JD(ATL)–29–13
Las Vegas, NV

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES
ATLANTA BRANCH OFFICE

CLARK COUNTY EDUCATION ASSOCIATION

and **Case 28-CA-099520**

CLARK COUNTY STAFF ORGANIZATION, affiliated with NATIONAL STAFF ORGANIZATION

Isis Ramos Melendez* and *Stephen Wamser, Esqs.,
for the General Counsel.
Francis C. Flaherty, Esq.
(Dyer Lawrence Law Firm),
for the Respondent.

DECISION

STATEMENT OF THE CASE

ROBERT A. RINGLER, Administrative Law Judge. Between August 13 and 15, 2013,[1] this case was heard in Las Vegas, Nevada. The complaint alleged that the Clark County Education Association (CCEA) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act) by, inter alia, threatening its employees, and firing Elena Hermanson because of her union activities.

On the entire record,[2] including my observation of the demeanor of the witnesses, and after thoroughly considering the parties' briefs, I make the following:

FINDINGS OF FACT

I. JURISDICTION

At all material times, CCEA, a not-for-profit corporation, with an office and place of

1 All dates are in 2013, unless otherwise stated.

2 On August 28, the General Counsel filed an unopposed Motion submitting GC Exhs. 28–30. The Motion is granted, and these exhibits are admitted.

business in Las Vegas (the facility), has operated a labor union representing teachers employed by the Clark County School District (the District). Annually, it purchases and receives at the facility goods valued in excess of $50,000 directly from points located outside of Nevada. Based upon the foregoing, it admits, and I find, that it is an employer engaged in commerce under Section 2(2), (6) and (7) of the Act. It further admits, and I find, that the Clark County Staff Organization (the Staff Union) is a labor organization under Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

The District, which has an annual budget of $2 billion, consists of a 357 schools. It employs approximately 19,000 teachers, who are represented for collective bargaining purposes by CCEA (the teaching unit).

The District is located in Nevada, a "right to work" state."[3] Accordingly, one of the primary challenges that CCEA faces is that a sizeable portion of the teaching unit are not union members. This scenario presents an ongoing risk that non-members might eventually outnumber members, and decertify CCEA as the teaching unit's collective bargaining representative. In order to combat this risk, CCEA recently hired John Vellardita, an experienced labor organizer, to serve as its Executive Director.[4] He has, consequently, been charged with increasing membership within the teaching unit. His first order of business involved hiring Organizing Director Marti Garza, who also possessed significant organizing experience.

Beyond the hiring of Vellardita and Garza, CCEA changed the model that its six UniServ Directors utilized to service the teaching unit. Specifically, although UniServ Directors were previously limited to representational duties (e.g., grievances, hearing advocacy, attending meetings, etc.), they were now newly assigned a host of organizing tasks that focused upon the recruitment of new members and leaders.[5]

CCEA also obtained outside grant monies to aid its organizing mission.[6] These grants subsidized the hiring of a full-time Organizer.

A. Hermanson's Hiring

In early 2012, CCEA posted a full-time Organizer position. (GC Exh. 2). Hermanson applied for this slot; her resume described a B.S. from Hunter College, and organizing experience with various labor unions. (JT Exh. 2(a)–(b)). Her resume, however, conspicuously lacked experience organizing professional workers (i.e. employees similar to those in the teaching unit), and revealed repeated employment gaps. On June 7, CCEA hired her subject to a six-month probationary period. (JT Exh. 3(b)).

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3 Nev. Rev. Stat. § 613.130, et seq. (unlawful to condition workers' employment on their union membership).

4 He has been active in the labor movement for roughly 40 years, and possesses substantial organizing expertise.

5 In sum, UniServ Directors abruptly changed from classic union business representatives to internal organizers.

6 Grants were provided by the Nevada State Education and National Education Associations. (R. Exhs. 7–8).

Vellardita stated that, although he interviewed Hermanson several times and ultimately hired her, he still retained serious reservations about her hiring connected to her lack of professional organizing experience and employment gaps. See (R. Exh. 20). He added that he was also concerned about her admitted past difficulty with supervision. See (R. Exhs. 18-19). He stated that, because he could not find the perfect candidate, he nevertheless opted to hire her.

