

VERMONT LABOR RELATIONS BOARD

GRETCHEN BAILEY,)	
)	
v.)	DOCKET NO. 21-35
)	
)	
PATRICIA A. HANNAFORD REGIONAL)	
TECHNICAL SCHOOL DISTRICT)	

ORDER

The matter before the Vermont Labor Relations Board (“Board”) is whether to issue an unfair labor practice complaint. On October 12, 2021, Gretchen Bailey (“Ms. Bailey”) filed an unfair labor practice charge against the Patricia A. Hannaford Regional Technical School District (“Employer” “School District”) alleging it violated 21 V.S.A. § 1726 (2-4) by retaliating against her for participating in a unit clarification proceeding before the Board. Ms. Bailey’s charge asserts that her Employer failed to renew her one-year employment contract because Grievant attempted to join the support staff bargaining unit of Addison Central Education Association (“Association”).

On November 5, 2021, the Employer filed a response to the charge claiming the contract was not renewed because of Ms. Bailey’s underperformance. The Employer asserts that there is no evidence of anti-union animus, that the decision to not renew her contract occurred fourteen (14) months after Ms. Bailey initiated her quest to join the union, and substantial evidence supports that the non-renewal decision was based on Ms. Bailey’s repeated performance issues and her failure to correct her performance issues.

On January 28, 2022, Board Executive Director, Judith L. Dillon, held an investigatory conference. Ms. Bailey participated in the conference and was represented by her attorney

Matthew M. Shagam. The Employer participated through Superintendent Dana Peterson and was represented by its attorney William F. Ellis.

Statement of Facts

1. Ms. Bailey had been employed by the Employer, and its predecessor-the Addison Central School District, since 1999. During her tenure she held the position of Bookkeeper from 1999-2005. In 2005, her position changed to Administrative Assistant to the Business Manager. Addison Central Education Association (Hannaford Regional Technical School District Support Staff Union) and Hannaford Career Center, 35 VLRB 503 (2020).
2. In 2019, Ms. Bailey's title changed to Financial Assistant to the Business Manager, in recognition of the increased job duties she had assumed over time. Id. at 504, 505.
3. Ms. Bailey was employed by Employer for the 2020-2021 school year (July 1, 2020-June 30, 2021) as the Financial Assistant to the Business Manager pursuant to a contract dated September 2020.
4. The Contract includes the following General Terms.
 1. The employee agrees to perform the duties of Administrative Assistant to the Business Manager in a manner satisfactory to the administration.
 2. In the event that the employee wishes to terminate employment, the administration shall be notified in writing fourteen (14) calendar days in advance of termination.
 3. The employee without liability to the School District agrees to accept termination of this agreement whenever services prove unsatisfactory to the administration. In the case where the employee is newly appointed, the first six (6) months shall be a probationary period and the fourteen (14) day notification may be waived by the administration.
 4. This contract is subject to the State of Vermont and the rules, regulations and policies of the Patricia A. Hannaford Technical Center.

Employer Exhibit B.

5. On January 30, 2020, the Association filed a unit clarification petition seeking to include the Ms. Bailey's position to the support staff bargaining unit represented by the Association. Addison Central Education Association (Hannaford Regional Technical School District Support Staff Union) and Hannaford Career Center, 35 VLRB 503 (2020).
6. Ms. Bailey testified at the August 2020 hearing on whether her position was confidential and should be excluded from the bargaining unit. Id.
7. In September 2020, the Employer through its Superintendent and Ms. Bailey executed an Employment Contract between Employer and Ms. Bailey for the school year 2020-2021, beginning July 1, 2020, through June 30, 2021. Exhibit B.
8. On November 4, 2020, the Board issued its unit clarification decision. The Board concluded that the Financial Assistant position should be excluded from the bargaining unit as a confidential employee because the duties relating to budgetary matters would make membership in, or representation by, an employee organization incompatible with official duties. 35 VLRB 503, 513. As a result, Ms. Bailey is not a member of the Association.
9. On April 14, 2021, the Employer notified Ms. Bailey that her contract would not be renewed for the 2021-2022 school year "on the basis of underperformance." Bailey unfair labor practice charge ¶ 4. The notice was included in a letter that outlined the recurring performance issues related to administrative and financial management. The letter outlined problems with budgeting, accuracy, bookkeeping best practices. The letter also outlined the history of these performance deficiencies and that they have spanned many years. Employer Exhibit E.

OPINION

The Board has discretion on whether to issue an unfair labor practice complaint. 21 V.S.A. 1727 (a). See also Lopez v. Chittenden Transportation Authority, 24 VLRB 255, 157 (2001). The Board will not issue an unfair labor practice complaint unless the charging party alleges sufficient facts for the Board to conclude that the Employer may have committed an unfair labor practice. See Burke Board of School Directors v. Caledonia North Education Association, 17 VLRB 187 (1994).

