

STIPULATED FACTS ¹

Petitioner DSTA is the exclusive representative of the members of the Division of State Police for the ranks of Trooper through Major.

Respondent STATE is a Division of the Department of Public Safety of the State of Delaware and the employer herein.

Commencing with a Memorandum of Understanding dated February 15, 1973, the DSTA and the STATE have negotiated a number of collective bargaining agreements.

During the negotiation of these collective bargaining agreements and, on the occasions when mediation and fact-finding have been utilized, the STATE has utilized one or more DSTA members of the rank of Major to participate on its bargaining team.

The instant negotiations began in April of 1991.

Two Majors were members of the STATE bargaining team and participated in the formulation of bargaining proposals and in formulating responses to Union proposals.

DSTA registered no formal objection to said Majors participating on the STATE bargaining team.

From April, 1991 until October 20, 1991, the parties met several times and DSTA did not object to the two Majors participating on the bargaining team.

On October 21, DSTA, by letter, registered a formal objection to the presence of the Majors. STATE declined to remove them from the bargaining team.

At the first mediation session on October 17, 1991, during the course of a mediator's conference between representatives of the DSTA and STATE, the STATE representative indicated that the State, to breaklock the deadlock and reach a contract, would recommend increasing the Educational Reimbursement from \$20,000

¹ The Stipulated Facts included herein are those stipulated and agreed to by and between the parties to this action on April 29, 1992.

to \$35,000, as of July 1, 1991, thereby meeting halfway the DSTA's last proposal to increase the educational allowance to \$50,000 as of July 1, 1991.

At the mediation session on October 17, 1991, DSTA, however, refused to agree to the STATE salary proposal of 0% for year 1 and 4% on July 1, 1992.

At the second mediation session between the parties, which was held on January 14, 1992, State withdrew its proposal for a 4% increase on July 1, 1992.

ISSUE

Whether the inclusion of a bargaining unit member on the employer's negotiating team constitutes a *per se* unfair labor practice in violation of 19 Del.C. §1607(a)(5), or, in the alternative, whether it is within the scope of permissible employer conduct to include a bargaining unit member on the employer's negotiating team?

PRINCIPLE POSITIONS OF THE PARTIES

DSTA: DSTA acknowledges the right of each party to the collective bargaining process to select its own bargaining representatives. It argues, however, citing NLRB v. International Ladies Garment Workers' Union (CA 3, 274 F.2d 376 (1960)), that this right is not absolute or immutable.

DSTA argues that the State's selection of a member of the bargaining unit to serve on its bargaining team represents a clear conflict of interest which is a well recognized exception to the general rule. It contends the Majors' participation in formulating the State's proposals and responding to DSTA proposals has compromised its confidential communications to its own members and that the State gains an unfair advantage in having access to this information. Further, the DSTA asserts that by their participation on the employer's negotiating team, the Majors are effectively

negotiating provisions of the agreement that directly affect the terms of their employment.

Finally, the DSTA argues that the State has a clear choice: Either avoid designating a bargaining unit member as a member of the State's negotiating team, or move to have the position of Major removed from the bargaining unit.

STATE: The State argues that parties to a collective bargaining agreement have the right to choose who is to serve on their negotiating team. Although there are a few exceptions to this general rule, none apply to this factual situation. It asserts that DSTA has failed to establish an actual conflict of interest which presents a clear and present danger to the collective bargaining process and which renders it futile. It is undisputed that Majors have voluntarily served on the State's negotiating team for nineteen (19) years, during which period the negotiations have resulted in agreements. Majors have been included on the State's team because of their familiarity with the day to day operations of the department. Finally, the State asserts that the DSTA has never objected to the practice of including Majors on the bargaining team nor claimed a conflict of interest until mid-negotiations in 1991. DSTA has presented no evidence of a change in circumstances during these negotiations which would suddenly create a conflict of interest or otherwise make the State's long standing practice objectionable.

