19 to share the results of her research to support her conclusion that the part-time custodians were part of the bargaining unit and should have received the additional compensation under both Article C2.5 of the collective bargaining agreement and the Memorandum of Understanding. She asked that she be advised as to when the part-time custodians might expect the additional payment.

President Strosser did not receive a response from either the Finance Director or

¹ The District admits this factual allegation “upon information and belief”. Answer ¶10.

Assistant Superintendent Judy. On May 21, she again sent an email to inquire about the issue and asking if the District would pay the part-time custodians. She again received no response to this email.

Article 4:1.5 of the parties' collective bargaining agreement states:

“Time Limits”- A grievance to be considered to have been asserted in timely fashion must have been brought to the attention of the immediate supervisor or the Superintendent (in the case of the Association's grievance) within 10 days² from the time when the employee or Association knew or should have reasonably known of the occurrence of the situation which is the subject of the grievance. The number of days provided at each level within which to provide a hearing and a decision is a maximum and every effort should be made to expedite the process. Time limits may, however, be extended by mutual written agreement. *Charge Exhibit 1.*

On the morning of May 22, 2020, SEA filed an Association grievance³ on behalf of part-time custodians seeking payment under Article C2.5 and the MOU, with the District's Superintendent Patrik Williams. Copies were also provided to Assistant Superintendent Judy, the SEA President and the SEA Grievance Chair.

The grievance was conveyed by an email from the DSEA UniServ Director Valerie Hoffmann, which stated:

Attached is a class action grievance filed by the SEA on behalf of all part-time custodians in the Smyrna School District. This grievance alleges a violation of Article C2.5 regarding additional pay for custodians during a State of Emergency (SOE). As you know, the parties developed a Memorandum of Understanding (attached) to amend Article C2.5 on April 21, 2020, which stipulates that *all* custodians and maintenance employees shall be paid for each day, in addition to payment at the employee's regular rate for hours actually worked during the first two weeks of the SOE. While full-time custodians received the additional pay in their May 8 paychecks, part-time custodians did not. When SEA requested that part-time custodians also receive the additional pay, the request was denied via email on May 11.

² Article 4.1.2 defines “days” as used in the grievance procedure to mean “work days”.

³ Charge Exhibit 3.

I understand this may have been based on a misunderstanding of the bargaining unit status of part-time employees, so we did get clarification this week from the PERB. Part-time custodians are included in the bargaining unit, and therefore, are covered by the negotiated agreement. I have attached a copy of the labor certificate for your review.⁴

If this can be corrected without a formal hearing, I welcome that. I'm also more than happy to meet, if you'd prefer a hearing. In the past, you have designated Deb Judy to hear the Level Two grievances, so I have copied her on this request. Please contact me [contact information provided] to let me know how you'd like to proceed, and/or to schedule a date and time for the grievance hearing. I look forward to working with you to resolve this matter... *Charge Exhibit 4.*

Superintendent Williams responded within less than half an hour, thanking the UniServ Director and advising that Assistant Superintendent Judy would be in touch.

Late in the afternoon of May 22, Superintendent Williams sent an email to the UniServ Director, SEA President, SEA Grievance Chair, copying Assistant Superintendent Judy. His email read,

Follow-up: As I am coming in to this late, today is the first I've heard of this. While [Assistant Superintendent Judy] is going to handle it, adhering to the timelines and even responding using your official form, I'll share with you what I've been saying to our staff and our leadership team throughout this pandemic. Stress is already high. The number one human consideration right now is to communicate. Up front communication solves problems early and lets folks know what is going on. It's the best tool we have to help everyone through this.

I would suggest that had you followed this very basic strategy during extraordinary times unlike any other in the last 102 years, [Assistant Superintendent Judy] would have been happy to work with you. As it is, she and I haven't heard from you in over a year. Until now. A good thing, on the one hand, but to underscore peaceful labor relations, maybe a quick text, call or email to [Assistant Superintendent Judy] would have saved you a lot of time, energy, and possibly stress, when none of us can afford it. Something to think about adding to your toolkit in the future... *Charge Exhibit 5.*

A few hours later that evening, UniServ Director Hoffmann responded to

⁴ The appended documents included records from the original certification of the bargaining unit in 1985 by the Department of Labor which defined the bargaining unit as "all full-time and part-time maintenance and custodial employees." DOL Case 164. *Charge Exhibit 4.*

Superintendent Williams' email:

Please see the attached emails which demonstrates [SEA's President's] attempts at trying to resolve this matter before filing a grievance. I agree that communication is essential. It's also a two-way process. Just to be clear, it was only after there was no response to [the President's] last three emails that we felt it necessary to proceed in a more formal way, especially since a timeline was involved... *Charge Exhibit 6*.

