Delaware State University, Respondent Below Appellant

v.

Delaware State University Chapter of the American Association of University Professors, Charging Party Below Appellee

Date of Decision: May 9, 2000

IN THE COURT OF CHANCERY OF THE STATE OF DELAWARE

IN AND FOR NEW CASTLE COUNTY

DELAWARE STATE UNIVERSITY,	)	
	)	
Respondent Below	)	
Appellant,	)	
v.	)	Civil Action No. 1389-K
	)	
DELAWARE STATE UNIVERSITY	)	
CHAPTER OF THE AMERICAN	)	
ASSOCIATION OF UNIVERSITY	)	
PROFESSORS,	)	
	)	
Charging Party	)	
Below Appellee.	)	

MEMORANDUM OPINION

Date Submitted: February 11, 2000
Date Decided: May 9, 2000

Noel E. Primos, Esquire, Catherine T. Hickey, Esquire, of SCHMITTINGER & RODRIGUEZ, Dover, Delaware, Attorneys for Delaware State University.

Perry F. Goldlust, Esquire, of HEIMAN, ABER, GOLDLUST & BAKER, Wilmington, Delaware; OF COUNSEL: Jonathan G. Axelrod, of BEINS, AXELROD & KRAFT, Washington, D.C., Attorneys for AAUP.

STRINE, Vice Chancellor

Delaware State University ("DSU") has appealed the State of Delaware Public Employee Relations Board's (the "PERB" or the "Board") finding that DSU committed an unfair labor practice ("ULP") under Title 19, Chapter 13 of the Delaware Code, entitled the Public Employment Relations Act ("PERA"). Specifically, DSU challenges the Board's conclusion that DSU violated § 1307(a)(5) of PERA by refusing to grant the American Association of University Professors (the "AAUP") access to certain files relating to DSU's administration of its Merit Compensation Program.

This dispute arose in connection with a grievance filed by a senior official of the AAUP, who alleged that DSU administrators retaliated against her for her union activity by refusing to award her merit compensation for academic year 1993-1994. The information requested by the AAUP pursuant to Article 14.4.6 of the applicable collective bargaining agreement ("CBA" or "Agreement") consisted of documents submitted by and on behalf of all bargaining unit members who received merit pay for that year, including the merit recommendations submitted by their supervisors.

DSU and the AAUP were unable to reach agreement over the AAUP's discovery request. Rather than using the contract's dispute resolution process, the AAUP filed an unfair labor practice charge against DSU pursuant to § 1307(a)(5) for refusing to provide the requested

information. Over a year later — and less than a week before the scheduled arbitration hearing on the grievance — the AAUP asked the arbitrator for a subpoena to compel the production of the requested documents, plus similar documents for 1994-1995. After hearing both parties' positions on the matter, the arbitrator decided three days before the hearing to grant the AAUP access to the documents for 1993-1994, and DSU fully complied with the subpoena two days later, the day before the hearing. The AAUP went forward with the arbitration, which it lost on the merits after two days of testimony.

More than a year after the AAUP received the requested information pursuant to the subpoena and two years after the AAUP filed its ULP charge, the PERB Hearing Officer issued the PERB's first decision addressing the union's allegation that DSU violated § 1307(a)(5). In response to the AAUP's claim that DSU violated its duty to bargain collectively in good faith by refusing to comply with the union's information request, DSU asserted that the underlying grievance was unsubstantiated and that production would violate the confidentiality and thus the "integrity" of the Merit Compensation Program. In addition, DSU asserted the defenses that DSU is not an "employer" or "public employer" within the meaning of 19 Del. C. § 1302(n) and therefore is not subject to PERA in the first place

and that the PERB ought to have deferred to the dispute resolution process established by the CBA.

The PERB rejected all of DSU's arguments and ruled that DSU is a "public employer" under PERA § 1302(n), that deferral to the contractual arbitration process was unnecessary, and that DSU's failure to produce the Merit Compensation Program materials violated § 1307(a)(5) of PERA. DSU now appeals that decision.

I find that the PERB correctly concluded that DSU is a "public employer" within the meaning of PERA. Apart from the plain English meaning of the term "public employer," several other considerations support this conclusion. First, DSU's highly subsidized status as a public university run by a board dominated by gubernatorial appointees and subject to legislative control favors characterizing DSU as a "state agency" — and thus a "public employer" — under PERA. In addition, it is undisputed that DSU functioned as a "public employer" for the purposes of PERA's predecessor statute. Nothing in PERA's legislative history indicates that the General Assembly intended to remove DSU from the coverage of Delaware's public employment relations scheme when it enacted the current Chapter 13 of Title 19. Finally, a finding that DSU was not covered by PERA would likely leave DSU and its employees outside any system of labor regulation,

whether state or federal. Such a result would conflict with Delaware public policy as forcefully expressed by the General Assembly in PERA and its sister statutes — Chapter 40 of Title 14, the "Public School Employment Relations Act" (the "PSERA"), and Chapter 16 of Title 19, the "Police Officers' and Firefighters' Employment Relations Act" (the "POPFERA").

By contrast, I find that the Board erred as a matter of law with respect to its determination that it should not defer to the grievance and arbitration procedures established in Article 14.4.6 of the CBA, a provision that specifically addresses requests for information in the context of grievances. More specifically, I conclude that the Board erred by failing to apply the standard set forth by the Delaware Supreme Court in *City of Wilmington v. Wilmington Firefighters Local 1590*,[1] under which deference to contractual dispute resolution provisions is generally appropriate even when such provisions address statutorily protected rights, or to explain why that standard ought not apply in this instance. Furthermore, although the PERB alluded to federal cases creating a request-for-information exception to the federal pre-arbitral deferral policy upon which the *City of Wilmington* standard is based, the Board did not adequately explain why that exception should be adopted under this state's public employment relations scheme.

---

[1] *City of Wilmington v. Wilmington Firefighters Local 1590*, Del. Supr., 385 A.2d 720 (1978).

In light of these omissions, I vacate the PERB's order and remand this case for the PERB's articulation — and careful justification of — the deferral standard that the Board believes will most effectively advance the purposes of Delaware's public employment relations statutes and for a redetermination of the deferral question in accordance with that standard. Because the PERB is the body established by the General Assembly as the state's expert agency in public sector labor relations, it is appropriate to give the PERB the opportunity to consider the factors raised in this opinion and to more explicitly articulate its own view of proper deferral policy before the courts make a final determination.[2]

I. Applicable Standards

This court reviews all conclusions of law made by the PERB on a *de novo* basis.[3] While the court is "not unmindful" that the PERB possesses special expertise in Delaware labor law and therefore functions "in an area

[2] This case, in particular the issue of whether DSU is a "public employer" under PERA, has wound a tortuous path before reaching this stage. It is with chagrin that I issue a ruling continuing this by now rather pointless dispute, and I do so only because the legal issues at stake affect all public employers and their employees, because the record before me now does not provide a solid basis to make the quasi-legislative judgment required to determine the appropriate deferral policy, and because respect for the PERB's legislatively authorized role commands a more measured approach than a definitive reversal and dismissal of the AAUP's charge. Of course, the parties may rationally choose to disengage voluntarily and allow the PERB to address the open issues in another, more live case.

[3] *Board of Education of Colonial School District v. Colonial Education Association*, Del. Ch., C.A No. 14383, mem. op., 1996 Del. Ch. LEXIS 27, at *11, Allen, C. (Feb. 28, 1996), *aff'd*, Del. Supr., 685 A.2d 361 (1996).

that requires or at least is greatly aided by such expertise[,]"[4] plenary review of a PERB decision is appropriate when the issue is the proper construction of statutory law and its application to undisputed facts.[5]

By contrast, all factual conclusions by the Board that are supported by substantial evidence in the record must be accepted as correct.[6] "Substantial evidence means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[7] In this case, the PERB based its decision on and drew factual inferences from a stipulated paper record.

The issue of DSU's status as a public employer is a purely legal one. But the scope of review with respect to the deferral issue is a bit more complex. Although the question of which standard the PERB must apply when deciding whether or not to defer to a contract provision is a question of law subject to *de novo* review,[8] the PERB's application of that standard in a

---

[4] *Fraternal Order of Police Lodge No. 15 v. City of Dover*, Del. Ch., C.A. No. 16654, mem. op., 1999 Del. Ch. LEXIS 224, at *7, Jacobs, V.C. (Dec. 10, 1999) (internal quotations and citation omitted).

