

**PUBLIC EMPLOYMENT RELATIONS BOARD
FOR THE STATE OF DELAWARE**

DELAWARE STATE UNIVERSITY,)	
)	PERB Review of the
Petitioner,)	Executive Director’s
)	Decision
AMERICAN FEDERATION OF STATE, COUNTY &)	
MUNICIPAL EMPLOYEES, AFL-CIO,)	
COUNCIL 81, AND ITS LOCAL UNIONS 1007 & 1267,)	<u>ULP No. 05-06-487</u>
)	
Respondent.)	

Appearances

Sarah E. DiLuzio, Esq., Potter, Anderson & Corroon, LLP, for DSU

Perry F. Goldlust, Esq., Aber, Goldlust, Baker & Over, for AFSCME Council 81

BACKGROUND

Charging Party Delaware State University (“DSU”) is a public employer within the meaning of §1302(p) of the Public Employment Relations Act (“PERA”), 19 Del.C. Chapter 13 (1986).

The Respondent, American Federation of State, County and Municipal Employees, AFL-CIO, Council 81, through its Local Unions 1007 and 1267 (“AFSCME”), is an employee organization which admits to membership DSU employees and has as a purpose the representation of those employees in collective bargaining, pursuant to 19 Del.C. §1302(i). AFSCME Local Union 1007 is the exclusive representative of the unit of Clerical/Technical

employees as defined in DOL Case 116; AFSCME Local Union 1267 represents a unit of DSU Plant Maintenance employees as defined by DOL Case 44. 19 Del.C. §1302(j).

On June 29, 2005, DSU filed an unfair labor practice charge against AFSCME alleging violations of 19 Del.C. §1307 (b)(2) and (b)(3), asserting AFSCME had refused to negotiate DSU's April 2005 proposal for a successor agreement to be effective July 1, 2005.

On July 20, 2005, AFSCME filed its Answer to DSU's charge, which included a counter-charge alleging that DSU violated 19 Del.C. §1307 (a)(2) and (a)(5). AFSCME argued that by introducing new proposals three years into the parties' negotiations, threatening to and implementing its "Opening Proposal" without impasse, issuing letters to bargaining unit members concerning their duty to have union dues or service fees withheld from their wages, and refusing to arbitrate grievances, DSU violated its duty to bargain in good faith. 19 Del.C. §1307(a)(5). Further, its actions concerning the deduction of dues and service fees and refusal to arbitrate grievances, dominated or interfered with the existence or administration of a labor organization in violation of §1307(a)(2).

At the completion of the pleadings, a probable cause determination was issued on November 18, 2005, and a hearing was convened on February 13 and 16, 2006. The receipt of written post-hearing argument concluded on April 11, 2006.

On June 2, 2006, the PERB Executive Director issued his decision wherein he found, *inter alia*, DSU committed a *per se* violation of its duty to bargain in good faith and also engaged in a continuing course of conduct in violation of that duty by:

- Presenting a comprehensive new proposal to the Union in the form of a complete contract, without explanatory comment and without adequate time to prepare an informed response;
- Unilaterally implementing that proposal (as later unilaterally modified by the University) for a successor collective bargaining agreement;

- Making unilateral changes in the status quo of mandatory subjects of bargaining;
- Communicating directly with bargaining unit employees by letter dated July 5, 2005, that they had a right to revoke their Union membership; and
- Communicating directly with bargaining unit employees by letter dated August 15, 2005, concerning suspension of the grievance and arbitration procedure.

The Executive Director also found AFSCME violated its obligation under 19 Del.C. §1307(b)(2) to bargain in good faith when it refused to discuss DSU's April 2005 proposal. Both parties were ordered to cease and desist from refusing to bargain in good faith.

The Executive Director's decision also addressed Delaware State University's August 18, 2005, letter to AFSCME which stated, "Additionally, consistent with the fact that there is no agreement between the parties, the University will not arbitrate grievances concerning matters that arise on or after July 1, 2005." Relying on *AFSCME 1102 v. Wilmington* (ULP No. 05-04-477, Del. PERB, Hearing Officer's Decision, V PERB 3419 (2005)), the Director found this notice did not violate 19 Del.C. §1307(a)(5).

On June 12, 2006, AFSCME filed its Appeal of the Executive Director's decision.

