COMMONWEALTH OF PENNSYLVANIA
Pennsylvania Labor Relations Board

BROOKVILLE AREA EDUCATION ASSOCIATION PSEA/NEA	:	
v.	:	Case No. PERA-C-06-562-W
BROOKVILLE AREA SCHOOL DISTRICT	:	

PROPOSED DECISION AND ORDER

On November 15, 2006, the Brookville Area Education Association/PSEA/NEA (Association) filed with the Pennsylvania Labor Relations Board (Board) a charge of unfair practices alleging that the Brookville Area School District (District) had violated sections 1201(a)(1) and 1201(a)(3) of the Public Employe Relations Act (Act) by "fail[ing] to rehire Ray Ewing . . . for the position of basketball coach." On December 14, 2006, the Secretary of the Board issued a complaint and notice of hearing directing that a hearing be held on February 1, 2007, if conciliation did not resolve the charge by then. On December 29, 2006, the District filed an answer and new matter alleging that the charge should be dismissed "as untimely and/or without merit." The hearing examiner subsequently continued the hearing at the request of both parties. On March 1, 2007, the hearing was held. Both parties were afforded a full opportunity to present evidence and to cross-examine witnesses. On May 1, 2007, each party filed a brief by deposit in the U.S. Mail.

The hearing examiner, on the basis of the evidence presented at the hearing and from all other matters of record, makes the following:

FINDINGS OF FACT

1. On December 11, 1970, the Board certified the Association as the exclusive representative of a bargaining unit that includes teachers employed by the District. (Case No. PERA-R-277-W)

2. In 2000, the District hired Mr. Ewing as a teacher. (N.T. 11-12)

3. In the fall of 2001, the District hired Mr. Ewing as the first assistant girl's basketball coach. The District subsequently rehired him as the first assistant girl's basketball coach on an annual basis through the 2005-2006 school year. (N.T. 12-13)

4. On June 15, 2006, at 2:03 P.M., Mr. Ewing on behalf of the Association's negotiations committee sent to the members of the bargaining unit an email as follows:

> "Folks today is day 716 without a contract. Things seem to be going no[]where, as usual. [T]he negotiating committee discussed a few ideas and the first one we want to undertake is to have 100% attendance at the board meeting on Monday. Besides that, (this is the fun part) we want everyone to speak during the public comment time. (The board seems to hate that time, so let[']s extend it.) It can be as simple as, 'Hi, my name is Mr. Ray Ewing. I have been here for six years and I would like a contract' or feel free to talk for a few minutes. It will make for a long night, BUT WE HAVE TO SHOW THAT WE ARE STILL TOGETHER ON THIS. That will show them that we are NOT falling apart and that we are still here and are still going to be heard. Please pass this on to others. I know some of you (my father-in-law included) don't check email. Talk about this, bring it up, make sure everyone knows.
>
> Those of you who are not tenured yet, you are always welcome to attend, but it is NOT recommended that you speak.
>
> Also, we want everyone to wear BLACK.
>
> I have had some students lately ask me about the strike/contract situation and I have explained the process to them (they really have no clue, even the smart ones). I took great measures to not try to sway them, but to just explain the process.

Once they understood it, they were REALLY fired up and agree with us. A few asked me if they could speak to the board about it. I said, 'Yes.' I feel that the more support we get there, that is not from the union, the stronger our case will be. If you know students who are for us and want to speak, get them there.

Let[']s get everyone there. I know that we won't really get 100%, but it is a good goal. I know some of you don't live close to here, but it takes all of us to show them that we won't take this.

We ARE a GREAT faculty and we DO deserve to get paid fairly, remember that."

