

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

POLYTECH EDUCATION ASSOCIATION,)	
DSEA/NEA,)	
Charging Party,)	
	<u>ULP No. 01-02-307</u>
v.)	
POLYTECH SCHOOL DISTRICT,)	
Respondent.)	

The Polytech School District (“District”) is a public employer within the meaning of Section 4002(n) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1983) (“Act”). Polytech Education Association (“Association”) is an employee organization within the meaning of Section 4002(h) and an exclusive representative of certificated professional employees of the District within the meaning of Section 4002(i), of the Act.

The Association filed the above-captioned unfair labor practice charge with the Public Employment Relations Board (“PERB”) on February 12, 2001. The charge alleges conduct by the District in violation of Section 4007(a)(5), of the Act, which provides:

- (a) It is an unfair labor practice for a public school employer or its designated representative to do any of the following:
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive bargaining representative of employees in an appropriate unit.

At all times relevant to the charge the parties were engaged in collective bargaining over the terms of a successor collective bargaining agreement. The Charge alleges two (2) actions which, it claims, evidence that the District's bargaining representatives did not possess the necessary authority to make timely decisions and commitments inherent in the collective bargaining process and that such conduct violates Section 4007(a)(5), of the Act: 1) The decision by the District to withdraw or rescind the tentative agreement on Local Bonus Pay or a Retention/Gap/Commitment Bonus¹; 2) The decision by the District to withdraw or rescind the tentative agreement on the deletion of the last sentence to Appendix B of the 1996-1999 Agreement, also involving the Bonus Pay issue.²

The charge further alleges two (2) additional actions by the District, altering the morning schedule and imposing a new policy concerning teachers leaving the school during the workday, which the Association contends unilaterally changed conditions of employment under negotiation and, in so doing, constituted independent violations of Section 4007(a)(5), of the Act.

In its Answer filed with the PERB on February 28, 2001, the District denied engaging in conduct in violation of Section 4007(a)(5), of the Act, as alleged. Under New Matter, the District plead numerous affirmative defenses which the Association denied in its Response filed on March 12, 2001.

On February 28, 2001, the District also filed a Counterclaim alleging that, considered within the totality of the circumstances, the Association's filing of the unfair labor practice charge was itself an unfair labor practice in that it constituted a refusal to or failure by the Association to comply with the provisions of the Act and the Rules and Regulations promulgated by the PERB. The Association denied the allegations of the Counter-Charge.

A finding of Probable Cause was issued on March 29, 2001. A hearing was held on May 14, 2001, at which the parties presented testimony and documentary evidence in support of their respective positions. Closing argument was provided in the form of written post-hearing memoranda, with the final

¹ The "Bonus Pay," Retention/Gap/Commitment Bonus" also referred to by Superintendent Sole as a "Longevity Increase," is hereafter referred to as "Bonus Pay."

memorandum received on July 6, 2001. The following discussion and decision result from the record thus compiled.

BACKGROUND

The testimony of the witnesses and the numerous exhibits establish the following material facts:

The Association and the District were parties to a collective bargaining agreement for the period July 8, 1996 through June 30, 1999. Neither party requested to negotiate a successor agreement. Therefore, by its terms, the agreement automatically continued in force from year-to-year. On or about March 23, 2000, the Association requested to open negotiations over the terms of a successor agreement. On May 12, 2000, the parties finalized ground rules governing the negotiations.

On May 16, 2000, the Association presented its initial non-economic proposals to the District. This initial proposal included, *inter alia*, the following new language:

IX. Employees Hours and Working Conditions

9.1.8 It is agreed that the first twenty-five (25) minutes of the employee's workday may be used for school-wide meetings. The schedule of weekly meetings may include a maximum of two (2) days for academy meetings and a maximum of two (2) days for section meetings and the remaining day(s) for additional school-related responsibilities (faculty meetings, parent conferences, cross academy section meetings, professional development and/or teacher preparation).

9.1.9 Employees may leave the building without permission during their non-instructional/supervisory periods and lunch periods after signing out manually or electronically with the main office. The exercise of this right is given with the understanding that the primary function of the planning period is for in-school planning.