On June 14, 2006, DSU also filed its Request for Review of the Executive Director's Decision, accompanied by a Motion for Leave to file that Request out of time. AFSCME subsequently filed a Motion to Dismiss DSU's appeal because it was not timely.

This Board met on July 19, 2006, to consider the cross-motions of the parties, at which time it granted the DSU's Motion to File Its Appeal Out of Time, and denied AFSCME's Motion to Dismiss DSU's Appeal as Untimely. *DSU v. AFSCME Locals 1007 & 1267*, ULP 05-06-487, Del. PERB, PERB Decision on Motions, V PERB 3635 (2006).

The parties filed written argument on cross-appeal. A copy of the complete record in this matter was provided and reviewed by each member of the Board.

The full Board convened in public session on August 16, 2006, to consider the cross-appeals of the parties in this matter.

POSITIONS OF THE PARTIES

Delaware State University:

DSU argues that the Executive Director correctly held that AFSCME's refusal to bargain the 2005 proposals was a *per se* violation of its duty to bargain in good faith. It asserts, however, that the Executive Director failed to consider the effect that this failure to negotiate had on the bargaining, and that all of the actions which were found to be violations by DSU in fact resulted from and in response to AFSCME's refusal to negotiate. AFSCME could have and should have asked questions and requested clarification on the University's proposal. The correspondence from the University directly to bargaining unit employees was necessitated by AFSCME's failure to engage in negotiations with the University. The Executive Director's conclusion that DSU violated its duty to bargain in good faith is wrong both on the facts and on the law.

DSU argues that from June 2004 through early 2005, the parties were negotiating an agreement which was to expire on June 30, 2005. When those negotiations did not result in an agreement, DSU asserts it was entitled to the benefit of its agreement with AFSCME memorialized in the June 1, 2004 Ground Rules which provided, in relevant part:

1. DSU and AFSCME agree as follows:
 - The current collective bargaining agreement will end on June 30, 2005. These negotiations will be for proposed changes through June 30, 2005.
 - Beginning not later than January 15, 2005, the individual AFSCME units (1007, 1267 and 2888) will begin to negotiate new agreements (for each unit) to be effective July 1, 2005. . .

It asserts that the parties consented to using this process and that all of DSU's conduct following its introduction of the April 2005 proposal for the 2005-2008 agreement was intended to encourage AFSCME to return to the negotiating table.

DSU further argues that it had a right to implement its proposal consistent with federal law that allows an employer in certain limited circumstances to implement an offer in the face of a union's refusal to bargain. It asserts that had this issue been presented to the Delaware Supreme Court, it could be expected to follow federal precedent. DSU notes, however, that this issue is essentially moot because on June 13, 2006, it voluntarily reinstated all mandatory subjects of bargaining that were eliminated by its implementation of the April 2005 proposal.

The Executive Director's finding that binding grievance arbitration did not survive the expiration of the collective bargaining agreement is supported by both Delaware and federal law. *City of Wilmington v. FOP Lodge 1*, Del.Ch., CA 20244-NC, 2004 WL 1488682 (2004); *Litton Financial Printing Division v. NLRB*, 501 US 190 (1991). Although the general rule of law in Delaware is that mandatory subjects of bargaining survive the expiration of a collective bargaining agreement, arbitration is the exception. DSU's decision to notice the union and employees that it would not arbitrate any grievances based on facts which arose after July 1, 2005, was based on controlling Delaware law.

AFSCME:

AFSCME argues the Executive Director erred as a matter of law in finding the union committed a *per se* violation of its duty to bargain in good faith when it refused to discuss the University's April 2005 proposal for a new agreement. DSU made a unilateral decision to ignore both the 1998-2002 collective bargaining agreement and the parties' three years of negotiations in favor of developing its own contract proposal for a new agreement to be effective

on July 1, 2005. This significant alteration in the pattern and practice of collective bargaining between these parties placed the union in the position of having to negotiate anew for any contractual terms DSU decided to delete, modify, reword, or move to a different part of the agreement. The Public Employment Relations Act does not support such a precipitous and disruptive upheaval by one party in the middle of negotiations. AFSCME argues that under the public sector collective bargaining laws in Delaware, the employer should not be permitted to force the union to negotiate a new agreement by simply declaring the prior negotiations finished, without having reached agreement or completing the statutory impasse resolution procedures.