[5] *Public Water Supply Co. v. DiPasquale*, Del. Supr., 735 A.2d 378, 381 (1999); *see also id.* 382 & 382 n.8 ("A reviewing court may accord due weight, but not defer, to an agency interpretation of a statute administered by it.").

[6] 29 Del. C. § 10142(d).

[7] *Breeding v. Contractors-One-Inc.*, Del. Supr., 549 A.2d 1102, 1104 (1988).

[8] *Colonial School District*, 1996 Del. Ch. LEXIS 27, at *11; *see generally DiPasquale*, 735 A.2d at 380-83; *cf. City of Wilmington*, 385 A.2d 720 (determining standard for pre-arbitral deferral under former Title 19, Chapter 13).

particular instance is reviewed by this court solely for abuse of discretion.[9] Stating these standards of review is easier than applying them. The articulation of the proper deferral policy under statutes like PERA turns not on any plain statutory language, but on a balancing of statutory purposes and a consideration of the practical imperatives of labor-management relations. Although the deferral standard is ultimately a question of law, it would be presumptuous to think that the PERB's views on the issue are not worthy of consideration by the judiciary in making a final determination.

II. PERA Jurisdiction Over DSU

A. DSU's Close Relationship With The State of Delaware

Formerly Delaware State College, DSU is one of the three institutions in Delaware's public university system, together with the University of Delaware and Delaware Technical and Community College ("Del Tech"). DSU was established by the Delaware General Assembly in 1891 "to promote the liberal and practical education of the industrial classes in the several pursuits and professions in life" as well as "other scientific and

[9] *See, e.g., NLRB v. American National Can Co.*, 924 F.2d 518, 522 (4th Cir. 1991) (an NLRB decision concerning deferral to arbitration "is to be affirmed unless found to be an abuse of discretion") (citation omitted).

classical studies . . . ."[10] Pursuant to the Delaware Code, DSU is a corporation and enjoys the powers incident to its corporate status.[11]

DSU is governed by an eleven-member Board of Trustees, six of whom are appointed by the Governor, with the remaining five elected by a majority of the Board. Each county of the State must be represented by at least three Board members. The Governor and DSU's President both serve as *ex officio* Board members. Under 14 Del. C. § 6505, the Board has sole authority to enact bylaws, appoint and remove faculty and other officers and agents of DSU, fill vacancies as required, and otherwise direct all "concerns of the institution."[12] Thus DSU's President has stated that "[t]he Board of Trustees has complete autonomy, *within the bounds of the statutory framework*, to determine fiscal and educational policy for DSU."[13]

DSU downplays its financial relationship with the State of Delaware. A bit contradictorily, DSU points to the substantial amount of federal funding it receives as one of the State's two land grant institutions of higher learning as evidence of its autonomy from the State. Of the funds

---

[10] 14 Del. C. § 6502.

[11] 14 Del. C. §§ 6501, 6503.

[12] 14 Del. C. § 6505.

[13] DSU I Ex. E, at 1 (emphasis added).

appropriated by Congress to Delaware for such institutions, 20% is paid directly to DSU each year by the State Treasurer.[14]

DSU also receives a large amount of funding from the State of Delaware. The State General Fund appropriation to DSU in Fiscal Year 1996 totaled $ 24.8 million.[15] Since then, appropriations to DSU have increased at a healthy clip. For Fiscal Year 2000, the General Assembly made over $33 million in General Fund and $8.5 million in capital improvement appropriations to DSU.[16] DSU must also comply with state accounting procedures and make its records available at the State's request.[17]

B. The PERB Correctly Concluded That DSU Is A "Public Employer" Within The Meaning Of 19 *Del. C.* § 1302(n)

Pursuant to § 1301, PERA applies only to "public employees" and "public employers." Section 1302(n) defines a "public employer" as, among other things, *the State . . . or any agency thereof . . . .*"[18] Unfortunately, PERA does not define the terms "State" or "agency." Nor have Delaware's

[14] 14 Del. C. § 6508. DSU also highlights the Board's authority to issue bonds in DSU's name, which must be paid exclusively from DSU funds without any pledge of the faith and credit of the State of Delaware toward the payment of the principal or interest. 14 Del. C. §§ 6512, 6514.

[15] DSU I Ex. A, at 7.

[16] 72 Del. Laws Ch. 94 (1999); 72 Del. Laws Ch. 258 (1999).

[17] DSU I Ex. A, at 7. As further measure of DSU's close ties to the State, the AAUP highlights the scholarship funding given DSU by the General Assembly pursuant to 14 Del. C. § 6510 and the requirement under 14 Del. C. § 6511 that DSU operate a tuition-free summer school program for public school teachers and instructional aides.

[18] 19 Del. C. § 1302(n) (emphasis added).

courts yet addressed whether any of the State's three "public" institutions of higher learning are "state agencies" within PERA's jurisdiction.[19]

Although the text of PERA does not specify which entities the General Assembly intended to cover as "state agencies," several other provisions of the Delaware Code designate DSU as a "state agency." These provisions include 30 Del. C. §§ 545(b)(1)(a) and 5506(d)(1), which state that DSU is an "agency" for certain tax purposes,[20] 29 Del. C. § 6102(b), which provides that DSU is an "agency" for certain purposes of the General Fund,[21] and 29 Del. C. § 7419(a), which states that DSU is an "agency" for certain procurement purposes.[22] The AAUP argues that these provisions indicate the General Assembly's intent that PERA would cover DSU. Yet the fact that DSU and its sister institutions are "state agencies" for some purposes under other statutes in the Code is not dispositive of the General Assembly's similar intent with respect to PERA.

---

[19] *But see Chapman v. Trustees of Delaware State College*, 101 F.Supp. 441, 444 (D.Del. 1951) (dismissing complaint because "a Federal Court should not interfere with The Trustees of Delaware State College, a state agency, which is a 'body corporate of the State of Delaware'"); *Lewis v. Delaware State College*, 455 F.Supp. 239, 245 (D.Del. 1978) (Delaware State College's personnel decisions "constituted state action within the meaning of the Fourteenth Amendment" to the United States Constitution); *see also Crumley v. Delaware State College*, 797 F.Supp. 341, 344 n.3 (D.Del. 1992) (although the court did not reach the question, Delaware State College itself argued that it was a "government agency" for the purposes of the Civil Rights Act of 1991 such that punitive damages could not be awarded against the institution).

[20] 30 Del. C. § 545(b)(1); 30 Del. C. § 5506(d)(1).

[21] 29 Del. C. § 6102(b).

[22] 29 Del. C. § 7419(a).

But I am likewise unconvinced by DSU's contrary argument that the *expressio unius est exclusio alterius* doctrine dictates the conclusion that the term "agency" in § 1302(n) cannot include DSU. In other words, DSU contends that the General Assembly's failure to specify that PERA covers DSU — in contrast with other statutes' specific mention of DSU — means that the General Assembly intended to exclude DSU from PERA.

The *expressio unius* doctrine is a rule of construction that must be applied with great caution,[23] and this case illustrates why. To infer that the General Assembly's silence in the case of PERA was an implicit act of exclusion solely because DSU was explicitly included in other statutes using the term "state agency" is to misapply a hornbook methodology to the process of lawmaking in a citizens' legislature. While the General Assembly's approach to DSU in other circumstances certainly bears on its intentions under PERA, the significance of this factor should not be overstated. After all, the General Assembly, unlike Congress, does not have a full-time staff whose job is to assist the members in drafting bills that achieve Code-wide consistency. While the diligent part-time lawyers who serve the General Assembly strive for uniformity, it would be a triumph of maxims over justice to give deciding weight to the *expressio unius* doctrine

[23] *Robb v. Ramey Associates, Inc.*, Del. Super., 14 A.2d 394, 396 (1940).

in this case based on context-specific statutory provisions adopted at different times and appearing in widely disparate chapters of the Code. As Chancellor Chandler has stated, "[w]hile the Legislature is appropriately charged with knowledge of the statutes it enacts, it is too high a burden to expect the General Assembly to maintain constant vigilance over the exact wording of all statutes addressing similar issues."[24]

In the absence of clear textual guidance, the question of whether DSU qualifies as a "public employer" for the purposes of PERA therefore depends critically on whether Delaware's General Assembly intended that PERA would cover DSU.[25] "When interpreting a statute, the fundamental rule is to ascertain and give effect to the intent of the Legislature."[26] The following considerations lead me to conclude that the General Assembly intended that PERA would cover DSU.