The Superintendent then responded to the UniServ Director again, this time at 9:01 p.m., on Friday evening of May 22, 2020. Although UniServ Director Hoffman had responded only to the Superintendent, he responded with copies to Assistant Superintendent Judy, SEA President Strosser and SEA Grievance Chair Maiden:

Did you call [Assistant Superintendent Judy]? Or text her? Or email her to inquire one last time before filing? Did you make any attempt to contact her to ask for a conversation?

No, of course not. You served a grievance on a Friday afternoon. You made no effort as the next leader in line to resolve a dispute. I have an opinion of that decision, but it's not fit for print here.

Effective leaders reach out before they ever write a formal document, Val. At least that's what [Assistant Superintendent Judy] does when there's a discipline issue, even an obvious one. Every time. She tries to make the process human, interactive, and she honors folks. Her reputation here in this district is impeccable.

You chose, instead, to try to dishonor her. And you wasted a lot of time – your members' time – doing this instead of just contacting her. And that does nothing but dishonor you.

[Assistant Superintendent Judy] has earned a whole lot better from you on the "two way street" she's tried to travel with you. Maybe give her the benefit of the doubt during a pandemic when we are all doing things we never thought we'd be doing and reach out to her before filing? Say, "Hey, [Assistant Superintendent Judy]? Can we resolve this before I have to file?" That's the classy move. The restorative move. The leader's move.

I always said as a teacher, "If someone comes to me first, the goal is to solve the problem. If someone goes to my supervisor first, the goal is to grandstand." And I have no respect for grandstanders. None. Zero. They aren't worthy of it.

You never contacted [Assistant Superintendent Judy]. You went right

past her and to me.⁵ I'm her supervisor. You have her number, I'm pretty sure. If you have lost it, here it is: [*phone number redacted*]

Though this grievance is small and classless during this period of time, and you, personally, decided not to give [Assistant Superintendent Judy] the benefit of the doubt that she has given the membership the past three years in her role, she will demonstrate to you what it means to be a high character person. A leader. A human being.

She will be sure to use all of the allotted time and the official form to respond to your grievance. During a pandemic. When most everyone has been hustling to help our staff and our families. Especially [Assistant Superintendent Judy]... *Charge Exhibit 7*.

On Tuesday, May 26, 2020, Assistant Superintendent Judy responded by email to Superintendent Williams and UniServ Director Hoffman, providing copies to the SEA President and Grievance Chair:

I spent most of the weekend thinking about the grievance and the message it sent to me ... but not a lot. Why? Because ... 1. I cannot fathom how a grievance would be filed for a matter completely resolvable without official documentation and 2. I am genuinely disappointed you were willing to dissolve a relationship I had attempted to foster over the past few years over a few thousand dollars. It's sad. Really sad. Only a few part-timers even worked during the time you are requesting double time.

I have attempted to build a bridge board by board with SEA. I have been HIGHLY COMMUNICATIVE ... to the point that Fran has repeatedly said "Thank you for getting back to me so quickly" on numerous occasions ... made sure your voices were heard and advocated for the things you felt were important even if I didn't from the stance of the District. Texts, phone calls, emails ... we communicate in many ways.

I truly appreciated Pat's kind words. We do not go around patting each other on the back so those words are not something I had heard before. I hoped I honored people, gave them respect for their craft and talents and genuinely try to "walk in people's shoes." I try to do right by the union even when we disagree.

The question about part-timers receiving double time was brought to my attention by Fran. I conferred with Jerry Gallagher. We had not paid double time to part timers before. In the midst of that conversation, Jerry had some things take him away including important work at the

⁵ Article 4.3.1 of the parties' collective bargaining agreement provides that when the Association files a grievance that affects a group of employees, "such grievance must be submitted to the Superintendent within the time lines designated in 4.1.5 and the processing of such a grievance shall begin at Level Two." *Charge Exhibit 1*, p. 5.

state level. I have had long days of support and meetings for our staff and administration. The implications of part timers as part of the CBA was an important conversation. Do they pay dues? Do they pay opt out fees? Do they even know they are a part of the union? This wasn't something Jerry and I disregarded. We were having some philosophical and possible precedent setting discussions. We hadn't even talked to Pat Williams yet, because we were still in the midst of gathering our thoughts. **I'm not apologizing for not responding back.** I always respond back. If I don't, there is clearly a reason why. Fran calls me and texts me and she knows that many things we discuss involve others in the District. We have had impromptu conference calls with Jerry at times! No question has ever gone unanswered... and this one wouldn't have either. A little grace would have gone a long way.

Regardless of how I feel about how this situation evolved, we will do what is right for our employees. I will submit it on the official paperwork. *Charge Exhibit 8.*

SEA President Strosser responded to Assistant Superintendent Judy's email later on May 26, 2020:

I totally agree that this grievance could have been resolved completely without official documentation, but sadly this did not occur. I made several attempts to resolve this issue on behalf of the custodians. Being that I did not receive a response from you and/or Jerry, other than to say that the District was not willing to honor our request, the next step was to file a grievance to protect the rights of our custodians.

