

COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

JEANNE M. WALTER :
 :
 v. : Case No. PERA-C-04-391-E
 :
 CUMBERLAND VALLEY SCHOOL :
 DISTRICT, ET. AL. :

PROPOSED DECISION AND ORDER

On August 20, 2004, Jeanne Walter, (Walter or Complainant) filed a charge of unfair practices with the Pennsylvania Labor Relations Board (Board) alleging that Cumberland Valley School District (District or Respondent) and five District administrators violated Section 1201(a)(1) and (3) of the Public Employe Relations Act (Act) by transferring Walter from a high school English teaching position to a eighth grade reading class as retaliation for her use of the grievance procedure. On September 17, 2004, the Complainant filed an amended charge of unfair practices.

On October 5, 2004, the Secretary of the Board issued a Complaint and Notice of Hearing in which the matter was assigned to a conciliator for the purpose of seeking resolution of the matters in dispute through mutual agreement of the parties and December 3, 2004, in Harrisburg, was assigned as the time and place of hearing, if necessary.

The hearing was necessary, but the date was changed to January 31, 2005 and the location changed to Mechanicsburg, at the District Administrative offices. The hearing was held before Thomas P. Leonard, Esquire, a hearing examiner of the Board. A second day of hearing was required on April 29, 2005. At the hearings, all parties in interest were afforded a full opportunity to present testimony, cross-examine witnesses and introduce documentary evidence. Post-hearing briefs were submitted on July 5, 2005.

The Examiner, on the basis of the testimony presented at the hearing, and from all other matters and documents of record, makes the following:

FINDINGS OF FACT

1. That Cumberland Valley School District is a public employer within the meaning of Section 301(1) of the Act.
2. That the Cumberland Valley Education Association is an employe organization within the meaning of Section 301(3) of the Act and the exclusive representative of the District's professional employes.
3. That Jeanne Walter is an English teacher at the Eagle View Middle School. Prior to the 2004-2005 school year, Ms. Walter had taught at the Cumberland Valley High School for 30 years. (N.T. I 12-13).
4. That Walter has taught reading for fourteen (14) years and English for seventeen (17) years, and is certified as a reading specialist and in comprehensive English. She holds a Bachelor's degree in English and a Master's degree in Reading. (N.T. I 13, 40-41, 78-79; Respondent's Exhibits 1 and 2).
5. That on January 5, 2004, a student made a written complaint about Walter's teaching to the Grade 12 Principal, Steve Kirkpatrick. (N.T. I 19, 179, Complainant's Exhibit 1)
6. That on February 11, 2004, Walter met with Kirkpatrick and Dr. Frances Carothers, the District's English Department Supervisor, to discuss the student's complaint. She was assisted in the meeting by her Association's grievance chair, Reuben "Rich" Yeager. (N.T. I 27-29, 105-107, 127, Complainant's Exhibit 1)

7. That at the beginning of the meeting, Carothers told Walter that because she brought an Association representative to the meeting, that the student complaint letter would remain in her file. (N.T. I 28, Respondent's Exhibit 3 (p.4))
8. That Carothers later acknowledged that she should not have made her February 11 statement about the Association. (N.T. I 129, 179, Respondent's Exhibit 3, p. 4)
9. That Walter and the Association took the matter of the student complaint to a level II meeting because of concern that the student complaint was going to remain in her file. The matter then became a formal grievance, filed on March 4, 2004. The grievance was heard at a meeting on March 9, 2004. Yeager also assisted her at that meeting. Also assisting Walter was her private attorney, J. Michael Sheldon. Present for the District were Principal Dominic Cavallaro, Kirkpatrick, Carothers and Human Resources Director Michelle Zettlemyer. (N.T. I 110, Complainant's Exhibit 3, Respondent Exhibit 3)
10. That in the March 9 meeting, Cavallaro's tone of voice was loud. He also expressed frustration at having to deal with the Association over Walter's issue with the student's complaint. (N.T. I 119, 151-152, II 118)
11. That at the conclusion of the March 9 meeting, Cavallaro responded that the he would have to further investigate the matter of the student complaint. On March 11, he issued a written response to the grievance, denying the grievance and restating his intention to "investigate the truthfulness of the complaint in an effort to better serve the school community." (N.T. I 134, Respondent's Exhibit 3)
12. That by March 25, Cavallaro deemed his investigation to be complete. Cavallaro tried to hold a meeting with Walter and the Association, but was unable to do so because of conflicts over schedules of the Association representative and Cavallaro. (N.T. I 116, Complainant's Exhibits 3 and 4.)
13. That on April 8, 2004, the Association appealed the grievance to level III, the Superintendent level. (N.T. I 129, Respondent's Exhibit 3)
- 14 . That the matter of the student complaint was resolved, as evidenced by letter dated April 22, 2004, in which Superintendent Walker wrote Walter that the student complaint would be removed from her file. (N.T. I 136, Complainant's Exhibit 3, Respondent's Exhibit 3)
15. That the Association then appealed the grievance to the District's Board of Directors (level IV) because Walters wanted to listen to the tape of the March 9 meeting. On April 30, 2004 the Association withdrew the appeal before a hearing was held. (N.T. I 137, Respondent's Exhibit 3)
16. That by letter dated April 22, 2004, Allison Rose, an eighth grade English teacher at the Eagle View Middle School, wrote to Dr. B. Jean Walker, Superintendent of the District, requesting childrearing leave for the 2004-2005 school year. (N.T. II 9, 34-35, 151, Respondent's Exhibit 4).
17. That Walker, upon receipt of Rose's letter, forwarded it to the Human Resources office for posting of the position in accordance with the collective bargaining agreement, Article III. (N.T. II 9-12, Joint Exhibit 1).
18. That the position of long term substitute English teacher at Eagle View Middle School was posted as Human Resource Memorandum #03-54 on May 13, 2004. It was posted as one of a series of electronic postings on that date, number #03-49 through #03-56, that were e-mailed as attachments to each District building, and also printed and physically posted at each building. At least one teacher, Susan VanZile, saw the notice of vacancy. (N.T. II 10-12, 28-29, 172-173, Respondent's Exhibits 5, 6).
19. That the District's administrators have designated eighth grade English as an important position to which special attention should be given to any vacancies there. The District's reason for this was because it is one of only three grades in which Pennsylvania State Assessment testing (PSSA) is accomplished. The grades from that