B. The Staff Union

UniServ Directors and Member Rights Specialists[7] are represented for collective bargaining purposes by the Staff Union.[8] Hermanson's Organizer position, however, was not included in the Staff Union bargaining unit. She testified that she inquired about this point during her final interview, and recalled the resulting exchange with Vellardita:

> Towards the end of the meeting, I asked him if I would be part of a union. At that point, he said that I will be on probation for six months, and after six months we will review my working conditions . . . .

(Tr. 104).

C. Hermanson's Tenure

On July 12, Hermanson began her Organizer position, under Garza's supervision. She described these duties:

> [M]y job responsibilities included recruiting new membership, recruiting teachers to participate in the professional development program, recruiting teacher volunteers to become organizing interns, and recruiting teachers to be mobilized in whatever union activities we had planned.

(Tr. 106); see also (GC Exh. 16). Hermanson, unfortunately, encountered several difficulties during her tenure.

1. Mid–September 2012 Conversation[9]

Hermanson stated that, while commuting home from an organizing meeting, she and Vellardita had this discussion:

> [F]irst we talked about . . . the meeting. He . . . asked me what . . . I learned . . . .

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7 The Member Rights Specialist position is presently unfilled.

8 CCEA and the Staff Union were parties to a September 1, 2011 through August 31, 2013 collective bargaining agreement. (JT Exh. 10). There are six employees in this bargaining unit.

9 At the hearing, the General Counsel moved to amend the complaint to allege that this conversation occurred on September 12. See also (JT Exh. 5). This motion was granted, inasmuch as the amendment was sufficiently, and timely, covered by the original March 4 unfair labor practice charge. See *NLRB v. Font Milling Co.,* 360 U.S. 301, 307 (1959) (a charge "is sufficient if it informs the alleged violator of the general nature of the violation charged against him and enables him to preserve the evidence relating to the matter.").

> Then somehow the conversation changed to talk about the employees that were working for CCEA . . . . He [stated] . . . that he hated that they felt entitled, that they were not doing their job and . . . he was going to get rid of deadwood. He . . . mentioned Steve Horner . . . saying that he was going to drop dead of a heart attack because of the workload . . . . [H]e was talking about the staff that he . . . [inherited] from the previous administration . . . .

(Tr. 112–13).

Vellardita testified that he solely critiqued Hermanson's performance, and did not discuss the Staff Union. He recalled needing to regain control of the meeting, after she lost her grip on the audience and her intended message.

Because Hermanson testified that Vellardita revealed a plot to remove unproductive Staff Union employees, and Vellardita denied such commentary, I must make a credibility determination. For several reasons, I credit Vellardita, who was straightforward, consistent and believable. He was universally helpful on direct and cross, and responded thoughtfully. Hermanson, on the other hand, frequently appeared less than candid. I also find it implausible that Vellardita, a seasoned manager, would have foolishly divulged a dicey plot to purge Staff Union employees to a relatively unknown colleague, who had likely not yet attained his trust. Finally, I find it improbable that Vellardita, a labor activist, would concoct a plan to break the Staff Union.

2. November 1, 2012 Team Meeting

Garza testified that Hermanson sarcastically and insubordinately interrupted this meeting, after one of her assigned schools was removed from a training program. He stated that, even after he admonished her, she remained hostile and disengaged. Watson corroborated his account.

Hermanson recalled asking questions about the reassignment of her assigned school, but, denied acting disrespectfully. UniServ Director Jahvel Manyvong witnessed the incident, but, did not recall Hermanson acting disrespectfully.

I credit Garza's testimony; he was a generally consistent witness, whose testimony was corroborated by Watson. Hermanson was, as noted, less than credible. Although Manyvong was generally credible, her recollection seemed clouded by a sincere desire to aid Hermanson's plight, and advocate the Staff Union's unfair labor practice charges.[10]

3. November 15, 2012 – First Performance Evaluation

a. CCEA's Position

Vellardita testified that Hermanson received mixed feedback. He stated that he raised concerns about her argumentative nature, poor communication skills and willingness to accept criticism. See also (R. Exhs. 12-13). He stated that his concerns were based upon his own, and

[10] She is a Staff Union officer.