²] The "staff and technical assistance" issue was withdrawn by the Association prior to the start of the hearing held on May 14, 2001.

The initial proposal from the Association also included a summary of the intended economic demands including a change to Article 14.1 and the deletion of Appendix B, both involving the local salary supplement. These four (4) items form the basis for the unfair labor practice charge at issue here.

The District informed the Association of the need for all of the Association's proposals (economic and non-economic) to be submitted in order for meaningful bargaining to occur. The District agreed, however, to proceed with a consideration of the individual non-economic proposals in order to expedite the process. Pursuant to Item # no. 9, of the Revised Ground Rules to which the parties agreed on May 12, 2000, the District periodically prepared, "a single operational document incorporating all of the agreed upon language to date."

During a negotiating session on or about May 18, 2000, Mr. Reihm, the Chief Spokesperson for the District, assured the Association's bargaining team that the District's bargaining team had full authority to negotiate for the District within certain parameters set by the School Board.

On June 13, 2000, the Association presented its initial "Financial Proposals", including the following new language:

14.1a. In addition to the salary scale in Appendix B, employees shall receive the following Retention/ Gap/Commitment bonus based on years of service and dedication to the Polytech School District. The intent of this bonus is to retain the most highly qualified instructors for our students. These monies shall not be included in calculating the 4% cap.

1-3 years of service		\$250	(29%)
4-6	“	\$500	(20%)
7-9	“	\$750	(38%)
10-15	“	\$1000	(09%)
16-21	“	\$1250	(01%)
22-27	“	\$1500	(03%)

28+ “ \$2000 (00%) ³

Appendix B - Delete last sentence in second paragraph ⁴On June 22, 2000, the District submitted a counter-proposal which included language involving 14.1a., but did not address the Association’s proposed new language for either 9.1.8 or 9.1.9 or the deletion of the last sentence of paragraph 2 of Appendix B.

A counter-proposal from the Association on June 22, 2000, resulted in a subsequent counter-proposal from the District on June 28, 2000. The June 28th proposal from the District included not only modified language concerning Section 14.1a., but also the following language for Section 9.1.9:

Employees shall be permitted to leave the premises during their planning period with administrative approval. Such approval shall embrace official school business and necessary personal matters concerning the teacher which necessitates the teacher leaving the premises.

The deletion of Appendix B and the Association’s proposed language for the new Section 9.1.8 remained unaddressed by the District.

In its June 29, 2000, counter-proposal, the Association persisted in its request to have Section 9.1.8 inserted into the collective bargaining agreement. With a minor addition not relevant to this matter, the Association agreed to the District’s proposed language for Section 9.1.9 and submitted a counter-proposal for Section 14.1a.

³ This proposal was also referred to throughout the hearing as “Bonus Pay” and “longevity increase” Hereafter. throughout this decision, this issue is referred to as, “Bonus Pay.” The number in parentheses represents the percentage of teachers in each category

⁴ The second sentence in the second paragraph of Appendix B provides: “In no case shall any employee’s Local Salary Supplement exceed that of the highest like position of other districts within the County.” In order for the bonus proposed in Section 14.1(a) to take effect this provision would have to be eliminated.

In its counter-proposal on July 19, 2000, the Association tentatively agreed (“TOK”) to the District’s language concerning Section 9.1.9 and Section 14.1a. There continued to be no movement (“NM”) concerning Section 9.1.8.

On or about August 22, 2000, during an in-service day prior to the start of the school year, an administrator stated that faculty members leaving school during the planning period would be required to sign out as sick leave or be charged professional development or personal time. This was contrary to the established practice which was the basis for the tentative agreement on Section 9.1.9.

In order to facilitate the resolution of the remaining unresolved issues, by letter dated September 13, 2000, the Association invited the District Superintendent, Dr. Sole, to the bargaining table. The first meeting attended by Superintendent Sole occurred on or about September 28, 2000, and involved primarily a review and clarification of the status of the negotiations. There was also some discussion concerning the problem with the tentatively agreed upon language of Section 9.1.9, about which Dr. Sole agreed to seek clarification.