---

[24] *Nakahara v. The NS 1991 American Trust*, Del. Ch., 739 A.2d 770, 781 (1998); *see also id.* at 780 (observing that several cases applying the *expressio unius* doctrine "address the interpretation of language discrepancies between different sections of a single statute or between different versions of the same statute").

[25] I therefore reject DSU's contention that the "more formal sense of 'state agency'" enunciated by *Gordenstein v. University of Delaware* provides the appropriate construction of the term under 19 Del. C. § 1302(n). *Gordenstein v. University of Delaware*, 381 F.Supp. 718 (D.Del. 1974). In *Gordenstein*, the court determined that the University of Delaware was "not an arm or alter ego of the State of Delaware under the Eleventh Amendment . . . ." *Gordenstein*, 381 F.Supp. at 722. *Compare, e.g.*, *Parker v. University of Delaware*, Del. Ch., 75 A.2d 225, 230 (1950) (University of Delaware was a "State agency" for the purposes of the common law and the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution). The proper construction of PERA depends on the General Assembly's intent rather than on the Eleventh Amendment test.

[26] *Nakahara*, 739 A.2d at 779; *see also Alfieri v. Martelli*, Del. Supr., 647 A.2d 52, 54 (1994).

First, the primary statutory language in question is "public employer." Although the question of whether DSU is a "public employer" turns on its status as a state agency, the term "public employer" is itself indicative of the General Assembly's intent. By any commonly understood measure,[27] DSU is a "public employer" created by the State of Delaware.[28] The institution was created by state statute and is governed by a board dominated by gubernatorial appointees. In addition, DSU is heavily dependent on funding from the State and accountable to the General Assembly for the monies it receives from the State Treasury. The significant degree of control retained by the executive and legislative branches over DSU it makes it difficult to conceive how DSU could be considered anything but a "public employer." Thus DSU's position as a cornerstone of Delaware's "public" university system suggests that PERA's drafters considered DSU a "state agency" or "public employer" under the statute.

Second, the legislative history of PERA also strongly indicates that the General Assembly intended to include DSU within the statute's scope, particularly given the drafters' retention of essentially the same jurisdictional language found in PERA's predecessor and the longstanding participation of

---

[27] *Kofron v. Amoco Chemicals Corp.*, Del. Supr., 441 A.2d 226, 230 (1982) (a court must "give the statutory words their commonly understood meanings").

[28] DSU employees also participate in the State's pension plan. 29 Del. C. § 5501(a)(1)(B).

DSU and the other state institutions of higher learning under that labor relations scheme.

The prior Chapter 13 of Title 19, entitled "Right of Public Employees to Organize," was enacted over thirty years ago and was administered by the Department of Labor with the help of the Governor's Council on Labor. PERA's predecessor also failed to precisely define the term "state agency," let alone specify that DSU, the University of Delaware, or Del Tech would qualify as "state agencies." But when the General Assembly formally repealed the predecessor statute and adopted PERA, the drafters did not materially change the chapter's jurisdictional language. DSU and the University of Delaware appeared frequently before the Governor's Council under the former Chapter 13 of Title 19, without voicing jurisdictional objections. In fact, DSU and the AAUP entered into the CBA governing this dispute "*pursuant to the Public Employee Bargaining Provisions of the Delaware Code.*"[29] Thus DSU, like the AAUP, evidently assumed that DSU was a "public employer" under the prior statute.[30] Both DSU and the University of Delaware actively functioned as "public employers" for many years under the prior statute, one may reasonably impute to the General

---

[29] CBA Art. 1.1 (emphasis added).

[30] By these observations, I do not suggest that DSU's participation under the predecessor statute means that it somehow assumed "public employer" status by virtue of a theory of consent or waiver. *Beeson v. Elliott,* 1 Del. Ch. 368, 383 (1831).

Assembly knowledge of these public universities' activity as "state agencies" under that statutory regime. It is therefore unlikely that PERA's drafters intended to remove employers like DSU from the statute's coverage — and thereby effect a significant change in the operation of the law — without doing so explicitly.[31]

DSU's suggestion that the General Assembly intended to exclude DSU from PERA is not only inconsistent with PERA's legislative history, but it also runs counter to the history of Delaware's public employment relations law. Between 1982 and 1994, when PERA was enacted, the General Assembly expended considerable energy in expanding, rather than contracting, the reach of Delaware's labor laws.[32] Accordingly, the synopsis to the Senate Bill enacting PERA explains the statute's goal in expansive terms, stating that it was intended to "extend[] to *all public sector employers and employees* the right to collectively bargain" and "bring *all public sector employers and employees* under the jurisdiction of the Public Employment

---

[31] *See, e.g., Ahner v. Delaware Alcoholic Beverage Control Comm'n*, Del. Supr., 237 A.2d 706, 708 (1967) ("it would seem more reasonable to expect an important change of policy . . . to be expressed in much more explicit and unequivocal language"); *State v. 0.0673 Acres of Land, More or Less*, Del. Supr., 224 A.2d 598, 602 (1966) ("The General Assembly is presumed to have enacted legislation with knowledge of the existence and effect of prior law.").

[32] During that time, the General Assembly enacted three statutes modeled on the federal NLRA: the PSERA in 1982 covering public school districts, the POPFERA in 1986 covering police and firefighting agencies, and the PERA in 1994 covering "state agencies" more generally.

Relations Board."[33] DSU's construction of PERA therefore appears at odds with the General Assembly's attempts to achieve comprehensive coverage under Delaware's public employment relations statutes.

Finally, construing PERA as covering DSU implements the drafters' stated purposes in enacting the statute, whereas a contrary holding would conflict with those purposes.[34] Section 1301 states that "[i]t is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between public employers and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public employer."[35] Holding DSU to be a "public employer" thus seems to advance PERA's purposes.

By contrast, DSU's interpretation would create a pre-Wagner Act state of nature that is hard to reconcile with PERA's purposes.[36] That is, the parties agree that if PERA does not apply, DSU would not be covered by the National Labor Relations Act (the "NLRA") and would therefore operate

---

[33] S.B. No. 401, 137th General Assembly, 69 Del. Laws Ch. 466 (1994) (emphasis added).

[34] *See Magill v. North American Refractories Co.*, Del. Supr., 128 A.2d 233, 236 (1956) (courts "are obliged to give to the language of a statute a plain and sensible meaning having in mind its purpose and intent") (internal quotations and citation omitted).

[35] 19 Del. C. § 1301.

[36] The result "may not be patently absurd," but "it heads in that direction" to a degree that warrants the conclusion that it cannot have been intended. *Nationwide Mutual Insurance Co. v. Krongold*, Del. Supr., 318 A.2d 606, 608 (1974).

outside any regulatory framework for labor relations.[37] This could mean that AAUP members would lack the statutorily protected right to bargain collectively but possess the right to strike,[38] creating a jurisdictional crack in conflict with Delaware's stated public policy of over thirty years.

For all these reasons, I affirm the PERB's conclusion that DSU is a "public employer" under 19 Del. C. § 1302(n).

III. The Appropriateness Of Deferral To The Agreement's Dispute Resolution Procedures

A. The 1995 Grievance Underlying This Appeal

The following facts are relevant to whether the PERB properly declined to defer to the contractual provisions governing the production of information related to grievances and whether the Board correctly concluded that DSU violated § 1307(a)(5).

1. The Conflict Between DSU And The AAUP Over Requests For Information

The present litigation is the second skirmish between DSU and the AAUP over whether and to what extent DSU must disclose information

---

[37] *See* 29 U.S.C. § 152(2) (definition of "employer" excludes "any State or political subdivision thereof"); *University of Vermont and State Agricultural College*, 297 NLRB 291 (1989) (advisory opinion concluding that NLRB would not exercise jurisdiction over the University of Vermont because the University was a political subdivision of the State of Vermont and therefore not an "employer" under the NLRA), *dismissed*, 748 F.Supp. 235 (D.Vt. 1990).