Garza's, observations. He added that his feedback to Hermanson was provided orally. He said that he told her that her next evaluation was set for February 15. (JT Exh. 6). Watson testified that he offered Hermanson some positive feedback at this meeting, but, also advised her to learn more about the teaching industry. He noted that she acknowledged her communication deficiencies at this meeting. Garza testified that he relayed his ongoing concerns about her attitude, communication skills and unwillingness to accept feedback. He credibly added that these concerns were previously shared at multiple counseling sessions. He noted that, at this point, he firmly doubted that she was flexible enough to become an effective CCEA organizer.[11]

b. Hermanson's Account

She described this meeting as follows:

> Vellardita explained . . . [that the] . . . performance expectations [applied to] . . . the team . . . . [and] would take place every three months . . . .
>
> Then we proceeded to go down the [performance expectations] list . . . . It was essentially a yes or no session. At the end of the list, he asked . . . Garza and . . . Watson if they had any feedback . . . . They both said that I was doing a good job. Then he said that I had a really [positive] way of interacting with people . . . . Marti said that I was doing a good job [and that he] . . . likes numbers . . . .
>
> [H]e said that he was pleased . . . and . . . I was a good addition to the team.

(Tr. 120).

c. Credibility Resolution

Because Hermanson indicated that she was praised for "doing a good job," and Vellardita reported that he raised serious performance deficiencies, I must make a credibility determination. For several reasons, I credit Vellardita, who possessed a highly believable demeanor. Additionally, his testimony, which was consistent with documentary evidence, was mostly corroborated by Garza and Watson, who were both credible. See (R. Exhs. 12-13). Lastly, I find it implausible that, given the many previous concerns raised about Hermanson's performance, she was simply praised for doing a "good job" and dispatched, without criticism.

4. December 2012 School Visits

Vellardita credibly testified that, at this time, he visited Hickey Elementary School, one of Hermanson's assignments, and that senior members of the teaching unit complained about her inability to listen to their concerns. See also (R. Exh. 22). He added that, during the same period, he visited Cimarron High School, another one of her assignments, and received complaints that she never visited the site. See also (R. Exh. 23).

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[11] He cited a Cauley Elementary School meeting, where a member expressed reservations about her intransigence.

5. February 5 – Second Performance Evaluation[12]

a. CCEA's Position

Vellardita testified that he informed Hermanson that her ongoing difficulties in taking direction, communication and accepting criticism might prompt her discharge. He stated that his criticisms were based upon his, Garza's and Watson's observations. He directed her to carefully consider his concerns and respond at a later meeting, where a final decision would be rendered. This meeting was attended by Garza and Watson, who essentially corroborated Vellardita's account.

b. Hermanson's Account

Hermanson testified that this meeting was positive, and she was congratulated for completing probation and becoming a permanent employee. She said that Garza told her that her organizing statistics "did not lie," and she had been successful. She recalled Watson telling her that she was a strong communicator.

c. Credibility Resolution

Because Vellardita testified that he advised Hermanson that he was considering her dismissal, and Hermanson stated that she was praised and welcomed aboard permanently, I must make a credibility resolution. For several reasons, I credit Vellardita, a very believable witness, whose testimony was corroborated by Garza and Watson. It also is implausible that Vellardita would have told Hermanson that she was a permanent employee, in light of her ongoing problems.

6. February 13 Discussion

Hermanson recalled the following discussion with Vellardita:

> [H]e had called me to give me an answer on the raise. He said that I was not getting a raise . . . . I reminded him that when he offered me the job he said that after six months we would review my working conditions, and that even if I belonged in the unit -- when I mentioned the unit, he raised his voice and asked me, "what unit?" I clarified for him that I was referring to the bargaining unit, and then he told me that I was . . . an Organizer and . . . [not] getting a raise . . . .

(Tr. 127–28). Because Vellardita did not testify about this discussion, I will credit Hermanson's unrebutted testimony on this subject.

D. February 20 – Hermanson's Firing

Vellardita indicated that, after reflecting about Hermanson's ongoing personnel issues, he reluctantly determined that discharge was warranted. He explained that, in spite of earlier

[12] Although not determinative, this meeting was also described as occurring on February 15.

warnings, she continued to deny accountability and failed to take corrective action. He explained that it seemed counterproductive to document each critique, instead of simply raising these matters at counseling sessions. He stated that she was not growing professionally, and, in a short period, was surpassed by her colleagues. He adamantly denied firing her because of her union activities. On February 20, he fired her,[13] and advised her that she was not a "good match."[14] (R. Exhs. 15, 16).

Hermanson recalled Vellardita permitting her to choose between discharge and resignation, before she was ultimately fired. (Tr. 130–31). She admitted that she never joined the Staff Union before her removal.