The second negotiation session attended by Dr. Sole occurred on or about October 18, 2000. At the start of the meeting, Dr. Sole informed the Association’s negotiating team that the School Board would not approve a contract containing the Bonus Pay provided for in Section 14.1a. Dr. Sole stated she had authorized the tentative agreement believing she could obtain the necessary approval by the Board.

The unilateral withdrawal of the Bonus pay provision caused significant distress among the Association’s team. Following a brief caucus, the Association returned to the meeting and withdrew several of its proposals, including Sections 9.1.8 and 9.1.9. The Association also sent the following memorandum to the District’s negotiating team:

Date: November 28, 2000

Subject: Negotiations

District Negotiating Team,

We have spent considerable time reviewing the proposals that we believed had been agreed to by our respective teams throughout the course of

the ongoing negotiations. However, due to the new position taken by the District on the “Bonus Pay” issue and shared with us by Dr. Sole at the October 18th negotiation session, we are currently reassessing where we stand in the total negotiation process.

To that end, we request that the District make available to us “a single operational document which incorporates all of the agreed upon language to date” per item #9 of our Negotiations Ground Rules. The receipt of the requested document will enable us to focus on what are truly agreed upon positions to date. Shortly after reviewing this document, we would like to schedule a meaningful negotiation session.

Thanks in advance for your prompt response to this request.

In response to this request, the District provided the Association with a copy of the proposal submitted by the District on June 1, 2000, which did not include tentative agreements reached by the parties thereafter, including Section 14.1a., Appendix B or Section 9.1.9.

Believing that the District had misunderstood its request, the Association submitted a second request, which provides:

Date: December 4, 2000

Subject: Negotiations

District Negotiating Team:

We wish to thank the District Negotiating Team for responding so quickly with their June 1, 2000 document to our request of November 28, 2000.

Since the initial issuance of the above document, the negotiating parties have met and/or exchanged information many times (6/6/00, 6/13/00, 6/20/00, 6/22/00, 6/28/00, 7/12/00, 7/19/00, 8/23/00, 8/28/00, 9/25/00, 10/18/00 . . . to name a few) and have tentatively

agreed upon many additional issues not included in that document.

As we left the October 18, 2000 negotiation session, our intent was to review exactly where we stood in the negotiation process. The removal of the “Bonus Pay” item as a tentatively agreed upon issue in the package under consideration has us somewhat confused. We need to know exactly what proposals within the package we should be considering at this time. Are there any other issues that the District may remove from consideration?

To that end, the PEA negotiating team requests a copy of what the District Negotiating Team believes are tentatively agreed upon issues in the package presently under consideration. Additionally and just as important, we request a copy of the items that the District feels are still under consideration, but not, as yet, agreed upon.

The District responded by providing a document entitled, Draft 5, as amended on January 24, 2001, (Draft 5B). Neither Section 9.1.9 Section, 14.1a. nor Appendix B, as tentatively agreed to by the negotiating teams, was included in the District’s response.

On February 12, 2001, the Association filed the instant unfair labor practice charge.

ISSUE

Whether, by its actions, the District violated 19 Del.C. §4007(a)(5) of the Act, as alleged?

PRINCIPAL POSITIONS OF THE PARTIES

Association: Citing Appoquinimink Education Association, DSEA/NEA v. Appoquinimink School District, Del. PERB, ULP No. 98-09-243, III PERB 1785, 1801 (1998), the Association argues

that designated representatives must possess the authority necessary to make timely decisions and commitments inherent in the collective bargaining process. Otherwise, meaningful bargaining cannot occur. This is especially true in Delaware where, unlike the private sector, public employees have no meaningful leverage at the bargaining table other than reliance upon the bargaining obligation. Concerning the Bonus Pay issue, the District's negotiators clearly lacked the requisite authority to commit the District to the tentative agreement reached.

The Association further contends that the District independently violated its duty to bargain in good faith by unilaterally changing the morning schedule and adopting a new policy concerning teachers who leave the school building during the workday, each a condition of employment under negotiation by the parties.