DECISION

A declaratory statement may be requested by a party where, as in this case, it is alleged that a controversy exists concerning a potential unfair labor practice. PERB Reg. 6.2(d). The controversy placed in question must be postured so that the issuance of the declaratory statement will facilitate a resolution of the controversy. PERB Reg. 6.1(c)(iv). During the processing of this request, the parties to this matter

did reach agreement on a successor agreement and the PERB was so notified by letter dated July 23, 1992 from the State's Deputy Director for Labor Relations. Because the State's practice of including bargaining unit members on its negotiating team is long standing and there is no indication that the State intends to alter its practice, the controversy placed in issue is not resolved by the parties agreement to a successor agreement. Therefore, this decision addresses the substantive merits of the petition.

Subsection (a)(5) of section 1607 of the Police Officers' and Firefighters' Employment Relations Act (19 Del.C. Chapter 16) imposes upon public employers the responsibility to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit. Subsection (b)(2) of section 1607 places a correlative responsibility on employee organizations and their designated representatives, stating that it is an unfair labor practice to "... Refuse to bargain collectively in good faith with the public employer or its designated representative if the employee organization is an exclusive representative." Clearly, each party to the collective bargaining process has the right to designate its representatives and the opposing party has the duty to negotiate with those representatives.

A party's right to designate its representatives to the bargaining process is not, however, absolute. Application of the rule must be reasonable. The integrity of the collective bargaining process must be preserved and to the extent that the designation of a bargaining representative thwarts good faith negotiations, it must be rejected as contrary to the clear intent of the statute.

Under a similar statutory scheme, the National Labor Relations Board has recognized limited exceptions to the general rule that parties can choose their bargaining representatives freely. However, these exceptions are "... so rare and confined to situations so infected with ill will, usually personal, or conflict of interest

as to make good faith bargaining impractical". General Electric v. NLRB, C.A.2, 412 F.2d 512 (1969). The Appeals Court further held in G.E.:

... the freedom to select representatives is not absolute, but that does not detract from its significance. Rather the narrowness and infrequency of approved exceptions to the general rule emphasizes its importance. Thus, in arguing that employees may not select members of other unions as 'representatives of their own choosing', the Company clearly undertakes a considerable burden, characterized in an analogous situation in NLRB v. David Butterick Co. ... as the showing of a 'clear and present' danger to the collective bargaining process. [citations omitted]

Although the factual circumstances in the G.E. case involve the employer's refusal to bargain with a union negotiating team containing members of labor organizations other than the union with whom the contract was to be negotiated, the principles and underlying logic of the decision is compelling and equally applicable to the present matter.²

In applying the standard that alleged conflicts of interest of negotiating team members of the parties must be of such a nature that they present a reasonably clear and present danger to the collective bargaining process, it is evident in this case that the parties have a substantial history of effective negotiations and a long-standing and successful relationship. The fact that Majors have served on the State's bargaining team for nineteen years of successful negotiations increases the burden on the DSTA to show cause why there is a proximate danger at this point in time of the continued use of these persons infecting the bargaining process. In this case, there is no evidence on the record that the process has been so poisoned.

Finally, it should be noted that either party has available to it the administrative remedy of moving to have the position of Major removed from the

² It should be noted that DSTA has not charged that an unfair labor practice has occurred but rather has requested a declaratory statement in reference to "...a controversy [which] exists concerning a potential unfair labor practice". There has been no actual or implied refusal to bargain. The parties have entered into negotiations and have as of the writing of this decision reached agreement on a successor agreement.

bargaining unit. Apparently, the alleged conflict of interest has not been so great for over the past nineteen years as to necessitate attempting to remedy the situation.

For the reasons stated above, it is determined that under the factual circumstances presented, the inclusion of Majors, who are members of the bargaining unit represented by DSTA, on the employer's bargaining team is within the scope of permissible employer conduct under the Police Officers' and Firefighters' Employment Relations Act.

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