E. Ellen Holmes' Statement

Hermanson recalled that, following her firing, in June, she met with Holmes, former CCEA Education Director, at Holmes' apartment.[15] She stated that, when she asked Holmes why she was fired, Holmes replied that Watson had told her that she was fired because she asked to join the Staff Union. (Tr. 131-32). She stated that Manyvong, Organizer Katy Haugen, Erin Hanson[16] and Josephine Sanchez[17] witnessed this statement. (Tr. 132). Although Manyvong testified that she was present, she did not recall the comment. (Tr. 248). The General Counsel conspicuously failed to call any witnesses to corroborate this statement, which, if credited, was a vital piece of evidence.

CCEA did not call Holmes to testify, and explained that she was no longer an employee. Watson, however, credibly denied making this statement. (Tr. 382).

For several reasons, I do not credit Hermanson's testimony about this statement. As discussed, she was less than credible. Moreover, if this statement had been made, someone else, without an interest in this proceeding, would surely have corroborated this "smoking gun" comment.[18] Manyvong, conspicuously, lacked any recall of this statement, and the General Counsel failed to explain why no other witnesses were called, or subpoenaed, to corroborate such crucial evidence. Watson's denial was, also, highly credible. Finally, it is improbable that CCEA, a labor organization that is presumably sympathetic to the labor movement and savvy about labor relations law, would have fired someone for their interest in joining an internal union, and then brazenly bragged about their invidious motivations.

F. Unit Clarification Petition

On March 7, the Staff Union filed a unit clarification petition (the UC petition) with

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13 It is undisputed that Hermanson did not receive any other discipline before her firing.

14 The rationale supplied for unemployment insurance purposes stated that Hermanson was "[n]ot performing the job adequately and could not improve." (R. Exh. 16); see also (R. Exh. 25).

15 Holmes, a then supervisor, worked for CCEA until August 2; she oversaw its training programs. (JT. Exh. 1).

16 She added that Hanson, the former Advocacy Director, supervised the UniServ Directors.

17 She could not recall her position.

18 It is likely that such a scandalous statement would have instantly become the focal point of their conversation, and would have been readily recalled by multiple witnesses.

Region 28 of the National Labor Relations Board, which sought to add the Organizer position to the existing Staff Union unit. (R. Exh. 1; see also R. Exhs. 2, 4). CCEA did not challenge the UC petition, and voluntarily agreed to add the Organizer to the Staff Union unit.

III. ANALYSIS

A. Section 8(a)(1)[19]

Counsel for the General Counsel asserted that, in September, Vellardita threatened to eliminate unproductive Staff Union employees. Given that Hermanson's isolated testimony about this alleged threat was not credited, this allegation is dismissed.

B. Section 8(a)(3)[20]

1. Legal Framework

The framework described in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982) sets forth the appropriate standard:

> Under that test, the General Counsel must prove by a preponderance of the evidence that union animus was a substantial or motivating factor in the adverse employment action. The elements commonly required to support such a showing are union or protected concerted activity by the employee, employer knowledge of that activity, and union animus on the part of the employer.
>
> If the General Counsel makes the required initial showing, the burden then shifts to the employer to prove, as an affirmative defense, that it would have taken the same action even in the absence of the employee's union activity. To establish this affirmative defense, "[a]n employer cannot simply present a legitimate reason for its action but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected activity."

Consolidated Bus Transit, 350 NLRB 1064, 1065-66 (2007) (citations omitted).

If the employer's proffered defenses are found to be a pretext, i.e., the reasons given for its actions are either false or not relied upon, it fails by definition to show that it would have taken the same action for those reasons, and there is no need to perform the second part of the *Wright Line* analysis. However, further analysis is required if the defense is one of "dual motivation," that is, the employer defends that, even if an invalid reason might have played some part in its motivation, it would have taken the same action against the employee for permissible reasons. *Palace Sports & Entertainment, Inc. v. NLRB*, 411 F.3d 212, 223 (D.C. Cir. 2005).

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19 This allegation is listed under paras. 5 and 7 of the complaint.