The Association contends that, in the absence of a statute specifically reserving exclusive authority to the public school employer, the application of the balancing test adopted by the PERB in Appoquinimink Education Association v. Board of Education of the Appoquinimink School District, Del. PERB, ULP No. 1-3-84-3-2A, I PERB 35, 42 (1984) ("scope decision") to determine whether a particular subject is excluded from the duty to bargain as a matter of inherent managerial policy, leads to the conclusion that the determination of the morning schedule constitutes a term and condition of employment which is a mandatory subject of bargaining.

The Association maintains that the ability of employees to leave the school during non-instructional time also constitutes hours and workload, both mandatory subjects of bargaining.

District: The District contends that the Board's reasons for rejecting the Bonus Pay provision were neither arbitrary nor capricious and at no time did the Board fail to negotiate with the Association in good faith over this issue. Prior to June 13, 2000, when the Association first submitted its economic proposals, individual non-economic issues were considered and agreed to. As reflected in the change from the word "agreed" to the initials "TOK" (tentatively okay) the parties intended that after receipt of the Association's economic demands the negotiations were to proceed on a "total package." Tentative

agreements reached were subject to revision until such time as a total package was approved by both the Association's members and the Board of Education.

The District argues that by regulation the Delaware Department of Education defines the workday of teachers as 7 1/2 hours, including a 1/2 hour paid lunch and the time required to perform duties. Services reasonably expected of the professional staff of a public school. Employees who work less than the specified time shall have their annual salaries adjusted accordingly.

Furthermore, absences for which teachers may be paid is governed by State law, specifically 14 Del.C. Sections 1318, 1319, 1320 and 1328. The District's position that absence from scheduled hours requires documentation, approval, and attribution to the appropriate leave category, as required by State law, is based upon the advice of its legal counsel.

The District further contends that the morning schedule concerns primarily the curriculum and programs of the District and the direction of personnel which are matters of inherent managerial policy to which no duty to bargain attaches.

DISCUSSION

The Association's reliance on Appoquinimink, Del. PERB, ULP No. 98-09-243, (supra.) to support its contention that the District violated its statutory duty to bargain in good faith because its representatives did not possess the necessary authority to make timely decisions and commitments inherent in the collective bargaining process is misplaced.

The Appoquinimink decision is factually distinguishable from the current dispute. The portion of the Appoquinimink decision relied upon by the Association involves the question of whether or not an agreement to extend the term of an existing collective bargaining agreement signed by the chief spokespersons of the Association and District bargaining teams satisfied a contractual requirement that the contract expired at a given date and time "unless extended by agreement of both parties." Furthermore, unlike the current dispute, in Appoquinimink a member of the School Board sat on the

negotiating team as the Board's representative and was aware of, but did not object, to the signing of the extension agreement.

In finding the extension agreement valid, the Hearing Officer concluded:

Rather than modifying the 1993-96 Agreement the extension agreement of July 2, 1996, was intended to extend the term of the Agreement. Compliance with a provision of an existing Agreement does not constitute a modification of that Agreement. The critical determination is whether the extension agreement signed by the District's spokesperson and the Association's President was "by agreement of both parties", as required by Article 31.

Appoquinimink, Del. PERB, III PERB at 1800.

Clearly, the issue in Appoquinimink did not involve the authority of the District's appointed representatives to engage in meaningful good-faith collective bargaining.

Whether the withdrawal of a tentative agreement prior to the creation of an enforceable contract violates the statutory duty to bargain in good faith is a question of first impression before the PERB. Rather than the singular incident involving the District's withdrawal of the tentatively agreed to "Bonus Pay" provision, the determination of whether the District's bargaining team was vested with the requisite authority must be determined from its overall course of conduct during the negotiations. Seaford Education Association v. Board of Education, Del. PERB, ULP 2-2-84S, I PERB 1 (1984).

Numerous negotiating sessions were held between early May, 2000 and September, 2000, during which progress was made, including movement by the District on the Bonus Pay issue (Section 14.1a. and Appendix B) and Section 9.1.9. In September, 2000, the Association invited the participation of Superintendent Sole in an attempt to dispose of the remaining unresolved issues and clarify the tentative agreement concerning Section 9.19. Only after Dr. Sole informed the Association's team that the Board would not ratify a contract containing the tentatively agreed to Bonus Pay provision was discontent voiced by the Association concerning the conduct of the negotiations and/or the authority of the District's bargaining team to engage in meaningful negotiation.