[38] *See* 19 Del. C. § 1303(1)-(2) (giving public employees the right of "organization and representation" and obligating public employees and unions "to enter into collective bargaining negotiations"); § 1316(a) ("[n]o public employees shall strike . . .").

concerning the Merit Compensation Program's administration. Both disputes have concerned grievances filed by the AAUP on behalf of Professor Jane Buck, a now-retired DSU psychology professor who served the AAUP in numerous leadership positions. Buck first grieved her merit pay in the spring of 1992 (the "1992 Grievance"), when she contested the amount of the award she received for academic year 1990-1991. The grievance underlying the current dispute concerns Buck's 1995 challenge of DSU's failure to award her any merit pay for 1993-1994 (the "1995 Grievance" or the "Grievance"). In both grievances, Buck complained that DSU improperly used the Program to penalize her for her union activity.

In relation to both grievances, DSU and the AAUP have clashed over the AAUP's request for information that it claimed was necessary to evaluate and process Buck's grievances. But whereas the discovery battle arising out of the 1992 Grievance turned solely on whether DSU was contractually obligated to comply with the AAUP's request for access to the Merit Compensation Program files, the present dispute also turns on DSU's statutory duty to grant such access under PERA, which was enacted in 1994. Buck lost the 1992 Grievance on the merits, but the arbitrator upheld the AAUP's contractual right to review the application files of merit award recipients under Article 14.4.6 of the Agreement, which requires that DSU

share with a grievant or the AAUP "[a]ny information pertaining to the grievance in the official file" within seven working days of a request.

2. The Relevant CBA Provisions

Although the PERB framed this case as concerning only the AAUP's statutory right to information pursuant to PERA § 1307(a)(5), several provisions of the CBA bear on the outcome of this dispute.

Article 17.12 of the Agreement and the Addendum to the Agreement provide for the annual Merit Compensation Program (the "Program") and establish the criteria and procedures for selecting award recipients. Article 17.12.2 explains that the Program is designed to recognize faculty who demonstrate outstanding performance in teaching or assigned duties, research and writing, or service to DSU or the community.

Article 17.12.4 states that merit compensation shall be awarded by DSU after an application and selection process in which department chairs recommend candidates who then submit documentation of their achievements, and then deans, the appropriate Vice President, and the President review those submissions and make their recommendations. But although Article 17.12 outlines the selection process in detail, that provision neither describes the files containing the application materials nor stipulates

the terms on which grievants or the AAUP may have access to them. Thus several other provisions are also relevant.

The most important of these, Article 14.4.6, requires DSU to share with a grievant or the union within seven working days of the request "[a]ny information pertaining to the grievance in the official file in the possession of [DSU] needed by the grievant or the Association on behalf of the grievant to investigate and process a grievance . . . ."

In addition, Article 15.4 requires that DSU keep certain contents of its files confidential. That provision states that DSU "shall not divulge any data or information from its files relating to any identified unit member without the express written request or written approval of the unit member, *except as evidence in legal disputes, response to compulsory legal process, response to requests for proposals which would involve the unit member, accrediting proceedings or as evidence in [DSU] hearings.*"[39] Article 15.3(f), in turn, describes the "official personnel file of each unit member" as including "[a]ll documents relating to professional growth or performance, including evaluations, correspondence or memoranda of discussions between the unit member and the Department Chairperson, appropriate Academic Dean, or

[39] CBA Art. 15.4 (emphasis added).

the appropriate Vice President or other peers or administrators relating to evaluations of professional performance."

3. The 1995 Grievance And The Battle Over The Union's Entitlement to Information Under PERA

The current litigation stems from the 1995 Grievance, which the AAUP filed on April 24, 1995. The same day the AAUP filed the 1995 Grievance, it submitted a written request for information *pursuant to Article 14.4.6, not PERA*. The AAUP sought "access to the merit applications and supporting documentation of all unit members who were awarded merit this year" and "copies of all the recommendations for merit forwarded by each of the Chairs and each of the Deans."[40] The AAUP did not specifically state that the request was in connection to the 1995 Grievance.

By letter dated May 2, 1995, DSU Contract Administrator James Mims refused to comply with the request, stating in words reminiscent of those used by the arbitrator of the 1992 Grievance that "it [was] evident that the information being requested [was] not needed to investigate and process a grievance, but instead [was] being requested in order to search for a

[40] DSU II Ex. 4.

grievance."[41] He asked the AAUP to submit a "proper request."[42] The grievance process was then suspended during the summer.

By the end of August, Buck had taken over the position of AAUP President and began acting as her own union advocate. Eschewing the option of grieving DSU's failure to provide the requested information by May 3, 1995, Buck instead initiated a round of testy correspondence between herself and Mims similar to the worst sort of lawyer-against-lawyer discovery battles.

The essence of the positions of the AAUP and DSU can be summarized as follows. For its part, DSU contended that the union's request should be made under Article 14.4.6 and that DSU only had to provide information relevant and necessary to investigate and process the 1995 Grievance. It further argued that the union had failed to demonstrate its entitlement under that standard.

By contrast, the AAUP argued that it had a right to the requested information under both the CBA and § 1307(a)(5) of PERA. In this regard, the AAUP contended that the information must be produced even if it was not relevant to the 1995 Grievance, because the union was entitled to

---

[41] DSU II Ex. 5.

[42] *Id.*

information in order to monitor DSU's compliance with the CBA. Notably, Buck's reference to the union's right "to monitor contract compliance"[43] was not tied to any particular compliance monitoring the union wished to perform. Rather, it is quite obvious that the real purpose of the request was the original one: to get evidence to support the 1995 Grievance. To that end, the union finally spelled out why it believed the information it sought was relevant to that purpose.

But even after this explanation by the union, the parties still could not reach accord. Instead of grieving the issue and seeking to have it consolidated with the 1995 Grievance for processing, the AAUP filed a ULP charge with the PERB on October 5, 1995.

4. The Arbitration Of The 1995 Grievance Goes Forward, And The PERB Finds That DSU Committed An Unfair Labor Practice

In April of 1996, the arbitrator chosen by the parties to hear the 1995 Grievance denied the AAUP's request for a stay of the arbitration proceedings pending the PERB's decision. In June of 1996, the arbitrator scheduled a hearing date for September 26, 1996.

The union waited until September 18, 1996 to obtain from the arbitrator a subpoena duces tecum requiring production of evidence from

[43] DSU II Ex. 6, at 2.

DSU.[44] The subpoena commanded DSU to produce the merit applications for academic years 1993-994 *and 1994-1995* in addition to supporting documentation, recommendations by department chairs and deans, DSU's announcements of the criteria for merit compensation, and copies of directives establishing the Merit Compensation Program's procedures for both academic years.

On September 20, 1996, DSU gave the AAUP copies of the program criteria and DSU's directives concerning those criteria but otherwise moved to quash the subpoena because, among other reasons, the requested materials were confidential and were being sought to search for an otherwise unsubstantiated grievance. The arbitrator granted DSU's motion to quash on September 23 as to the AAUP's expanded request for information from 1994-1995 but otherwise denied it, and on September 25 DSU gave AAUP access to the applications, the supporting documentation, and the recommendations for 1993-1994.

After evidentiary hearings conducted on September 26 and December 3, 1996, the arbitrator issued a decision on March 5, 1997 denying the 1995

[44] Whereas the AAUP contends that DSU unfairly dumped the discovery on the union the day before the September 26 hearing, the AAUP apparently sat on its hands by waiting until September 18 to seek the subpoena; the union could have done so in April of 1996, when the arbitrator refused to stay the proceedings, or in June of 1996, when a hearing date was set. For this and other reasons, I reject the AAUP's claims that it was "futile" to grieve the dispute.

Grievance. In his decision the arbitrator compared Buck's application with those of other faculty and considered the DSU officials' analysis of those applications in light of the contract criteria.

DSU fared less well before the PERB, however. On November 18, 1997 — over two years after the ULP charge was filed and over a year after DSU had produced the information at issue — the PERB Hearing Officer assigned to the case concluded that DSU's denial of the AAUP's written request for access to the 1993-1994 applications, supporting documentation, and recommendations constituted a violation of PERA § 1307(a)(5). On February 5, 1998, the PERB affirmed the Hearing Officer's decision in an opinion that relied heavily on the Hearing Officer's analysis.

