

The County filed its answer on June 27, 1991, denying the charge.

A hearing was held before the PERB on July 22, 1991. Based upon the hearing record the FOP filed a second charge with the Board on August 16, 1991. The second charge alleges that by providing in its proposed budget a 2% economic increase for its employees in FY92 and limiting the authority of its negotiators to exceed the budgeted amount, the County violated section 1607(a)(5) and (a)(6) of the Act. ²

The parties agreed that the record of the July 22nd hearing was sufficient for resolving both charges. Legal issues raised by the two charges were addressed in opening briefs filed by the parties on August 26, and reply briefs filed on September 6, 1991.

FINDINGS OF FACT

The FOP and the County were parties to a collective bargaining agreement. The County was also a party to collective bargaining agreements with two (2) other FOP bargaining units and three (3) bargaining units represented by the American Federation of State, County, and Municipal Workers, including Local 1607. Each of the six (6) labor agreements expired on March 31, 1991.

The Petitioner presented the County with its initial proposals for a renewal contract on January 28, 1991. The proposal included a request for a 9% general salary increase in the first year of the new contract, commencing April 1, 1991. On February 19, 1991, the County responded with its first counter proposal which provided for a 2% general salary increase in

Footnote 1 (continued)

- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
- (5) Refuse to bargain collective in good faith with an employee representative which is the exclusive bargaining representative of employees in an appropriate unit.

² 19 Del.C. §1607(a)(6):

- (6) Refuse or fail to comply with any provision of this Chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this Chapter.

the first year of the new contract. The 2% was characterized by the County as a "limit" above which its negotiators were not authorized to proceed. ³

The County advised the FOP that although there was no flexibility to exceed the 2% offered in the first contract year, it was willing to negotiate both the distribution of the first year's increase and additional increases in the second and/or third years of the proposal, without prior condition.

At the bargaining session of April 5, 1991, the FOP informed the County that as long as it refused to negotiate the amount of the first year's increase there was nothing further to discuss and negotiations were suspended. There has been no bargaining between the Petitioner and the County since the meeting of April 5, 1991.

Negotiations for a renewal contract with AFSCME Local 1607 commenced on or about February 26, 1991, and continued weekly thereafter through March. The County's initial and only economic offer to Local 1607, as was the case with each of its unions, was for a 2% general salary increase in the first year of the agreement applicable to all economic items.

After continuing negotiations, Local 1607 reached a tentative agreement with the County over the terms of a successor agreement on or about April 22, 1991. ⁴ The agreement provided for a 2% general salary increase in the first year (April 1, 1991 through March 31, 1992). ⁵ It also contained a "parity clause" by which the County agreed to increase the 2% "... to a percentage equal to the highest percentage salary increase received by any other County bargaining unit for the first year of the contract...".

³ Although there was conflicting testimony concerning the scope of the terms "general salary increase", it is clear that the 2% limit applied to all economic items.

⁴ Through July 22, 1991, the date of the hearing in this matter, the County had not reached tentative agreements with any of its other five (5) bargaining units.

⁵ A \$6,000.00 shift differential increase for county librarians was deferred until the second year of the tentative agreement reached between Local 1607 and the County because it would have been in excess of the 2% limit.

Concurrent with its ongoing collective bargaining negotiations with the various representatives of its organized employees, the County was involved in developing its proposed budget for fiscal year 1992 (July 1, 1991 through June 30, 1992). The budget process commenced in the fall of 1990 and the Administration's budget proposal was presented to County Council on March 26, 1991, for its review and consideration. On April 9, 1991, the budget ordinance was formally introduced before County Council. The final version of the budget ordinance was eventually approved by County Council on May 28, 1991.

ISSUE

1. Whether by offering and/or agreeing to a parity provision with the American Federation of State, County and Municipal Employees, Council 81, Local 1607, the Respondent, New Castle County, violated 19 Del.C. §§1607(a)(1) and (a)(5), as alleged?