The National Labor Relations Board (“NLRB”) in Merrell M. Williams, et.al., and Hotel and Restaurant Employees, Local 703, 279 NLRB 82, 121 LRRM 1313 (1986), decided, *sua sponte*, to reconsider its decision that the employer violated Section 8(a)(5) and (1) of the National Labor Relations Act by repudiating tentative agreements reached during collective bargaining concerning meal credits and cost-of-living increases in wages.⁵ In reversing its prior decision, the NLRB concluded:

. . . the withdrawal of tentative agreements reached prior to the formation of a legally enforceable contract represents only one factor to be considered in determining good- or bad-faith bargaining. In ruling upon an allegation that a party has failed to bargain in good faith, it is well established that we look to the totality of the circumstances reflecting the party’s bargaining frame of mind. Rhodes-Holland Chevrolet, 146 NLRB 1304, 56 LRRM 1058 (1964). We have previously declined to find employers who withdrew provision on which tentative agreement had been reached during negotiations to have failed in their bargaining obligations where the .employer’s explanation for its retraction did not indicate a lack of good faith. *See* Olin Corp., 248 NLRB 1137, 1141, 104 LRRM 1017 (1980); Loggins Meat Co., 206 NLRB 303, 309, 84 LRRM 1270 (1973); Food Service Co., 202 NLRB 790, 802-803, 82 LRRM 1746 (1973).

In this case, the Respondent’s negotiator made an offer to the Union believing he had the authority to do so. When it became clear the Respondent would

⁵ Sections 8(a)(1) and (a)(5) of the National Labor Relations Act mirror Sections 4007(a)(1) and (a)(5), of the Public School Employment Relations Act.

not approve the proposals, the negotiator immediately withdrew from the agreements, offering a reason for so doing, and further offered to immediately resume bargaining. The Union, which had not yet submitted the proposal to membership for ratification or taken any action on reliance of the parties' tentative agreement, refused to bargain further. The Respondent's explanation for its retraction of its prior agreement regarding the two provisions constitutes sufficient good cause to rebut any inference of bad faith arguably arising from that action . . . There is no other indication that the Respondent was withdrawing from the agreements in order to frustrate the bargaining process or avoid reaching a contract. Williams, 279 NLRB at 1314.

The rationale supporting the decision in Williams is applicable to the current dispute. Mr. Shetzler, the Association President, and Mr. Reihm, the District's Chief Spokesperson, testified concerning Attachment 10 to the unfair labor practice charge entitled PEA Negotiations for Agreement Between Polytech School District and Polytech Education Association, Inc., dated July 19, 2000. Mr. Shetzler identified the document as his copy of what occurred during the negotiation sessions of July 12 and 19, 2000.

The document identifies the status of specific items being negotiated as either "Agreed", "TOK", or "NM." Mr. Shetzler explained that proposals "Agreed" to were finally resolved. Items marked "TOK" were tentatively resolved, subject to agreement upon a final package and ratification by both the Association's membership and the School Board. According to Mr. Shetzler, once tentative agreement was reached, these items were set aside and not subject to further negotiation. Items identified as "NM" (no movement) then formed the basis for the continuing negotiations.

Mr. Reihm's understanding of Attachment 10 differed in material respects from that of Mr. Shetzler. Mr. Reihm testified that although the District informed the Association of the need for a comprehensive proposal including both non-economic and economic items in order for meaningful bargaining to occur, the District agreed to individually consider a limited number of non-economic issues

which were, for the most part, formalities. The “Agreed” to items appearing in Attachment No. 10 reflect the agreements reached prior to receipt of the Association’s economic proposals on June 13, 2000. Thereafter, the negotiations proceeded on a “total package” basis.

Mr. Reihm’s understanding of “TOK”, as used thereafter, was that items so marked were part of the on-going negotiation process and the agreements remained tentative until there was final agreement on a total package. Mr. Reihm testified that, “In order to agree upon any one of those items we had to go through the whole package and that’s why as to each item there was only tentative agreement.” (Transcript @ pg. 107).