testing are published in the newspaper and monitored by the federal government in accordance with the No Child Left Behind Law to determine whether a school district is making "adequate yearly progress" under that statute. Although one-year childrearing leaves of absence are normally filled by long term substitute teachers who are new to the profession and inexperienced, the Superintendent did not believe that it was appropriate to utilize a long term substitute in this eighth grade English vacancy. (N.T. II 35-38).

20. That Walker, in deciding who to assign to the vacancy, consulted with Harold Bricker, the Assistant Superintendent of Secondary Education, and with Dr. Frances Carothers, the English Department Supervisor, both of whom concurred that it was not appropriate to place a long term substitute in this vacancy but was preferable to have an experienced teacher in the eighth grade vacancy. Furthermore, the District could make such a decision unconstrained by the collective bargaining agreement, because transfer decisions are not subject to the grievance arbitration process. These administrators then decided that Walter would be transferred to the Eagle View Middle School for the 2004-2005 school year because of her abilities and credentials. (N.T. II 38-43, 58, 100-101, 134-135, 152)

21. That Bricker first raised Walter's name as being someone with the needed background and expertise in English and reading, as well as writing. Dr. Carothers was also familiar with Walter's credentials and concurred that she would be ideal for the vacancy. Walker and Bricker then later conferred with the Eagle View Principal, Kaye Wishard, concerning the assignment of Walter to the eighth grade vacancy. That Carothers affirmed Bricker's suggestion to transfer Walter because at the time, Walter was the only teacher who had the secondary English certificate, the master's in reading and the reading specialist teaching in a classroom. (N.T. II 38-43, 58, 100-102, 134-135, 152)

22. That Bricker, in keeping with the practice of the District for transfer cases, drafted a letter to the person being transferred, and the immediate supervisor then met with the person about the letter and the new assignment. Bricker's letter to Jeanne Walter was dated May 20, 2004, and set forth the reasons for the transfer. (N.T. II 47, Respondent's Exhibits 6 and 8).

23. That Carothers was asked to meet with Walter to discuss the letter and the new assignment. (N.T. II 47).

24. That copies of Bricker's letter were sent to the other administrators involved in the decision to transfer: Carothers and Kaye Wishard. Copies were also sent to Michelle Zettlemoyer, Director of Human Resources, and to Dominic Cavallaro, High School Principal, neither of whom had been aware of the decision to transfer prior to receiving the letter, but each of whom needed to be aware of the transfer decision. (N.T. II 16, 43-44, 58-59, 135-139, 169-172).

25. That pursuant to the collective bargaining agreement, the District was required to notify Jeanne Walter of her transfer to Eagle View by July 1, 2004 (Article III-B) or at least thirty (30) days in advance of transfer except in cases of emergency (Article III-E). In the case of Walter, Walker determined that additional notice would be given as Walter had asked to be notified as far in advance as possible of any change in her schedule or her working conditions. (N.T. II 52).

26. That Walker also explained that in the 2004-05 school year, writing was going to be tested for the first time in the eighth grade rather than the ninth grade, so that Walter's writing skills and background were a part of her decision that she was the optimal person for the eighth grade assignment. (N.T. II 95-96, Respondent Exhibit 2).