B. The PERB Failed By Failing To Apply The Correct Legal Standard To Determine That Deferral Was Unnecessary

DSU appeals the PERB's rejection of DSU's defense that the PERB should have required the AAUP to grieve DSU's denial of the information request under Article 14.4.6 of the Agreement, which governs grievance-related production requests. In other words, DSU argues that the PERB should have deferred to the arbitrator's resolution of the dispute pursuant to the procedures set forth in the CBA.

1. The PERB Correctly Ruled That § 1307(a)(5) Of The PERA Imposes A Statutory Duty To Disclose Information

As a preliminary matter, I find that the PERB correctly concluded that § 1307(a)(5) of PERA imposes a statutory duty on employers to disclose information in certain situations. Section 1307(a)(5) provides that "[i]t is an unfair labor practice for a public employer or its designated representative to . . . [r]efuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject."[45]

Delaware courts have yet to apply this section of PERA to a discovery dispute like the present one. But when construing the PSERA, the courts have held that employers are statutorily required to furnish information necessary for the processing of grievances.[46] Similarly, federal courts have long held that NLRA § 8(a)(5) requires the production of information necessary to process grievances.[47] Thus it appears beyond question that the duty to bargain in good faith under PERA § 1307(a)(5) encompasses the obligation to provide non-privileged information relevant to contractual grievances.

---

[45] 19 Del. C. § 1307(a)(5).

[46] *Colonial School District*, 1996 Del. Ch. LEXIS 27, at *23 (citation omitted).

[47] *See, e.g., National Labor Relations Board v. Acme Industrial Co.*, 385 U.S. 432, 435-36 (1967).

2. The PERB Failed To Identify The Standard It Applied To Determine That Deferral Was Inappropriate In This Case

Although the PERB correctly held that § 1307(a)(5) requires employers to disclose information, the Board failed to identify the standard it applied to decide that it was unnecessary to defer to the CBA's provisions governing grievance-related information requests.

Instead, the Board's analysis of DSU's argument that this matter should be deferred to the parties' contractual arbitration process consisted solely of the following quotation from the Hearing Officer's decision:

> "[A] resolution of the substantive grievance would not resolve the statutory charge. Further, pre-arbitral deferral, in this case, would serve to defeat the purpose of the statute. PERB is charged with facilitating harmonious and cooperative relationships and is empowered to prevent the commission of any unfair labor practice. The continuing duty to bargain in good faith is statutory and failure to do so results in the commission of an unfair labor practice . . . ."[48]

The Hearing Officer's decision, in turn, did not explore the deferral question in any significantly greater depth. The Hearing Officer merely characterized the "PERB's . . . deferral policy" as "limited" and "discretionary" and stated that "[t]he procedural issue of disclosure of information is but a preliminary step in the resolution of the underlying substantive issue and does not limit, but rather facilitates, the resolution of

[48] DSU I Ex. D, at 4 (*quoting Hearing Officer's 1997 Decision* (DSU I Ex. C), at 16).

the dispute."[49] Finally, the Hearing Officer concluded her discussion by quoting a passage reflecting the federal case law's general stance that parties possess an independent, statutory right to information and that unions need not file contractual grievances to vindicate that right.[50]

Thus, neither decision referred to Delaware case law when discussing the applicability of the PERB's "deferral policy" in this case. Nor did either decision cite any prior PERB decision or regulation addressing this issue. I therefore turn to an examination of existing Delaware law on the subject.

3. Delaware Follows A General Policy of Pre-Arbitral Deferral To Contract Provisions Addressing Statutorily Protected Rights, A Policy Triggered In This Case By Article 14.4.6 Of The Agreement

Delaware public policy strongly favors the use of contractual dispute resolution procedures to resolve disputes between public employers and the bargaining representatives of their employees.[51] Indeed, under PERA:

---

[49] DSU I Ex. C, at 15-16.

[50] Specifically, the Hearing Officer concluded her discussion as follows:

> "In these circumstances, we find no merit in encumbering the process of resolving . . . pending grievances with the inevitable delays attendant to the filing, processing and submission to arbitration of a new grievance regarding the information request. Such a two tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration. Nor would it be consistent with prior [National Labor Relations] Board decisions in this area."

Id. at 16 (quotations and citation omitted).

[51] *City of Wilmington*, 385 A.2d at 724-25; *City of Wilmington v. Fraternal Order of Police*, 510 A.2d at 1029.

> [t]he public employer and the exclusive bargaining representative shall negotiate written grievance procedures by means of which bargaining unit employees, through their collective bargaining representatives, may appeal the interpretation or application of any term or terms of an existing collective bargaining agreement; such grievance procedures shall be included in any agreement entered into between the public employer and the exclusive bargaining representative.[52]

Furthermore, the Delaware Supreme Court has provided guidance as to when the PERB should defer to collective bargaining agreement provisions that establish grievance and arbitration procedures, even when such provisions address statutorily protected rights. In *City of Wilmington v. Wilmington Firefighters Local 1590*, our Supreme Court adopted the federal "pre-arbitral deferral policy" under which the National Labor Relations Board ("NLRB") "'refrain[s] from exercising jurisdiction in respect of disputed conduct arguably *both* an unfair labor practice and a contract violation when . . . the parties have voluntarily established by contract a binding settlement procedure.'"[53] The reason for deferring "to the contractually agreed-upon arbitration procedures when the issue is a refusal-to-bargain" is to require parties "'to honor their contractual obligations rather than, by casting [a] dispute in statutory terms, to ignore their agreed-

---

[52] 19 Del. C. §1313(c).

[53] *City of Wilmington*, 385 A.2d at 723 (*quoting William E. Arnold Co. v. Carpenters District Council*, 417 U.S. 12, 16 (1974)) (emphasis added).

upon procedures.'"[54] This approach is therefore premised on a recognition that collective bargaining agreements often define statutorily protected rights more specifically and that particular actions may breach both the contract and the relevant statute.

City of Wilmington was decided under PERA's predecessor statute. In that case, the Delaware Supreme Court embraced the practice of deferring to "contractually agreed-upon arbitration procedures when the issue is a refusal-to-bargain."[55] But, as the Court further explained, the statutory decisionmaker (at that time this court, and now the PERB) may "consider an application for additional relief on a showing that either: (1) the dispute has not been resolved with reasonable promptness, or (2) the arbitration procedures have been unfair or have rendered a result repugnant to the Act."[56]

In this case, Article 14.4.6 explicitly addresses information requests in the context of grievances, and Article 14 of the CBA establishes the

---

[54] *Id.*, 385 A.2d at 723 (*quoting Arnold,* 417 U.S. at 16) (*quoting Collyer Insulated Wire*, 192 NLRB 837, 842-43 (1971)).

[55] *Id.*, 385 A.2d at 723-24 (*citing Collyer Insulated Wire*, 192 NLRB 837). Although *City of Wilmington* was decided under the former Title 19, Chapter 13, I see no reason to conclude that its deferral standard does not apply under PERA as well. PERA does not contain any provisions materially different from the former Chapter 13 or from the NLRA in effect when our Supreme Court adopted the federal deferral policy in *City of Wilmington*. If anything, arbitration procedures have evolved since 1978 to a much greater level of sophistication, and arbitration is now an accepted alternative to litigating even extremely complex civil matters.

[56] *City of Wilmington,* 385 A.2d at 723-24 (*quoting Collyer*, 192 NLRB at 837, 1971 NLRB LEXIS 123, at *32-*33).

grievance and arbitral processes for handling violations of the CBA, including Article 14.4.6. *Indeed, the dispute in this case arose as a result of an information request originally made by the AAUP "[u]nder terms of Article 14.4.6," not PERA.*[57] Despite the union's unsubstantiated claim of a broader purpose, the only evident reason for the information request was to help the AAUP prosecute the 1995 Grievance.

Notwithstanding these factors, the PERB did not discuss the basic standard set forth in *City of Wilmington*, explain the need for "additional relief"[58] against DSU based on an application of that standard, or justify the need for an exception to that standard. By failing to do so, the PERB erred as a matter of law.