Mr. Reihm’s understanding is consistent with the testimony of Mr. Sampere, the Association’s Chief Spokesperson. Mr. Sampere testified that when asked about the meaning of the word “tentative”, Mr. Reihm responded that once subjects are tentatively agreed to, until there is ratification by the School Board and by the Association’s membership they are just that.

Mr. Reihm testified that, pursuant to item no. 9 of the Revised Negotiation Ground Rules dated May 12, 2000, the District’s response to the Association’s requests of November 28, 2000 and December 4, 2000, did not contain those items about which there was only a tentative agreement but included only the unconditional agreements reached by the parties prior to the submission of the Association’s economic proposals in mid-June.

Superintendent Sole tentatively agreed to Bonus Pay because she believed it was, in fact, a tentative agreement subject to the approval of the School Board. Subsequent to the Board’s adopting the pay philosophy statement incorporated in the collective bargaining agreement as Appendix B⁶, the Polytech District expanded from providing a technical education to a comprehensive program offering both technical and academic education. Dr. Sole was hopeful that because of this change in circumstance the Board would accept the Bonus Pay provision.

At the request of Dr. Sole, the District’s negotiating team made a presentation to the School Board concerning the status of the negotiations at its September 2000, meeting. At its next meeting in

⁶ The salaries for all employees covered by this agreement . . . shall be constructed to provide that each cell in the schedule is equal to the highest paid salary for that cell by a school district in the county . . .”

October, 2000, the Board indicated it was uncomfortable with the Bonus Pay provision because of the previously adopted philosophy statement concerning teacher salaries appearing in Appendix B of the collective bargaining agreement.

The Board believed that going beyond assuring that no corresponding teacher in the County received greater pay than the teachers employed by the Polytech School District was not justified. The Board members were concerned that adding the Bonus Pay provision would create a pay differential with other District's within the County which might result in teachers leaving other districts for employment with the Polytech District, thereby negatively impacting the ability of the other districts to retain experienced teachers.

Superintendent Sole believed that she could secure the Board's agreement. Her inability to do so resulted from an honest error in judgement on her part. She promptly informed the Association of the Board's position, explained the Board's rationale and accepted full responsibility for the situation. Considered as a whole, there is no evidence of record that withdrawal of the tentative agreement concerning Bonus Pay reflected an intent by the District to, "frustrate the bargaining process or avoid reaching a contract." 279 NLRB 82 Williams, (Supra.)

The two (2) remaining issues involving Section 9.1.8 and Section 9.1.9, allege a unilateral change in the status quo of mandatory subjects of bargaining currently being negotiated. Rather than the presence or absence of good-faith to be determined based upon the totality of the circumstances, allegations of unilateral change are inherently rooted in the failure to bargain, regardless of intent.

The PERB, Superior Court and the Chancery Court of the State of Delaware have adopted the holding of the United States Supreme Court in the private sector case of NLRB v. Katz, 369 U.S. 763 (1962). The Court held that an employer's unilateral change in conditions of employment which are under negotiation, without impasse, violates the employer's duty to bargain in that it undermines the bargaining process. Milford Education Association v. Board of Education, et. al., Del. Super., 811 C.A. 1976, Taylor J. (Feb. 24 1977); Caesar Rodney Education Association v. Board of Education., et. al., Del. Chan., C.A. No. 5635, Brown, V.C. (June 30, 1978).

In New Castle County Vo-Tech. Education Association v. New Castle County Vo-Tech. School District, Del.PERB, ULP No. 88-05-025 I PERB 309 (1988), the PERB extended the holding in Katz under the Public School Employee Relations Act beyond impasse:

There is no statutory basis upon which to conclude that impasse, a prerequisite for mediation, also permits the employer to unilaterally alter the status quo. To the contrary, such a conclusion would be inconsistent with the declared policy of the State and the purpose of the statute . . . New Castle County Vo-Tech., I PERB at 317.