27. That Walker also believed that the new assignment was going to be less difficult for Walter because she would only have to prepare for one class per day, since the lesson would be repeated to similar classes the rest of the day. In the high school, Walter had to prepare for multiple classes each day that were not the same. (N.T. II 52-54).

28. That Cavallaro first learned of Walter's transfer when he received a copy of Walker's May 20 transfer letter. (N.T. II 169, Respondent's Exhibit 8)

29. That prior to Walter's transfer, Cavallaro had no discussions with Walker, Carothers or Bricker about the transfer. (N.T. II 169-170)

30. That there have been other transfers of other teachers from the high school and Cavallaro has also not been made aware of these until after they occurred. (N.T. II 171)

31. That Walter filed a grievance over the transfer. The grievance proceeded to the Board, which denied the grievance. Under the collective bargaining agreement, the Board level is the last level of appeal for grievances over transfer decisions; such grievances are not arbitrable. (N.T. II 163)

DISCUSSION

The Complainant's charge of unfair practices alleges that the District transferred her from a high school teaching position to a middle school teaching position in retaliation for her requesting a hearing over a student complaint about her work. The Complainant alleges that the District's action violated Sections 1201(a)(1) and (3) of the Act.

The District defends the charge by contending that the complainant has not made a prima facie case of discrimination and that even if she had done so, the District has proven that it would have made the same transfer decision in the absence of the Complainant's protected activity.

In order to sustain a charge of discrimination under Section 1201(a)(3) of the Act the complainants must prove a prima facie case. The elements of a prima facie case are that the employe engaged in protected activity, the employer was aware of that protected activity, and but for the protected activity the adverse action would not have been taken against the employe. Saint Joseph's Hospital, 473 Pa. 101, 373 A.2d 1069 (1977). The complainants must establish these three elements by substantial and legally credible evidence. The Union must establish these three elements by substantial evidence. Shive v. Bellefonte Area Board of School Directors, 317 A.2d 311 (Pa. Cmwlth. 1974). St. Joseph's Hospital, supra.

As for the first element, the complainant showed that she engaged in protected activity by vigorously questioning a student complaint about her teaching. She asked Association building representative, Reuben Yeager, to attend a February 11, 2004 meeting with a team of administrators, including 12th Grade principal Kirkpatrick to discuss how the District improperly handled a student complaint against her. This meeting did not resolve the matter. Accordingly, she asked the Association to assist her in taking the issue to three higher levels of the grievance procedure, up to the board of school directors. Eventually, at the highest administrative level, the matter was eventually resolved to her satisfaction.

As for the second element, employer knowledge, the complainant also satisfied her burden of proof. The complainant proved that the public employer knew that she exercised the protected activity, since officials of the District were present at the various meetings at the different steps of her grievance.

The third element of complainant's discrimination charge requires proof that the employer was motivated by Walter's use of the grievance procedure. In a charge of discrimination it is the employer's motivation which creates the offense. Perry County v. PLRB, 364 A.2d 808(Pa. Cmwlth. 1994)

The complainant was unable to make a case based on direct evidence such as an admission by the District's officials that the transfer was a retaliatory measure for her exercise of the grievance process. The complainant argues that Cavallaro, her principal, threatened to transfer her during a discussion over the grievance of the student complaint. The District disputes this assertion and offered evidence to rebut it. Having observed the demeanor of the witnesses on this point, I must conclude that Cavallaro

displayed frustration at Walter during this meeting but he did not threaten to transfer her. In any event, Cavallaro was not one of the administrators involved in the decision to transfer her. These administrators were Walker, Bricker, Carothers, and later, the receiving principal, Kay Wishard. The complainant argues that Bricker was Cavallaro's mentor, and that, from this fact, it can be inferred that Bricker recommended Walter's transfer to help Cavallaro. However, arriving at such a conclusion requires speculation, and Board precedent cautions against such an approach to the evidence. Shive, supra.

Since improper motivation is rarely admitted and since the decision makers who are accused of anti-union motivation do not always reveal their inner-most private mental processes, the Board allows the fact finder to infer anti-union animus from the record as a whole. PLRB v. Montgomery County Geriatric and Rehabilitation Center, 13 PPER ¶ 13242 (Final Order, 1982); St. Joseph's Hospital, supra. However, an inference of anti-union animus must be based on substantial evidence consisting of "more than a mere scintilla and must do more than create a suspicion of the existence of the fact to be established." Shive supra at 313. The Board will allow union animus to be inferred from various factors. Child Development Council of Centre County, 9 PPER ¶ 9188 (Final Order, 1978). Such factors as timing, statements of supervisors and the failure of the employer to adequately explain the reason for its decision are factors that may be used to infer animus. Child Development Council of Centre County, supra.