4. Delaware Courts Have Yet To Acknowledge The Federal Information Exception To The Pre-Arbitral Deferral Policy

In concluding that the PERB failed to properly consider Delaware's basic deferral standard and the two primary exceptions justifying continued PERB jurisdiction, I recognize that federal case law carves out an exception from the general policy of deferring to contractual grievance procedures in the case of requests for information. I also acknowledge that the PERB decisions in this case suggest that the agency believes that this exception

[57] DSU II Ex. 4.

[58] *City of Wilmington*, 385 A.2d at 723.

applies under Delaware law as well. But to my knowledge, Delaware courts have yet to explicitly adopt the federal exception to the general policy of deferring to contractual grievance procedures where requests for information are concerned, *let alone in cases where a contract contains a provision specifically addressing the production of grievance-related information.*

It is true that Delaware courts turn to federal case law decided under the NLRA for guidance in construing Delaware's similar statutory provisions.[59] But even to the extent that federal courts have adopted a clear standard for pre-arbitral deferral in the context of requests for information, neither Delaware courts nor the PERB should blindly follow federal precedent without first examining whether the NLRA practice in question would in fact promote the goals of Delaware's public employment statutes.[60]

Turning to the federal right-to-information cases, the United States Court of Appeals for the Fourth Circuit has held, for example, that "[a] Section 8(a)(5) violation based on an information request is an exception to the Board's general deferral policy since denial of necessary information is a rejection of the bargaining process."[61] The rationale is that "deferral in such

---

[59] *City of Wilmington*, 385 A.2d at 724; *Cofrancesco v. City of Wilmington*, 419 F.Supp. 109, 111 (D.Del. 1976).

[60] *E.g.*, *City of Wilmington*, 385 A.2d 720 (evaluating merits of deferral policy).

[61] *Roytype Division, Pertec Computer Corp.*, 284 NLRB 810, 1987 NLRB LEXIS 440, at *50-51 (June 30, 1987).

cases can lead to a two-tiered dispute resolution procedure, whereby the Union would have to file one grievance to obtain the needed information, followed by a second grievance concerning the access provision," which would constitute an "'unacceptable impediment to the right of the Respondent's employees to be effectively represented by their collective bargaining representatives.'"[62]

This exception from deferral stems from the 1967 case of *NLRB v. Acme Industrial Co.*, in which the United States Supreme Court rejected the employer's contention that the NLRB must "await an arbitrator's determination of the relevancy of the requested information before it can enforce the union's statutory rights [to information] under § 8(a)(5) [of the NLRA]."[63] The *Acme* Court was not persuaded that the "arbitrator's greater institutional competency" required deferral and approved of the Board acting only "upon the probability that the desired information [is] relevant, and that it would be of use to the union in carrying out its duties and responsibilities."[64] Rather than "threaten[ing] the power which the parties have given the arbitrator to make binding interpretations of the labor

---

[62] *American National Can*, 924 F.2d at 523 (*quoting American National Can Co.*, 293 N.L.R.B. 110, 1989 NLRB LEXIS 186, at *11 (Apr. 28, 1989)).

[63] *Acme*, 395 U.S. at 436.

[64] *Acme*, 395 U.S. at 437-37 (citation omitted).

agreement[,]" the Court found that the NLRB's assertion of jurisdiction "was in aid of the arbitral process."[65]

Although our Supreme Court cited *Acme* with approval in *City of Wilmington*, it did so merely for the proposition that "'the existence of a claimed contract violation and the availability of a contract remedy — arbitration, for example — does not divest the NLRB of jurisdiction to adjudicate an alleged statutory violation for the same conduct.'"[66] The Court held that "NLRB jurisdiction continues but, if the labor dispute involves both allegations (that is, statutory as well as contract violations) and if it is at the pre-arbitral stage, the NLRB will defer to the contractually agreed-upon procedures when the issue is a refusal-to-bargain."[67] Thus the Delaware Supreme Court has yet to adopt the federal information exception that grew out of the *Acme* decision.[68]

---

[65] *Acme*, 395 U.S. at 438. *See also id.* (because "[a]rbitration can function properly only if the grievance procedures leading to it can sift out unmeritorious claims[,]" the arbitration system would be "woefully overburdened" if unions were forced to take grievances "all the way through to arbitration without providing [unions] the opportunity to evaluate the merits of the claim").

[66] *City of Wilmington*, 385 A.2d at 723 (*quoting Acme*, 385 U.S. 432).

[67] *Id.* (*citing Collyer Insulated Wire*, 192 NLRB 837).

[68] Nor has the Chancery Court adopted this exception. Although this court cited *Acme* with approval in a 1996 case involving a union's request for information under the PSERA, that case did not involve contractual provisions governing requests for information. *Colonial School District*, 1996 Del. Ch. LEXIS 27, at *24 n.9 (*citing Acme* for proposition that "a private sector employer has a general obligation to provide information that is needed by the bargaining representative for proper performance of its duties") (*citing Acme*, 385 U.S. at 435-36).

Furthermore, it is far from clear that *Acme* and its progeny stand for the proposition that parties may always assert their statutory right to information allegedly necessary to evaluate or process grievances regardless of the existence of a collective bargaining agreement provision specifically addressing the production of grievance-related information.[69]

5. Remand Is Appropriate For A Redetermination Of The Deferral Issue Under The *City Of Wilmington* Standard Or To Permit the PERB To Explain Why A Different Deferral Standard Should Apply

The PERB did not persuasively articulate the practical reasons Delaware should adopt the federal information exception, let alone why an exception should apply in this case notwithstanding the highly specific language of CBA Article 14.4.6. As a consequence, I conclude that the interests of the parties and the public are best served by remanding this case

[69] *Cf. United Aircraft Corp.*, 204 NLRB 879, 1972 NLRB LEXIS 774, at *8 n.4 (July 10, 1972) (*Acme* did not suggest that "that the Board would be precluded from withholding its processes in such cases where, as here, the contract makes available a quick and fair means for the resolution of the dispute including, if appropriate, a fully effective remedy for any breach of contract which occurred") (*citing Acme*, 385 U.S. 432); *United Technologies Corp.*, 274 NLRB 504; 1985 NLRB LEXIS 710, at *15-17 (Feb. 28, 1985) (finding waiver of statutory right to information where step two of contractual grievance procedure detailed the production of information), *adopted*, 277 NLRB 584 (1985); *see also Red Clay Education Association v. Board of Education of the Red Clay Consolidated School District*, Del. Ch., C.A. No. 11958, mem. op., 1992 Del. Ch. LEXIS 9, at *9-*29, Chandler, V.C. (Jan. 16, 1992) (holding that "a waiver of a statutory right . . . must be clear and unmistakable" and addressing whether a zipper clause in collective bargaining agreement constituted a waiver of the union's statutory right pursuant to the PSERA to insist on negotiations over the school district's change in teachers' starting times).

to the PERB.[70] If the PERB finds it appropriate to adopt the federal right-to-information exception and to take a different approach than *City of Wilmington* in informational cases, it should provide a clear statement of its recommended deferral policy, and explain why that standard best advances the goals of PERA.[71]

In performing that task, the PERB must take pains not only to safeguard the ability of certified representatives to advocate on behalf of public employees but also to avoid unfairly whipsawing public employers with duplicative statutory proceedings on top of bargained-for dispute

---

[70] Remand commends itself to me for several reasons. First, the issue of when deferral is appropriate in the context of an information dispute is one of first impression under Delaware law. Second, the difficulty of resolving this issue is exacerbated by the lack of guidance in the texts of PERA and the NLRA and by the fact that the case law construing these statutes leaves room for reasonable people to differ. Finally, answering this purely "legal" question requires a quasi-legislative policy choice, and the absence of clear legislative direction makes all the more valuable the PERB's expertise in ensuring "harmonious and cooperative [employment] relationships" in the public sector *and* "the orderly and uninterrupted operations and functions of the public employer." 19 Del. C. § 1301. At the very least, therefore, it seems prudent to give the PERB an opportunity to consider the concerns expressed herein and to fully articulate its view of the proper deferral policy before the court issues a definitive decision.