2. Whether the inflexibility of the Respondent, New Castle County, concerning its offer of a 2% general wage increase in the first year of the renewal contract, based upon its proposed budget for FY 92, violates section 1607(a)(5) and (a)(6) of the Act, as alleged?

Principal Positions of the Parties

Fraternal Order of Police:

The Petitioner argues that the parity clause agreed to by the County and Local 1607 is a per se violation of the Act because it necessarily interferes with, restrains and coerces the FOP in fulfilling its duties as the exclusive bargaining representative for Lodge No. 5, by introducing Local 1607 into the continuing negotiations between the County and the FOP, absent the consent of the latter. Citing the case of Local 1219, International Association of Firefighters v. Connecticut Labor Board (Supr.Ct.Conn., 370 A.2d 952, 956 (1976)), the Petitioner argues that in so doing, two different bargaining units representing employees with dissimilar jobs and unrelated by a community of interest were inextricably merged into one unit for the purpose of

collective bargaining. Citing decisions from numerous other jurisdictions, the Petitioner argues that by joining the two units the County has attempted to avoid its duty to bargain separately with each based upon their individual characteristics and circumstances. The Petitioner maintains that the County's action violates the concept of community of interest which is the statutory standard by which bargaining units are determined to be appropriate.

The Petitioner also contends that by granting parity to Local 1607, a bargaining unit composed of non-uniform employees whose collective bargaining rights are controlled by Title 19, Chapter 13, the County violated its duty to bargain separately with the FOP, a bargaining unit of uniform employees, whose collective bargaining rights are determined by Title 19, Chapter 16. The Petitioner maintains that Local 1607 has become a beneficiary of, if not a participant in, the impasse resolution procedures established by Chapter 16, despite the fact that Local 1607 is not subject to the Act's jurisdiction but remains under the authority of Chapter 13 which is administered by the Department of Labor.

Concerning the impact of the County's budget process and the proposed budget submitted by the Administration to County Council on March 6, 1991, the Petitioner argues that the resulting inflexibility of the County concerning its offer of 2% in the first year of the contract constitutes an attempt to avoid its statutory duty to bargain in good faith and violates section 1607(a)(5) and (a)(6) of the Act.

The Petitioner contends that the County not only unilaterally determined the dollars available for increases in the first year of the proposed contract but also unilaterally determined that the money was to be allocated equally among its several bargaining units without any consideration of its legal duty to bargain individually with the exclusive representatives of each. The Petitioner contends that the County's action, if condoned, will permit any public employer to unilaterally determine the economic terms of the first year of any collective bargaining agreement through its internal budget process and not through collective bargaining, as required by law. The FOP argues that the County's action treats the

bargaining unit members as though they were unrepresented merit employees having no right to participate in either the determination of the dollars available for employee increases or the extent to which they are to share in the distribution of the available dollars.

NEWCASTLE COUNTY: Citing the decision of the California Supreme Court in Banning Teachers Assn v. PERB, (Cal. Supr., 128 LRRM 3009 (1988)), the County maintains that parity clauses are not per se unlawful and must be examined on a case by case basis considering all of the individual circumstances present in each factual setting. The County contends that a "parity clause" is unlawful only if it obstructs an employer's ability to negotiate in good faith. The County argues that is not the case here since the 2% limitation on its first year offer did not preclude the ability of the parties to negotiate the distribution of the 2%, additional economic increases in later years, and the numerous non-economic issues which remain unresolved.

The County argues the decision to budget 2% for the first year was made in the fall of 1990, based upon a combination of political and fiscal considerations. The County maintains that the 2% limit did not result from but was, in fact, the basis for the parity agreement with Local 1607. The County contends that the Petitioner's argument is an attempt to transform the duty to bargain into a duty to concede the singular issue concerning the 2% limit on the first year's increase.

The County accuses the FOP of attempting to dictate the employer's bargaining strategy by requiring that it make some concession on every issue.