The PERB next considered whether, under the duty-to-bargain imposed by Section 4007(a)(5) of the Public School Employment Relations Act, the public school employer could unilaterally impose its last, best, offer following the District's rejection of a recommended settlement issued by a Factfinder pursuant to Section 4015, of the Act.⁷ Appoquinimink Education Association v. Appoquinimink School District, Del. PERB, ULP No. 98-09-243 III PERB 1785 (1998).

In adopting the general rule that the District violated its statutory duty-to-bargain, the PERB observed:

A public employer and the certified representative share a statutory duty to bargain in good faith over mandatory subjects of bargaining. The Board's action reflects that which the Act is intended to prevent. Except for the most compelling or extraordinary circumstances a public employer is not free to ignore its bargaining obligation and impose upon the bargaining unit terms and conditions of employment which it alone determines. Appoquinimink, I PERB at 1810.⁸

⁷ Section 4015 provides, in relevant part: (g) Within 30 days after the conclusion of the hearings but not later than 45 days from the day of appointment, the fact-finder shall serve written findings of fact and recommendation for resolution of the dispute on the public school employer, the certified exclusive representative and the Board.

⁸ In Appoquinimink, following the District's rejection of the Factfinder's recommended settlement, the parties reached a tentative agreement. Following rejection by the Association's membership, the District unilaterally imposed its last, best offer.

The subject of the morning schedule Section (9.1.8) was being negotiated at the time the District unilaterally implemented its schedule. Since the duty-to-bargain and, consequently, the prohibition on implementing a unilateral change attaches only to “terms and conditions of employment” the critical question is whether or not Section 9.1.8 so qualifies.

14 Del.C. Section 4002, Definitions, provides, in relevant part:

(r) “Terms and conditions of employment” means matters concerning or related to wages, salaries, donated leave program(s) in compliance with Chapter 13 of this title, hours, grievance procedures and working conditions; provided however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public school employer.

Section 4005, of the Act, School employer rights, provides:

A public school employer is not required to engage in collective bargaining on matters of inherent managerial policy, which include, but are not limited to, such areas of discretion or policy as the functions and programs of the public school employer, its standards of services, overall budget, utilization of technology, the organizational structure, curriculum, discipline and the selection and direction of personnel.

The PERB has adopted a balancing test for subjects which arguably constitute both terms and conditions of employment and inherent managerial policy:

Where a subject in dispute concerns or is related to wages, salaries, hours, grievance procedures and working conditions, and also involved areas of inherent managerial policy, it is necessary to compare the direct impact on the individual teacher

in wages, salaries, hours, grievance procedures and working conditions as opposed to its probable effect on the operation of the school system as a whole. If its probable effect on the school system as a whole clearly outweighs the direct impact on the interest of the teachers it is to be excluded as a mandatory subject of bargaining; otherwise, it shall be included within the statutory definition of terms and conditions of employment and mandatorily bargainable.

Appoquinimink, I PERB 35 at 50 (1984).

The Association contends that the morning schedule “clearly falls within the parameter of hours.” The District, on the other hand, maintains that the morning schedule directly involves the “curriculum and programs” of the District and the “direction of personnel” insofar as the implementation of the designated curriculum and programs.

The morning schedule concerns the number of days the morning meeting would be devoted to a Section or Academy meeting. The Association favored a fixed schedule of three (3) Section and two (2) Academy sessions. The District favored flexibility which it considers necessary to effectively address individual educational issues as they arise. It is undisputed that in the past, decisions concerning the distribution of the meetings were made by the building principal.

The morning schedule issue involves the participation of teachers and administrators during the first period of each day. The first period of each day has traditionally been devoted to participating in either “Section” or “Academy” meetings or other educational related purposes, as necessary. A Section involves the planning and coordination for limited disciplines, much like Departments in a traditional high school, such as mathematics, history or English. The purpose of Sections is to fine-tune these individual disciplines.

The primary function of each Academy is to deliver the overall curriculum to the students in an integrated manner. An Academy brings together people from various disciplines, including both the academic and technical, for the purpose of assuring an integrated and comprehensive educational program. There are five Academies at the Polytech High School, each of which is managed by a teacher

elected by his or her peers. The Academy Managers make up the Building Management Team. The Building Principal is ultimately responsible for the decisions affecting instructional programs offered at the high school. The Building Management Team is a resource upon which he relies.