[71] Although neither the parties nor the PERB raised this question, the arbitrator's resolution of this discovery dispute so many months before the PERB suggests that a standard akin to the arguably more deferent *post*-arbitral federal deferral policy might well be more appropriate in this case given that the PERB did not render a decision until the arbitration was completed. *See, e.g.*, *NLRB v. The Motor Convoy, Inc.*, 673 F.2d, 734, 735 (4th Cir. 1982) ("Although [the NLRB] has actual authority to adjudicate unfair labor practice charges which have been resolved in prior arbitration proceedings, [the NLRB] has instead established a policy of deferral in such cases. . . . Since the establishment of the so-called 'Spielberg Doctrine' in 1955, [the NLRB] has consistently stated that it would defer to arbitration awards resolving unfair labor practice charges if: (1) the proceedings have been fair and regular; (2) the parties agreed to be bound; (3) the decision was not clearly repugnant to the purposes and policies of the Act; and (4) the unfair labor practice charges were resolved.") (citations omitted); *id.* at 736 (where "the unfair labor practice issue is identical to the contract issue . . . [r]esolution of one is necessarily a resolution of the other"). The PERB should consider this when it reexamines its deferral policy.

resolution mechanisms.[72] A central purpose of PERA is to facilitate the speedy, peaceful, and inexpensive resolution of labor issues. Only a careful balancing of the competing values at stake will advance these goals of Delaware public employment relations laws. To that end, the following considerations are pertinent as the PERB reconsiders this matter.

a. The Basic *City of Wilmington* Standard Provides A Sound Framework

Overall, an application of the general *City of Wilmington* deferral standard to the facts of this case highlights the wisdom of that standard's deference to duly negotiated contract terms except when the request has "not been resolved with reasonable promptness" or when the arbitration procedures are "unfair" or produce a result "repugnant" to PERA.[73]

As to the first element of the *City of Wilmington* standard, I note that the arbitrator of the 1995 Grievance resolved this discovery dispute considerably in advance of the PERB. The arbitrator ruled on the AAUP's information request in September of 1996, which was more than a year before the Hearing Officer issued her November 1997 decision on the ULP charge and nearly a year and a half before the full Board affirmed the

[72] *See NLRB v. Pincus Brothers, Inc.-Maxwell*, 620 F.2d 367, 379 (3d Cir. 1980) (discussing the "inherent tension" between "the central role that arbitration plays in our national labor policy" and the Board's statutory power to prevent unfair labor practices).

[73] *City of Wilmington*, 385 A.2d at 723 (*quoting Collyer*, 192 NLRB at 837, 1971 NLRB LEXIS 123, at *32-*33).

Hearing Officer in February of 1998. By the time the PERB issued these decisions, not only had the information request been resolved pursuant to the contractual procedures, but the arbitration of the merits of the 1995 Grievance had also long since taken place.[74]

Consideration of the standard's first prong might also address the AAUP's decision to eschew the contractual mechanisms available for obtaining the information necessary to process the 1995 Grievance. Under Article 14.4.6, DSU was required to produce the requested information *within seven working days* of April 24, 1995, after which the union could grieve the issue. Instead, the AAUP pursued a purely statutory vindication of its claimed entitlement to information relevant to "monitoring contract compliance," even though the union clearly sought the information in connection with the 1995 Grievance rather than for more general purposes.[75] Indeed, once the arbitrator denied the AAUP's request for a stay of the

---

[74] I realize that some of the delays in the PERB proceedings are attributable to DSU's motion to dismiss the ULP charge on the ground that DSU was not subject to PERA and by DSU's subsequent appeal to this court of the Hearing Officer's April 1, 1996 rejection of that claim. Thus, in fairness, DSU's jurisdictional arguments were not effectively put aside until February 24, 1997. But even taking this into account, over eight months elapsed between the time this court dismissed DSU's appeal for lack of subject matter jurisdiction and the date the Hearing Officer issued her decision on the ULP charge, with nearly a year having elapsed before the full Board ruled on the question.

[75] If such general purposes in fact existed, they appear to have been subordinate and incidental to the primary purpose that inspired this dispute: Buck's 1995 Grievance. And nowhere in the record are such general purposes substantiated.

arbitration pending resolution of the ULP charge, the delay in the arbitrator's resolution of this discovery dispute may fairly be attributed to the AAUP.[76]

Even accounting for these delays, this discovery dispute seems to have been "resolved with reasonable promptness" by the arbitrator, bearing out the observation that "[a]rbitration is often a catalyst in labor peace because of its speed."[77] In fact, DSU and the AAUP might well have reached some measure of peace on this issue several years ago had the PERB not permitted the AAUP to "cast [a contractual] dispute in statutory terms" and to "ignore [the parties'] agreed-upon procedures."[78]

With respect to the second element of the *City of Wilmington* standard, neither the Hearing Officer nor the Board appear to have considered whether the arbitration procedures "have been unfair or have rendered a result repugnant to the Act."[79] The AAUP has not alleged that the arbitrator's handling of the discovery dispute was procedurally or substantively "unfair." Neither the Hearing Officer nor the PERB discussed the extent to which the arbitrator's resolution of the discovery dispute was satisfactory. I question whether any aspect of the arbitrator's resolution of

---

[76] *See* note 44, *supra*.

[77] *United Steelworkers v. American International Aluminum Corp.*, 334 F.2d 147, 153 n.11 (5th Cir. 1964), *cert. denied*, 379 U.S. 991 (1965).

[78] *City of Wilmington*, 385 A.2d at 723.

[79] *Id.*, 385 A.2d at 724 (*quoting Collyer*, 192 NLRB at 837, 1971 NLRB LEXIS 123, at *32-*33).

this discovery dispute was "repugnant" to PERA, when it resulted in the AAUP receiving the bulk of the information it sought in connection with the 1995 Grievance. After all, the only additional relief the AAUP got from the PERB was a ULP finding and an order requiring DSU to tell its employees it had breached the statute.

Given that the arbitrator had long since resolved the evidentiary dispute, the PERB's own refusal to defer to this resolution appears to undercut important objectives of PERA and its sister statutes. The shared purpose of these laws is to promote collective bargaining that culminates in mutually acceptable contract provisions governing the employment relationship — provisions like Article 14.4.6.[80] Encouraging end-runs around such contract terms seems inconsistent with this core purpose.[81] Indeed, failure to give effect to such a highly specific provision would leave DSU subject to statutory adjudications *and* contractual grievance and arbitration proceedings over the same information request and therefore appears to remove any incentive for DSU to agree to a similar provision during future negotiations.

---

[80] *See* 19 Del. C. § 1313(c).

[81] Of course, if an employer repeatedly ignores legitimate information requests and forces a union to go to the grievance well again and again, such conduct may be a factor cutting against deferral.

Thus, upon remand the PERB should carefully consider the exceptions under the *City of Wilmington* standard. If the Board believes those exceptions are inadequate to serve the statute's purposes, the Board should explain why additional exceptions are necessary and practical.

b. Given Current Arbitration Practices, Deferral Of Grievance-Related Information Disputes Seems Consistent With The Statutory Purposes of PERA

On remand, two additional factors warrant particular consideration by the PERB before it again concludes that requiring parties to use contractual grievance procedures to gather grievance-related evidence would *invariably* result in a "two tiered arbitration process" inconsistent with the "voluntary and expeditious resolution of disputes through arbitration."[82]

First, one may validly question whether it is realistic to state that a union would be forced to press two wholly separate grievances in a case like this one. Here the subsidiary issue — the discovery of relevant evidence related to a substantive grievance — can be grieved through the same process and before (one assumes) the same arbitrator as the substantive grievance under a contract provision requiring prompt disclosure of grievance-relevant information. That is, both "grievances" could be resolved pursuant to a consolidated grievance and arbitration process that

[82] DSU I Ex. D, at 16 (quotations and citation omitted).

might result in a speedier resolution of the parties' dispute over the information request than could statutory proceedings before the PERB. In fact, that appears to be what happened in this case.