OPINION

In addition to the specific unfair labor practice enumerated in the complaints, other statutory provisions directly impact upon the resolution of this matter.

The statutory duty to bargain is set forth in §1602 of the Act, as follows:

(d) "Collective bargaining" means the performance of the mutual obligation of a public employer through its designated representatives and the exclusive bargaining representatives to confer and negotiate in good faith with respect to terms and conditions of employment, and to execute a written contract incorporating any agreements reached. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

The phrase "terms and conditions of employment" is defined at paragraph (n) of §1602

as:

... matters concerning or related to wages, salaries, hours, grievance procedures, and working conditions; provided, however, that such terms shall not include such matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public employer. ⁶

Article 1613 of the Act, entitled Collective Bargaining Agreements, provides:

(d) Any contract or agreement reached between a public employer and an exclusive representative shall be for a minimum period of 2 years from the date of such contract or agreement, unless otherwise mutually agreed upon by the public employer and the exclusive representative.

The PERB first addressed the concept of the duty to bargain in good faith in the case of Seaford Education Assn. v. Bd. of Education of the Seaford School District (Del.PERB, U.L.P. No. 2-2-84S (1984)). The essence of the Seaford decision is set forth, therein, at page 7:

When deciding failure to bargain in good faith issues, it is necessary to examine the "totality of conduct" of the parties. NLRB v. Montgomery Ward, (Supra.). The validity of a single position can only be ascertained from the overall record. While a party's posture as it relates to a particular subject, in and of itself, might qualify as an unfair labor practice, viewed in the light of the continuing and evolving negotiation process, it may well prove otherwise. It is the totality of the conduct which tests the quality of the negotiations. Absent sufficient proof of an unwillingness by the party charged to maintain an open mind and a willingness to sincerely search for common ground upon which a settlement is based, it is not the Board's prerogative to dictate bargaining strategy.

Even prior to the requirement imposed by the Police Officers' and Firefighters Employment Relations Act, the collective bargaining agreements negotiated by these parties were for a term of two or more years. Bargaining proposals involving multi-year contracts

⁶ It is not disputed that salaries and wage constitute a term and condition of employment and are a mandatory subject of bargaining to which the good faith duty to bargain attaches.

were not negotiated one year at a time. Nor are the issues negotiated independently in isolation from one another. The essence of collective bargaining involves a give and take environment in which the parties search with an open mind for a mutually acceptable resolution of often conflicting positions. Flexibility and reasonable compromise are essential ingredients of the collective bargaining process, if it is to be successful. A party is not, however, required to make a concession concerning every issue. To the contrary, the Act expressly provides that the duty to bargain does not require that either party do so.

Each set of labor negotiations is unique. There are times when contract language or non-economic issues are of paramount importance. There are also times when economic issues are of primary concern. Within the dynamics of the collective bargaining process the relative priorities of specific issues frequently change as progress is made. During the negotiations existing contractual requirements, both economic and non-economic, are modified or deleted and new provisions are agreed upon for the first time. The required two-year minimum term for collective bargaining agreements is an important factor in the process because negotiated changes often become effective in different years of a multi-year contract.

The duty to bargain in good faith requires each party to approach the bargaining table with reasonable demands supported by facts to be shared with each other. To bargain intelligently and effectively requires extensive preparation including the determination and researching of issues which are then coordinated and prioritized as the bargaining strategy is developed.

Based upon economic and political considerations, New Castle County included in its FY92 budget a 2% limit on economic increases for its employees. Except for the amount of the first year increase, the Respondent was prepared and willing to bargain. The County expressed its intention to negotiate with the Petitioner concerning the distribution of the 2%. At the request of the FOP, the County agreed to explore whether the application of §457 of the tax code would aid in stretching the dollars available for the first year increase. The County advised the FOP of

its willingness to to negotiate salary increases and other economic matters for year two of the agreement and beyond, without precondition. Numerous non-economic issues also remained unresolved. The Petitioner was, therefore, in a position to pursue immediate non-economic gains and additional economic improvements during the second year of the contract and beyond, which it considered necessary to offset the 2% offered by the County in the first year of the agreement.