The term "hours" typically refers to scheduled hours of work. The determination of the functions and responsibilities to be performed during scheduled hours ultimately rests with the Board and/or the administrators based upon their assessment of how best to accomplish the educational objectives. Union President Shetzler acknowledged that the teachers' desire to emphasize Section time over Academy time results from the implementation of statewide accountability. While understandable, the teachers' concern over accountability does not alter the conclusion that the scheduling of Section meetings and Academy meetings has a far greater direct impact upon the school district as a whole than upon the hours of the individual teacher.

The morning schedule therefore constitutes a "matter of inherent managerial policy" about which the District is not obligated to bargain. Consequently, the change in policy implemented by the District does not violate its duty to bargain in good-faith under the Act.

The final issue involves teachers leaving school during the workday. 14 Del.C. Section 1318, Sick leave and absences for other reasons; accumulation of annual leave, paragraphs (a) through (g) set forth the specific types of paid leave to which public school employees are entitled. Section (j), provides: "Any absence not covered in subsection (a), (b), (c), (d), (e), (f) or (g) of this section shall be considered unexcused." (emphasis added)

14 Del.C. Section 1319, Records of absences; proof, provides, in relevant part: "Each employing board shall keep an accurate record of the absences from duty and reasons therefor of all employees for whatsoever reason . . ." (emphasis added).

14 Del.C. Section 1320, Deduction for unexcused absence, provides:

For each day's absence for reasons other than those permitted under § 1318 of this title, there shall be deducted 1/185 in the fiscal year beginning July 1, 1999; 1/187 in the fiscal year beginning July 1, 2000;

1/189 in the fiscal year beginning July 1, 2001; and 1/190 in the fiscal year beginning July 1, 2002, and each succeeding fiscal year, of the annual salary; 1/204 in the fiscal year beginning July 1, 1999; 1/206 in the fiscal year beginning July 1, 2000; 1/208 for fiscal year beginning July 1, 2001, and 1/209 for the fiscal year beginning June 1, 2002, and each succeeding fiscal year, of the annual salary; 1/222 for an employee who is employed for 12 months, for each day of unexcused absence. (emphasis added).

The impact of these provisions is clear. Sub-section (j) of Section 1318 expressly provides that any absence not enumerated in sub-sections (a) through (g) is unexcused. Section 1319 requires the District to maintain accurate records of all absences and the reason, therefor. Section 1320 requires a proportionate salary reduction for all absences other than those permitted by Section 1318. Stated differently, Section 1320 requires a salary reduction for all unexcused absences. Applying the cited provisions of 14 Del.C. Chapter 13, paid absence for reasons other than those set forth in 14 Del.C. Section 1318 (a) through (g), does not qualify as a mandatory subject of bargaining. The District was, therefore, free to implement the steps necessary to comply with the cited statutory provisions. Regardless of the past practice and the tentative agreement concerning Section 9.1.9, doing so did not constitute a per se violation of 14 Del.C. Section 4007(a)(5), as alleged.

DECISION

Consistent with the foregoing discussion, it is determined that:

1. By withdrawing the tentative agreement concerning Section 14.1.a and Appendix B (bonus or longevity pay), the District did not violate 14 Del.C. Section 4007(a)(5), as alleged. Consequently, the District did not violate 14 Del.C. Section 4007(a)(5) because its representatives did not possess the necessary authority to make timely decisions and commitments inherent in the collective

bargaining process, as alleged.

2. By unilaterally determining and implementing what it considered to be the appropriate mix of Section and Academy meetings, the District did not violate 14 Del.C. Section 4007(a)(5), as alleged.

3. By unilaterally imposing a policy and procedure concerning teachers who leave the building during the planning period, the District did not violate 14 Del.C. Section 45007(a)(5), as alleged.

4. The filing of the unfair labor practice by the Association does not constitute a refusal to or failure by the Association to comply with the provisions of the Act and the Rules and Regulations established by the PERB.

August 21, 2001
(Date)

/s/Charles D. Long, Jr.
Charles D. Long, Jr.
Executive Director