The Complainant urges the Board to conclude that the District has failed to adequately explain the reason for the transfer, and from this failure, to infer that the real reason was retaliation against the complainant for her exercise of protected rights. As a threshold issue, the Complainant argues that the District was unable to explain the rationale behind the decision to replace an 8th grade teacher with a high school teacher who had not taught in middle school for over a decade. However, Superintendent Walker testified credibly that the District had determined that it was important to have an experienced teacher with reading and writing skills for 8th grade because of new statewide PSSA writing tests being given for the first time. The District also wanted to improve the PSSA scores of the 8th grade at the Eagle View Middle School. The District's decisions on who would fill the opening were based on this foundation.

The complainant argues that the District's foundation rationale is not to be believed, taking issue with the District's overlooking a drop in PSSA scores at the high school. However, as the District points out, the drop in the high school scores was an almost imperceptible decline of two points. Furthermore, superintendent Walker testified credibly that the District administrators had made a policy determination that having a successful result for the first time state writing test of 8th graders was an important District goal in itself.

The Complainant argues that even if the Board accepts the District's foundation rationale for appointing an experienced teacher to the position, the District did not present a convincing case that Walter was the best candidate who met the District's guidelines. Initially, the complainant argues that any testimony from Carothers should be discounted because of Carothers' own history with Walter. The Complainant argues that Carothers displayed a retaliatory attitude toward Walter for her February 11, 2004 use of the Association to assist her with her grievance over the student complaint. There is no dispute that Carothers made the remark on February 11. Indeed, the remark is troubling because it demonstrates a lack of awareness of employee rights. However, in the hearing, Carothers admitted making the remark. She let Walter know that she should not have made the remark. Carothers' candor in admitting the remark bolsters her credibility on the more important factual inquiry of whether Carothers is to be believed that Walter was the best qualified person for the opening. Having observed Carothers' demeanor, there was nothing to lead me to doubt her credibility on the issue of whether she sincerely concluded that Walter was the most qualified person for the vacancy.

The Complainant argues that the failure to adequately explain factor is supported by the fact that there were other teachers who could have been selected for the transfer. The Complainant contends that the District could have selected either Susan VanZile, Matthew Gay, Brian Martin or Joan Kanavy. However, none of these teachers stand out as clearly better candidates than Walter. VanZile comes the closest to being a comparably

qualified candidate. Indeed, she testified that she was qualified for the vacancy and was recently transferred to the Good Hope Middle School to teach English shortly after Walter was transferred. However, she does not possess the Masters degree in reading that Walter holds. The three other teachers do not come close to be being comparable. Gay and Martin are not certified in reading. Kanavy is at the high school, but she just recently transferred there. Additionally, Kanavy does not have the same years of experience as Walter. The Complainant has not clearly demonstrated that any of these teachers had demonstrably superior qualifications compared to Walter or why the District was manifestly wrong in selecting Walter over them.

The Complainant proved that the District's transfer decision caused her serious distress. However, the collective bargaining agreement permits such a transfer, which means that the complainant can only prevail in this unfair practice charge if she can show that the District's motivation was due to her exercise of protected activity. The District presented a convincing case that it transferred Walter without regard to her protected activity. The District called several witnesses, who testified that the transfer decision had nothing to do with Walter's filing of grievances in general or the student complaint grievance in particular. Among the District's witnesses were the three top administrators who were the decision makers on Walter's transfer. The witnesses testified that the District's motivation was to find an experienced, qualified replacement for an eighth grade reading teacher and that Walter was the teacher who was best qualified. Accordingly, the third part of the St. Joseph's Hospital test for proving a discriminatory action has not been proven.

CONCLUSIONS

The examiner, therefore, after due consideration of the foregoing and the record as a whole, concludes and finds:

1. That Cumberland Valley School District is a public employer within the meaning of Section 301(1) of the Act.
2. That Jeanne Walter is a public employe within the meaning of Section 301(2) of the Act.
3. That the Board has jurisdiction over the parties hereto.
4. That the District and the five individual respondents have not committed unfair practices within the meaning of Sections 1201 (a)(1) or (3) of the Act.

ORDER

In view of the foregoing and in order to effectuate the policies of the Act, the examiner

HEREBY ORDERS AND DIRECTS

that the charge of unfair practices is dismissed and the complaint issued thereon is rescinded.

IT IS HEREBY FURTHER ORDERED AND DIRECTED

that in the absence of any exceptions filed with the Board pursuant to 34 Pa. Code § 95.98(a) within twenty (20) days of the date hereof, this order shall be final.

SIGNED, DATED AND MAILED at Harrisburg, Pennsylvania, this eighteenth day of May, 2006.

PENNSYLVANIA LABOR RELATIONS BOARD

THOMAS P. LEONARD, Hearing Examiner