The budget proposal was presented to the County Council for its consideration on March 26, 1991. Public hearings were subsequently held and a budget ordinance was formally introduced in Council on April 9, 1991. The final budget ordinance was ultimately approved by County Council on May 28, 1991. For the sole reason that the County was unwilling to increase or otherwise modify its initial offer of 2%, the FOP refused to continue negotiations after April 5, 1991. Had the Union not refused to negotiate beyond April 5, it is possible that positions may have changed and/or agreements might have been reached which were sufficient to make the 2% increase offered for the first contract year acceptable when considered within the context of the total package.

Parties to a collective bargaining agreement are required to bargain over "terms and conditions" of employment. This requirement does not, however, preclude either party from initially taking a position concerning a particular subject and not conceding that position throughout the course of the negotiations. To rule otherwise would violate the express statutory prohibition that the duty to bargain collectively does not require a party to agree to a proposal or make a concession.

Consistent with the Board's decision in Seaford (Supra.), the record, when considered in its entirety, does not support a finding that the County violated §1607(a)(5) by refusing to yield from its original offer of 2%. Absent a violation of §1607(a)(5), there can be no violation of §1607(a)(6), as alleged.

Concerning the legality of parity clauses, the parties have submitted prior case law from other jurisdictions among which there is a split of authority. In Seaford Education Assn. v. Bd. of Education (Supra.), the PERB concluded:

This Board, agreeing with the Supreme Court of Pennsylvania in Pennsylvania Labor Relations Board v. State College Area School District (Pa.Supr., 337 A.2d 262 (1975)), recognizes the wisdom of refraining from attempting to fashion broad and general rules that would serve as a panacea. The obviously wiser course is to resolve disputes on a case-by-case basis until there is developed, through experience, a sound basis for developing general principles. Pa.LRB v. State College ASD, Supra., at page 265.

The status of parity clauses under the Police Officers and Firefighters Employment Relations Act is a question of first impression not previously considered by the PERB. Labor disputes frequently involve complex and unique fact situations which require evaluation on their individual merit. To rule, as the Petitioner argues, that all parity clauses, by their very existence, violate §1607 (a)(1) of the Act would be an unwise departure from the principles enunciated in Seaford (Supra.).

Section 1601, Statement of Policy, provides:

It is the declare policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees, employed as police officers and firefighters, and to protect the public by assuring the orderly and uninterrupted operations and functions of public safety services.

To determine that parity clauses are *per se* illegal would mean that where multiple bargaining units exist, any given Union would be either unwilling or hesitant, at best, to settle first. Such a situation carries the potential to create protracted and difficult negotiations resulting in uncertainty, unrest and even open hostility between the parties. Clearly, these ends are inconsistent with the declared policy of the State and the primary purpose of the Act.

Parity clauses can, and do, in many instances play an important role in maintaining a positive cooperative bargaining relationship between a public employer and the exclusive representatives of its organized employees. Parity provisions, or "me too" clauses as they are

frequently called, permit one union to reach agreement with the employer without fear of criticism or internal strife should another bargaining unit subsequently negotiate a more favorable settlement. Where multiple bargaining units are present, it is unrealistic to believe that settlements reached with one bargaining unit will not be considered by the employer and impact agreements it reaches with other units concerning the same or similar issues.

Despite the potential for facilitating the settlement of contract negotiations where two or more bargaining units are present, an individual parity agreement may, because it is overly broad and encompassing, effectively restrict and prejudice the ability of an exclusive representative not party to the parity agreement to effectively negotiate on behalf of the bargaining unit members it represents. An employer that enters into such an agreement authorizes the intrusion of one bargaining representative into the collective bargaining process of another. In so doing, the employer's conduct interferes with the ability of the latter to bargain effectively for its members and violates its duty to bargain in good faith.