(N.T. 16-18; Association Exhibit 1)

5. Mr. Ewing was supervising two students in a scheduled advanced placement biology lab when he sent the email. (N.T. 17)

6. On August 21, 2006, the District hired John Elkin as the first assistant girl's basketball coach for the 2006-2007 school year. (Joint Exhibit 4)

DISCUSSION

The Association has charged that the District committed unfair practices by "fail[ing] to rehire Mr. Ewing . . . for the position of basketball coach." As set forth in the specification of charges, the Association alleges that the "District's failure to rehire Mr. Ewing was based solely on Mr. Ewing's actions in encouraging other professional employes to attend a public School Board meeting in order to request that the District and the Association settle their contract dispute." As the Association established at the hearing, Mr. Ewing on behalf of its negotiations committee sent to members of the bargaining unit an email encouraging them to attend a meeting of the District's board of directors in order to voice their displeasure with the status of negotiations for a successor collective bargaining agreement (finding of fact 4). As the Association also established at the hearing, the District thereafter did not rehire Mr. Ewing as the first assistant girl's basketball coach as it had in the past (findings of fact 3, 6). According to the Association, Mr. Ewing was engaged in an activity protected by the Act when he sent the email.

The District has answered that the charge should be dismissed "as untimely filed and/or without merit." In its brief, however, the District only contends that the charge should be dismissed for lack of merit. According to the District, it did not rehire Mr. Ewing as the first assistant girl's basketball coach because of parental complaints about his coaching and because of the contents of unrelated emails he sent.

The timeliness of a charge is jurisdictional, Delaware County, 29 PPER ¶ 29087 (Final Order 1998), so the timeliness of the charge will be addressed even thought the District no longer contends that the charge is untimely filed. In order to be timely, a charge must be filed within four months of when the charging party knew or should have known of the unfair practices charged. Thomas v. Commonwealth of Pennsylvania, PLRB, 483 A.2d 1016 (Pa. Cmwlth. 1994). As set forth in finding of fact 6, the District hired an individual other than Mr. Ewing to be the first assistant girl's basketball coach on August 21, 2006. The charge was filed on November 15, 2007, which is less than four months thereafter. Thus, it is apparent that the charge is timely filed.

An employer commits unfair practices under sections 1201(a)(1) and 1201(a)(3) if it discriminates against an employe for having engaged in an activity protected by the Act. St. Joseph's Hospital v. PLRB, 473 Pa. 101. 373 A.2d 1069 (1977). If, however, the employe did not engage in a protected activity, then no such unfair practices may be found. City of Philadelphia, 32 PPER ¶ 32009 (Final Order 2000). The conduct of union business by an employe during working hours is not a protected activity. Id., citing Ellwood City Police Wage and Policy Unit v. PLRB, 736 A.2d 707 (Pa. Cmwlth. 1999). If the charging party does not present a prima facie case of discrimination during its case-in-chief, the employer's defense to the charge need not be considered. Montour County, 35 PPER 147 (Final Order 2004).

The charge must be dismissed because the Association did not present a prima facie case during its case-in-chief. As set forth in findings of fact 4-5, the record shows that Mr. Ewing was supervising two students in a scheduled advanced placement biology lab when he sent the email encouraging members of the bargaining unit to attend a meeting of the District's board of directors in order to voice their displeasure with the status of negotiations for a successor collective bargaining agreement (findings of fact 4-5). As noted above, the conduct of union business during working hours is not a protected activity. City of Philadelphia, supra (an employe was not engaged in a protected activity when he called his union during working hours); Ellwood City Police Wage and Policy Unit, supra (employes would not be engaged in a protected activity if they processed grievances during working hours). There is, therefore, no basis for finding that Mr. Ewing was engaged in a protected activity when he sent the email. See also City of Pittsburgh, 33 PPER ¶ 33103 (Proposed Decision and Order 2002)(an employe was not engaged in a protected activity when he left his assigned patrol area to represent another employe at a disciplinary hearing during working hours); Aliquippa School District, 32 PPER ¶ 32034 (Proposed Decision and Order 2001)(an employe was not engaged in a protected activity when she left school to attend an arbitration hearing during working hours).

Given the foregoing disposition, the District's defense to the charge need not be considered.

CONCLUSIONS

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

1. The District is a public employer under section 301(1) of the Act.

2. The Association is an employe organization under section 301(3) of the Act.

3. The Board has jurisdiction over the parties.

4. The District has not committed unfair practices under sections 1201(a)(1) and 1201(a)(3) of the Act.

ORDER

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

HEREBY ORDERS AND DIRECTS

that the complaint is rescinded and the charge dismissed.

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 twenty-second day of May 2007.

PENNSYLVANIA LABOR RELATIONS BOARD

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Donald A. Wallace, Hearing Examiner