I feel that I tried to communicate effectively and I felt that I expressed our situation clearly, several times and requested responses each time. I was waiting to hear back from you. If I had received a response from you and/or Jerry we could have certainly resolved this issue without official documentation. That didn't happen, however.

Being that I never received any type of response, the SEA had to follow the timeline and file a grievance to protect the rights of our custodians. Simply put, the SEA was just following the agreed upon guidelines on how to proceed. The SEA is required to protect the rights of all members, regardless of their numbers.

[Assistant Superintendent Judy], I agree that we do communicate very well. I feel strongly that we have a very good relationship. I do appreciate all that you do for the district. I know that you work tirelessly for this district. Believe me, it doesn't go unnoticed.

Please keep in mind that as SEA President, I also have a responsibility to my members as well. Sometimes, that responsibility will place us on opposite sides of an issue, like this situation does. It is not personal. I want you to know that even when that may occur, I respect you as a person and as a leader in this district. It is the issue that needed resolving

in this case, not the relationship. The SEA was simply looking out for its members and had a timeline that needed to be followed. I hope that you understand this. *Charge Exhibit 9.*

The Superintendent again responded later in the afternoon on May 26, 2020:

Thank you, [SEA President Strosser], but there are times when a big person with character simply says, “I apologize.” I don’t think I see that anywhere in this dissertation. What a shame. Takes character to do that when it’s called for, and over the years, it has been called for many times on both sides.

Our point is that [UniServ Director Hoffmann] abdicated her ethical, professional, leadership and human obligation to contact [Assistant Superintendent Judy] before filing. That’s a lack of character on her part. I’ve worked with folks in Capital and Smyrna at the state level, both as a teacher and an administrator. This is what they do.

Filing a grievance was poor all around, and the damage is done. [Assistant Superintendent Judy] is very good to SEA and DSEA. And there are times when the right thing to do is simply. apologize. [*Sic*] This is clearly one of those times. [Assistant Superintendent Judy] made that clear.

I don’t think I can recall ever hearing that from you or [UniServ Director Hoffmann]. Takes a really big person to do that, and to understand that a failure to extend grace when that’s what we are doing every day for our staff across the district is pathetic. Just flat out pathetic, and I won’t be bashful about sharing that opinion where I travel.

This email, as usual, tries to rationalize a lack of character and leadership. We won’t forget that. Yet again. *Charge Exhibit 10.*

On May 27, 2020, Assistant Superintendent Judy issued a decision granting the grievance. The Step 2 decision stated, “Pay part-time custodians “double time” pay for first two weeks of State of Emergency (March 15 – 28). Pay date 6/5/20.”

DISCUSSION

Rule 5.6 of the Rules and Regulations of the Delaware Public Employment Relations Board provides:

- (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 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 will 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.

There are no disputed facts in this case; consequently, a hearing is unnecessary.

The analysis therefore turns to consideration of whether the facts establish that an unfair labor practice was committed by the District. The burden is on the Association to support its allegations that the District has engaged in conduct in violation of the PSERA:

Direct evidence that any employee was actually intimidated, coerced or restrained, however, is not necessary. Rather the test is whether the conduct reasonably tended to interfere with either the free exercise of employee rights or administration of the labor organization.⁶ An objective standard is required in evaluating the "reasonable tendency" of the actions to interfere, restrain or coerce.⁷

SEA alleges the District has engaged in actions which interfere with, restrain, or coerce employees in or because the employees have exercised a right guaranteed by statute.

Employee rights are set forth in §4003:

School employees shall have the right to:

- (1) Organize, join, form or assist any employee organization, provided that membership in, or an obligation resulting from collective bargaining negotiations to pay any dues, fees or assessments or other charges to an employee organization shall be required as a condition of employment for certified professional school employees.
- (2) Negotiate collectively or grieve through representatives of their own

⁶ The decision noted it is consistent with the test established in *NLRB v. Ford*, 6th Cir., 170 F.2d 735 (1948).

⁷ *Sussex County Vo-Tech Teachers' Association v. Board of Education*, ULP 88-01-021, I PERB 287, 297 (PERB, 1988).

choosing.

- (3) Engage in concerted activities for the purpose of collective bargaining or other mutual aid or protection insofar as any such activity is not prohibited by this chapter or any other law of the State.
- (4) Be represented by their exclusive representative, if any, without discrimination.

The charge does not allege interference with any specific employee right, nor indicate which employee rights may have been infringed. The grievance filed by SEA, which appears to have triggered the unusual emails from the District administrators, was found to be meritorious. The negotiated grievance procedure worked effectively to protect the rights of the part-time custodians to be paid a premium for working during the first two weeks of the COVID SOE. The undisputed facts do not support the conclusion the rights of bargaining unit employees, as set forth in 14 Del. C. §4003, were interfered with or infringed upon by the emails.