Such is not the case here. The initial proposal of Local 1607, submitted on February 6, 1991, included a parity clause guaranteeing "...Parity with any County employees, with regard to any and all monetary increases". On April 22, 1991, after continued bargaining for approximately ten (10) weeks, a tentative agreement was reached between Local 1607 and New Castle County. The tentative agreement provided for a 2% general salary increase for the first year of the contract and contained a parity clause which, in contrast to the broad scope of the clause initially proposed by Local 1607, protected only the "general salary increase" in the first year of the agreement, vis-a-vis the settlements obtained by other bargaining units. The impact of this limited clause on the ability of the Petitioner to effectively bargain on behalf of its members is insignificant if, in fact, it exists at all.

Nor does the parity agreement between Local 1607 and New Castle County cause the interests of the uniformed and non-uniformed employees to be significantly and inseparably entwined to the detriment of the Petitioner. Equally unpersuasive is the Petitioner's argument

that the dispute resolution procedures available to it under Chapter 16 are rendered ineffective because the cost of its proposals must be calculated based not only on the cost when applied to its members but also to the non-uniformed members of Local 1607. There is nothing on the record to establish that the tentative agreement between the County and Local 1607 was ratified by either side. Neither supposition nor mere possibility as to what might occur in the future constitutes a valid basis for finding a breach of the duty to bargain. Even assuming that the tentative agreement between the County and Local 1607 was or is ratified, the FOP and the County are each free to make whatever arguments it may choose during the course of the dispute resolution procedures, should that become necessary. Ultimately, it is the responsibility of the fact-finder to establish the facts, consider the arguments presented by the parties and determine what weight, if any, he/she will accord to each.

In summary, the County is not statutorily required to make a concession, however slight, on every issue or position. Based upon a combination of political and economic considerations, the County determined in the fall of 1990 to limit increases for its employees in FY92 to 2%. It also determined that the available dollars were to be distributed equally among the affected employees, regardless of union or affiliation. The narrow parity clause in issue is simply one method of implementing the County's position which is not rendered invalid or illegal merely because it was reduced to writing in the form of a parity agreement and included in the tentative agreement with Local 1607.

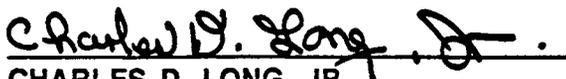
For the reasons set forth above, the Petitioner has failed to establish a violation of §1607(a)(1) of (a)(5), as alleged.

The thorough preparation and presentation by Counsel for both parties is acknowledged. The primary cases submitted by each were read and considered in deciding these issues. While they provided valuable background information, in the final analysis, the decision resulted from application of the relevant provisions of the Police Officers and Firefighters Employment Relations Act of 1986 to the specific circumstances of this matter.

CONCLUSIONS OF LAW

1. New Castle County is a public employer within the meaning of §1602(l) of the Police Officers' and Firefighters' Employment Relations Act, 19 DeL.C. Chapter 16.
2. The Fraternal Order of Police, Lodge No. 5, is an employee organization within the meaning of §1602(f) of the Act.
3. The Fraternal Order of Police, Lodge No. 5, is an exclusive bargaining representative within the meaning of §1602(g) of the Act.
4. By offering and/or agreeing to the parity provision in dispute, the Respondent, New Castle County, did not violate §§1607(a)(1) or (a)(5) of the Act, as alleged.
5. The inflexibility of the Respondent, New Castle County, concerning its 2% general wage increase in the first year of the contract renewal based upon its proposed budget for FY92 did not violate §§1607(a)(5) and (a)(6), as alleged.
6. For the reasons set forth above, unfair labor practice charges numbers 91-06-064 and 91-08-066 are dismissed.

IT IS SO ORDERED.



CHARLES D. LONG, JR.
Executive Director
Delaware Public Employment Relations Bd.



DEBORAH L. MURRAY-SHEPPARD
Principal Assistant
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DATE: October 22, 1991