20 This allegation is listed under paras. 6 and 8 of the complaint.

2. Prima Facie Case

I find that the General Counsel has made a prima facie *Wright Line* showing. Union activity and knowledge were proven, when the General Counsel established that Hermanson asked Vellardita whether her position could be included in the Staff Union unit. Animus can be inferred from the relatively close timing between Hermanson's request to be represented by the Staff Union and her firing. *See La Gloria Oil & Gas Co.*, 337 NLRB 1120 (2002), enfd. 71 Fed. Appx. 441 (5th Cir. 2003).

3. Affirmative Defense

CCEA abundantly established that it would have discharged Hermanson, irrespective of her protected activity. As a threshold matter, Hermanson's protected activity was exceedingly minor, and did not rise to the caliber of action that would generally prompt retaliation. She solely asked whether she could be represented by the Staff Union. She never sought to organize her workplace, challenge CCEA's longstanding workplace policies, or engage in any comparable collective activity, which might reasonably prompt a recalcitrant employer to take action. One would, accordingly, be hard-pressed to find that her very negligible collective activities prompted any retaliation, or that she would not have also been fired absent her inconsequential activities. Additionally, although it is not entirely impossible that a rogue labor union might abandon its founding principles by firing its very own employee for union activity, CCEA, as an institution, and Executive Director Vellardita, as an individual, both appeared deeply committed to the labor movement and seemed unlikely to fire a union adherent. Furthermore, Hermanson had serious ongoing performance problems,[21] which would reasonably have prompted her dismissal, irrespective of her limited union activities.[22] She was also afforded several oral warnings about her misconduct, and given an ample opportunity for rehabilitation.[23] Moreover, if CCEA were genuinely hostile to the Staff Union, it would not have voluntarily agreed to add the Organizer position to the Staff Union unit, in response to the UC petition.[24] In sum, under

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21 It is probable that Hermanson, who acknowledged poor English skills and lacked experience working with highly-educated, professional bargaining units, encountered substantial performance problems, when interacting with a teaching unit that likely demanded the very same qualifications that she lacked. Additionally, Vellardita possesses substantial organizing expertise, and his assessment of organizing talent and potential must be afforded some deference.

22 Although the General Counsel averred that CSEA's decision to fire Hermanson shortly after the close of her probationary period and failure to sufficiently document her transgressions demonstrates pretext, these assertions are invalid. First, given that Hermanson, an employee-at-will, was not covered by a contract's "just cause" protections, her transition from probationary to at-will status was, at best, an illusory and somewhat meaningless change in job security. Thus, CCEA retained the equivalent right to fire her before, during and after her probationary period, and its decision to fire her following her probation did not demonstrate an abrupt and contradictory personnel action, as the General Counsel suggests. Second, although CCEA could have better documented her shortcomings, her employment problems were nevertheless real and abundant. Such documentary omissions do not, as a result, demonstrate pretext. CCEA should, nevertheless, derive a lesson from this experience; that better documentation might help it avoid comparable future hearings.

23 Her personnel problems preceded her second request to join the Staff Union, which the General Counsel has tied to her termination.

24 Arguably, if CCEA were genuinely hostile to the Staff Union, as the General Counsel suggests, it would have also taken an adverse personnel action against Hermanson, when she first asked about joining the Staff Union during her final interview, which was not done herein.

the circumstances, Vellardita logically determined that continued rehabilitative efforts would prove fruitless and Hermanson's termination was warranted,[25] irrespective of her protected activities.[26]

CONCLUSIONS OF LAW

1. CCEA is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. The Staff Union is a labor organization within the meaning of Section 2(5) of the Act.

3. CCEA has not violated the Act in the manner alleged in the complaint.

On these findings of fact and conclusions of law, and on the entire record, I issue the following recommended[27]

ORDER

The complaint is dismissed in its entirety.

Dated Washington, D.C. November 13, 2013

Robert A. Ringler
Administrative Law Judge

25 Although Hermanson obtained more RSVPs from teachers to organizing events than competing UniServ Directors, these statistics were mostly based upon non-verifiable, self-reported data. Moreover, even assuming arguendo that such data was accurate, it did not outweigh her serious performance issues.

26 The fact that Hermanson's firing conflicted with CCEA's overriding priority to organize the teaching unit makes it less likely that she was fired for her collective activities. It follows that Vellardita would have been indifferent to her interest in the Staff Union, if she had adequately served his primary mission to organize the teaching unit. One would, accordingly, be hard-pressed to assert that her request to join the Staff Union was the proximate cause of her firing.

27 If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.