The charge also alleges that the District dominated, interfered with or assisted the formation, existence or administration of the SEA. Historically this statutory prohibition⁸ was designed to prohibit employers from setting up company unions, supporting supervisors to become union officers or representatives, and/or providing funding or support for the union in a manner which served the employer's interests, making it difficult for the union to effectively serve the interests of the bargaining unit employees. Prohibited interference results from an employer's direct involvement in the functions of the union in a manner which impedes the effective functioning of the union, but does not control or dominate the union.

The PERB test for a §4007 (a)(2) violation requires the charging party establish

⁸ 29 U.S.C. §158(a)(2). The Delaware PERB looks to federal law under the National Labor Relations Board for guidance, recognizing that there are differences between the private and public sectors. *Seaford Education Association v. Bd. of Education*, ULP 2-2-84S, 1 PERB 1, 5 (1984).

that the complained of conduct reasonably tends to interfere with the administration of the labor organization. Similar to the factual basis of the *Sussex Co. Vo-Tech (Id.)* case, the charges in the instant case also arise from statements made by district administrators.

... Such statements must, either on their face or through surrounding circumstances, reasonably tend to interfere with employee rights or to exercise undue influence and/or coercion of employees or the Association in order for such statements to rise to the level of a violation of §4007(a)(1) and/or (a)(2).⁹ It is this attendant threat of reprisal or promise of benefit which violates the Act...

The Public Employment Relations Board is charged with promoting harmonious and cooperative relationships between public school districts and their employees in Delaware.¹⁰ The undisputed details of this interaction are a cautionary tale to those who choose to reduce to writing their frustrations and to “blast” them in emails to others, without taking the time necessary to understand the facts, context, or requirements of the negotiated grievance procedure. The grievance procedure found in Article 4 of the parties collective bargaining agreement provides that an Association grievance (filed on behalf of a group of employees) must be filed directly with the Superintendent and begins at Level Two. Further, the grievance must be filed within ten working days of the incident giving rise to the grievance. The full-time custodians received the premium payment on Friday, May 8, 2020; consequently, Friday, May 22 was the last day to file a timely grievance.

The filing of a grievance is not an act of defiance, an inhuman act, “pathetic”, nor does it demonstrate a lack of character, leadership, or grace. Filing a timely grievance to represent bargaining unit members is SEA’s contractual and statutory obligation. There is no reason to apologize for adhering to the terms of the mutually negotiated collective

⁹ Citing *NLRB v. Peterson*, 6th Cir., 157 F.2d 514 (1946).

¹⁰ 14 Del. C. §4001

bargaining agreement.

The tenor of the Superintendent's emails to the union representatives was unusually caustic. The time it took to draft and send these emails after normal school hours might have been better spent doing something less destructive of the District's relationship with the union. In order to find the administrators' emails interfered with the administration of the union, however, requires finding they tended to exert undue influence and/or coercion of the Association in the performance of its statutory obligations. In the last paragraph of the Superintendent's last email¹¹ he states he will not be bashful about sharing his opinion of SEA and DSEA "where [he] travels" and warns that "we won't forget". This comment was not publicly made in a manner which would impugn the SEA's reputation or ability to continue to effectively represent bargaining unit employees. The Superintendent would, however, be well advised to consider that should he choose to act in a manner to publicly discredit either SEA or DSEA because of the filing of a grievance in the future, it may provide the basis for another charge.

Although personally insulting and very coarse in tone, the emails did not interfere with the effective functioning of the grievance procedure. The Step 2 decision was issued by Assistant Superintendent Judy on May 27, 2020, five days after the grievance was filed. *Charge Exhibit 11*. The grievance was granted and the part-time custodians were to be paid on June 5, 2020 for the "double time" earned during the first two weeks of the COVID SOE.

The grievance procedure worked to correct the District's error in calculating the compensation due to the part-time custodians for the hours they worked cleaning the facilities during the pandemic. For this reason, the charge is dismissed as the evidence

¹¹ Charge Exhibit 10.

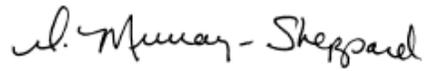
does not support the conclusion that the District violated 19 Del. C. §4007(a)(1) and/or (a)(2), as alleged.

DETERMINATION

Considered in a light most favorable to the Charging Party, the pleadings are not sufficient to establish that the District violated 14 Del. C. §4007 (a)(1) and/or (a)(2), as alleged.

Having found no probable cause exists to find that an unfair labor practice may have been committed, the Charge is dismissed.

DATE: February 15, 2021



DEBORAH L. MURRAY-SHEPPARD
Executive Director
Del. Public Employment Relations Bd.