Ms. Bailey's term of employment was governed by her employment contract with Employer. Ms. Bailey was not a member of the support staff bargaining unit. The contract expired on July 1, 2021. There was nothing in the Contract that required renewal. There was no requirement or prerequisite to non-renewal. The notice termination provision related to termination during the term of the contract. The contract was not terminated during its term. Ms. Bailey continued her employment through the expiration of the contract term, July 1, 2021.

Ms. Bailey claims the non-renewal was an unfair labor practice in violation of 21 V.S.A. § 1726 (2), (3), and (4). The unfair labor practices statute provides in pertinent part:

- (2) To determine or interfere with the formation or administration of any employee organization or contribute financial or other support to it; provided that an employer shall not be prohibited from permitting employees to confer with the employer during working hours without loss of time or pay.
- (3) By discrimination in regard to hiring or tenure of employment or by any term or condition of employment to encourage or discourage membership in any employee organization.
- (4) To discharge or otherwise discriminate against an employee because the employee has filed charges or complaints or given testimony under this chapter.

In determining whether retaliatory action was taken against an employee for engaging in protected activity, the Board has adopted the analysis employed by the U.S. Supreme Court and

the National Labor Relations Board. The employee must first demonstrate that she was engaged in protected conduct, then she must demonstrate that the protected activity was a motivating factor in the employer's decision adversely affecting the employee. The burden then shifts to the employer to show that its actions were motivated by legitimate interests, that it would have taken the same action in the absence of the protected conduct. See, e.g., Carbone v. State of Vermont, 16 VLRB 282, 300 (1993); Barre City Educational Support Personnel Association v. Board of School Commissioners of the City of Barre, 2 VLRB 244, 247 (1979).

When evaluating whether protected activity was a motivating factor in an employer's decision to terminate an employee, the Board follows the following guidance: 1) whether the employer knew of the employee's protected activities, 2) whether there was a climate of coercion, 3) whether the timing of the discharge was suspect, 4) whether the employer gave as a reason for the decision a protected activity, 5) whether the employer interrogated the employee about protected activity, 6) whether the employer discriminated between employees engaged in protected activities and employees not so engaged, or 7) whether the employer warned the employee not to engage in protected activity. Horn of the Moon Workers Union v. Horn of the Moon, 12 VLRB 110,126-27 (1989).

In her unfair labor practice charge, Ms. Bailey has alleged that she was engaged in protected conduct, seeking to join the Union. The Employer was a party to the unit clarification petition and was therefore aware of Ms. Bailey's activities. When applied against the remaining Horn of the Moon factors, however, Ms. Bailey's charge fails to present sufficient facts to support an unfair labor practice complaint based on retaliation for protected activity.

Ms. Bailey has not alleged that there was a climate of coercion at the School District. There have been no facts asserted that demonstrate or support that there was a climate of

coercion at the workplace. The only factor upon which Ms. Bailey appears to rely is the timing of the non-renewal, that it came after her involvement in the unit clarification matter. The unit clarification petition was filed on January 30, 2020. Ms. Bailey's position was the subject of the petition. Despite her position being the subject of the unit clarification petition, the Employer did not penalize or retaliate against Ms. Bailey. Instead, after the petition was filed, the Employer executed an employment contract with Ms. Bailey for the 2020-2021 school year. The Board decision was issued in November of 2020. At that time, the Employer took no action and did not seek to terminate Ms. Bailey for cause or take any other retaliatory action against her. The non-renewal decision occurred nearly fifteen months after the filing of the unit clarification petition and five months after the Board decision. Under these facts, the timing of the non-renewal is not suspect and does not support Ms. Bailey's claim that retaliation for her union activity was a motivating factor in her Employer's non-renewal decision.

Ms. Bailey has not presented any facts or information evincing that the employer asserted her protected activity as a reason for the non-renewal. Instead, as represented by Ms. Bailey the employer stated the reason for the non-renewal was her underperformance. The Employer's notice of non-renewal lists her job performance deficiencies and her failure to correct them as the reason for the non-renewal.

Ms. Bailey has also failed to allege the presence of the remaining Horn of the Moon factors. Ms. Bailey has not alleged, nor is there any information suggesting that the Employer interrogated Ms. Bailey about protected activity, disparately treated employees engaged in protected activity, or warned Ms. Bailey not to engage in protected activity.

We conclude Ms. Bailey has failed to meet her burden of showing that her union activity was a motivating factor in her Employer's decision not to renew her employment contract. The

Board's inquiry ends here, and it need not shift to the Employer the burden of demonstrating that it would have taken the same action in the absence of the protected conduct.

ORDER

Based on the foregoing reasons, we decline to issue an unfair labor practice complaint in this matter, and it is ORDERED that the unfair labor practice charge filed by Gretchen Bailey is DISMISSED.

Dated this 12th day of May 2022, at Montpelier, Vermont.

VERMONT LABOR RELATIONS BOARD

/s/ Robert Greemore

Robert Greemore, Acting Chair

/s/ Roger Donegan

Roger Donegan

/s/ Alan Willard

Alan Willard