Second, in a case involving an information request that is related to contractual grievance proceedings and made pursuant to a contractual provision for such requests, it stands to reason that the arbitrator presiding over the merits of the substantive dispute will be in the best position to adjudicate related evidentiary disputes and to balance the union's need for information against the public employer's legitimate confidentiality and burden concerns. Although *Acme* held that the "arbitrator's greater institutional competency" did not *require* deferral,[83] this State's statutory public policy strongly favors the use of contractual dispute resolution provisions. Viewed from this Delaware-specific perspective, deferral would seem appropriate where an "arbitrator's greater institutional competency" can be used without sacrificing other, more important statutory values.

c. When Determining Whether To Defer, The PERB Should Reevaluate Aspects Of Its Decision On The Merits

Depending on its articulation of the deferral policy, the PERB may or may not have occasion to reconsider the merits of its finding that DSU

[83] *Acme*, 395 U.S. at 436 (citation omitted).

committed a ULP. Although I do not reach the question of whether the PERB abused its discretion in concluding that the Merit Compensation Program materials requested were relevant and that the union's need for that information outweighed any legitimate confidentiality concerns of DSU, the PERB's decision raises concerns that are relevant to the question of whether the PERB should reach the merits.

Under labor statutes like PERA, the right to information is an instrumental one that serves the larger statutory goal of effective collective bargaining. Thus PERA does not give public employees and their representatives free rein to subject public employers to overly burdensome, irrelevant, or intrusive documents requests; the statute provides access to information necessary for the bargaining representative to fulfill its statutory responsibilities.[84]

As a result, the statutory informational right necessarily raises the same sort of balance concerns that arise in discovery disputes in litigation. The fact that a public employer resists a request for information that is later ordered produced by an arbitrator, for example, hardly compels the

---

[84] *See, e.g.*, *Colonial School District*, 1996 Del. Ch. LEXIS 27, at *23 (relevant and non-privileged information material to this purpose is statutorily due the union); *Safeway Stores, Inc. v. National Labor Relations Board*, 691 F.2d 953, 956 (10th Cir. 1982) ("Even when the information is objectively relevant, however, a union's request may be denied if its compilation would be unduly burdensome . . . .").

conclusion that the employer was not acting in "good faith," to borrow the language of §1307(a)(5). In determining whether it should stay its hand, the PERB might be expected to distinguish between a good faith dispute about the scope of information that should be produced and a bad faith refusal to provide clearly relevant, non-privileged information that in a litigation context would justify a sanction.

Put simply, the PERB should consider what, if any, "additional relief"[85] is necessary to vindicate the purposes § 1307(a)(5) serves given that the arbitrator afforded the AAUP access to the information it sought. When it does so, several aspects of its prior decision should be revisited, as they seem to give unduly short shrift to the concerns raised by DSU and, if nothing else, could provide a troubling precedent for future disputes between public employers and unions.

Although DSU did less than a clear job of presenting and supporting its position to the PERB, the PERB did not simply rest its decision on the DSU's failure to meet its burden to justify its confidentiality concerns. Instead, the PERB went even further and also based its decision on findings that lack a solid evidentiary foundation.

---

[85] *City of Wilmington*, 385 A.2d at 723.

For example, in its opinion, the PERB held that the files sought by the AAUP were not entitled to any presumption of confidentiality because, among other reasons, the selection process involved several levels of managerial review, thus diminishing the Program's confidentiality; and because the Program is designed to recognize and publicize award recipients' accomplishments, thus making it "illogical" that there could be any realistic expectation of confidentiality in the Program materials.

These conclusions are blithe, at best. It is hardly unusual for an evaluation process to require layers of managerial review; the fact that the chain of decisionmakers had access to the files does not support a reasonable inference that the files were not considered confidential. Likewise, the fact that the merit award recipients are later publicly recognized does not justify a determination that the recipients' application files contain no materials that should be kept confidential. In this regard, the PERB seems to have found, without any evidentiary basis, that recommendations for merit awards cannot implicate privacy concerns because such recommendations are necessarily, on balance, positive. While the positive nature of merit recommendations may diminish confidentiality concerns, candid positive recommendations often contain some negative commentary and may also include comparative assessments rating a candidate against others. It does

not, therefore, seem unreasonable for DSU to fear that wide dissemination of such recommendations would discourage forthright and balanced reviews.[86]

Indeed, the nature of the information sought in this case suggests that a reasoned resolution of the discovery dispute between the union and DSU required a careful distinction between aspects of the files that lack any credible claim to confidentiality (e.g., published articles) and aspects that are more sensitive (evaluations and merit recommendations). Although Article 14.4.6 would seem to subordinate the confidentiality concerns of DSU to the union's need for relevant evidence, in legal proceedings under statutes like the PERA a union's "right to access to relevant information is not, of course, absolute" and is instead "subject to privileges that may arise from threats to other legally protectible interests."[87] In this case, such concerns suggest that

---

[86] DSU I Ex. C, at 16, Ex. D, at 4. In its decision, the PERB also stated that the requested records were not "otherwise kept confidential for other purposes during the normal course of business"; and that there was "no evidence of record that applicants were advised or could be reasonably believe that their applications were confidential." *Id.* As to these conclusions, Article 15.4 of the CBA itself casts great doubt on the PERB's findings. Despite the exceptions in Article 15.4 for legal disputes or university hearings, the contract expressly requires DSU to maintain the confidentiality of files containing evaluations and therefore may be viewed as creating a reasonable expectation on the part of merit award applicants and reviewers that these files would be handled with great sensitivity. In fairness, I acknowledge that DSU did not rely on this provision before the PERB and that the 1992 Grievance arbitrator's reading of this provision gave it little meaning as a bar to production. Nonetheless, because the matter will be considered by the PERB again, it bears mention, as Article 15.4 creates a question about the reasonable expectations of merit applicants (whose interests should be considered in this context) regarding confidentiality. Moreover, the arbitrator of the 1992 Grievance made his ruling on Article 15.4 in an opinion that upheld DSU's position on the merits, leaving DSU no rational incentive to appeal it.

[87] *Colonial School District*, 1996 Del. Ch. LEXIS 27, at *24-*25.

the union's access to certain information perhaps should have been subject to a confidentiality order limiting the purposes for which the information could be used and restricting who could see it.

On the other hand, evidence in the record also supports the PERB's conclusion that DSU rejected the AAUP information request in far too blanket a way. While it was understandable for DSU to be concerned about whether the union was going on a fishing expedition with a net rather than a fly rod — especially in light of the union's reluctance to specify the relevance of its request to the pending 1995 Grievance and its "all files and all documents" approach[88] — the fact remains that the 1995 Grievance had been filed and that the information sought was similar to information held subject to production under Article 14.4.6 by the arbitrator of the 1992 Grievance. As a matter of basic relevance, DSU had little basis to contest production.

---

[88] DSU and the union also sparred about whether the union was seeking information relevant to assessing the merits of the 1995 Grievance (the union's position) or simply fishing for information in order to discover information that might support a grievance that was unsupported by any evidence already in the union's possession (DSU's position). Because the 1995 Grievance was actually pending and Buck was clearly bent on having the union prosecute it for her, this dispute was more semantic than real. In any event, the fact that under § 1307(a)(5) or Article 14.4.6, the union is entitled to relevant, non-privileged information necessary to assess the merits of a pending grievance (or perhaps a grievance a bargaining unit member wished the union to pursue) would not give the union the right to unrestricted access to any document it wishes to see. Nor would it deny the employer the legitimate right to ask the union the nature of the grievance and the relevance of the requested materials. The fact that the union had little or nothing else to substantiate a pending or possible grievance must be considered in assessing whether, e.g., an "all files" information request was unduly burdensome and should be more narrowly tailored.

But considered as a whole, the paper record before the PERB is much muddier than the picture that emerges from the PERB's own decision. If the PERB reiterates its view that there is a need to go beyond the arbitrator's decision to order production of the files and to declare whether DSU breached its duty of good faith under § 1307(a)(5), then the PERB should articulate the statutory purposes served by consideration of this declaratory relief and discuss what, if any weight, it accorded to whether DSU had good faith bases for resisting full and unconditional production of the requested information. In this regard, the mere fact that the arbitrator did not state that DSU had committed a ULP does not in itself justify non-deferral; if that were the case, there would be little purpose to the deferral doctrine.[89]

IV. Conclusion

For the foregoing reasons, I conclude that the PERB correctly found that DSU is a "public employer" within the meaning of PERA § 1302(n) but that the PERB erred as a matter of law by ignoring and failing to apply the *City of Wilmington* deferral standard, by otherwise neglecting to articulate the standard it applied to determine that deferral was inappropriate, and by failing to consider several factors weighing in favor of deferral. The parties shall submit an implementing order within seven days of this opinion.

---

[89] *City of Wilmington*, 385 A.2d at 723.