The parties had the right and obligation to employ the statutory impasse resolution procedures in order to resolve the dispute over the terms of the 2002-2005 agreement. It is illogical to require a party to discuss or negotiate concerning a successor agreement when the terms of the prior agreement have not yet been determined.

The Executive Director correctly found that DSU committed both *per se* violations as well as engaged in a course of conduct which violated 19 Del.C. §1307(a)(2) and (a)(5). The record is clear and the arguments were fully briefed and decided below.

AFSCME argues the Executive Director erred as a matter of law in finding DSU did not commit an unfair labor practice when it advised the union and employees that it would not arbitrate grievances based on facts which arose after July 1, 2005. The *Wilmington v. FOP* decision on which DSU relies for support is very different on its facts, as is the *Litton* case. In the *Wilmington* case, the collective bargaining agreement was silent as to the future of performance bonuses after specifically identified dates. In this present case, the parties were in negotiations and had continued to operate as if the collective bargaining agreement was still in full force and effect during the period of negotiations.

AFSCME also notes that although DSU advised both the union and employees that it would not arbitrate grievances, it also advised those groups and its managers and supervisors that DSU's April 2005 proposal would be implemented until a new agreement could be negotiated. DSU's April 2005 proposal included binding arbitration as the final step of the grievance procedure.

DISCUSSION

Upon consideration of the record below and the arguments of the parties on appeal, the decision of the Executive Director is affirmed in part and reversed in part.

The record supports the decision that Delaware State University committed both *per se* violations of its duty to bargain in good faith and also engaged in a course of conduct which is inconsistent with its statutory obligations under the Public Employment Relations Act. The University's assertion that its actions were intended to encourage the union to return to the negotiating table is illogical.

DSU argues that the parties had agreed to abandon what it calls "the mid-term negotiations" of a successor to the 1998- 2002 agreement under the 2004 Ground Rules. The clear language of the Ground Rules, however, requires, "Beginning not later than January 15, 2005, the individual AFSCME units (1007, 1267 and 2888) will begin to negotiate new agreements (for each unit) to be effective July 1, 2005." DSU did not give notice to AFSCME that it wished to redirect the negotiations to the 2005-2008 agreement until Vice President Farley sent a letter to AFSCME dated March 14, 2005, followed by comprehensive proposals for new agreements for each unit in mid-April. Until this point, it is undisputed that the negotiations had addressed proposals for modification of the 1998-2002 agreement. The language is clear. It does not provide for initiating negotiations any time after January 15, 2005, but rather requires

that negotiations begin “not later than January 15, 2005.” The language of the negotiated ground rules is not ambiguous and the University’s action in March, 2005 is inconsistent with the clear language. There was no attempt by DSU to open discussion concerning ground rules or process for moving the negotiations forward to address needs beyond June 30, 2005.

The statute requires that when collective bargaining negotiations reach an impasse, statutory impasse resolution procedures are provided through PERB. The statute does not provide either party the unilateral right to impose its proposal on the other party. Although Delaware courts have held that the state can be expected to follow federal labor law, that premise is limited to cases where Delaware law is similar to the federal law or silent on the issue in question. In matters of impasse resolution and the right to strike or lockout, Delaware’s public sector collective bargaining laws are very different from federal labor laws governing the conduct of private sector employers and unions. DSU has chosen to ignore those differences and the many decisions of this Board which require parties to employ the statutory impasse resolution procedures and maintain the status quo of terms and conditions of employment during negotiations for successor agreements.

The Board agrees that DSU’s unilateral action placed AFSCME in an untenable position and concludes that AFSCME did not commit a *per se* violation of its duty to bargain in good faith by failing or refusing to comply with the University’s request to abandon the previous three years of negotiations to consider a radically new prospective proposal by the University in April, 2005. On this point, the Board reverses the decision of the Executive Director.

Although not specifically addressed as a finding in the Executive Director’s decision, a significant question exists concerning the parties’ arbitration obligation. The grievance procedure is a mandatory subject of bargaining as explicitly set forth in 19 Del.C. §1302(t). This Board recently restated its steadfast adherence to that principle, specifically applying it to

binding grievance arbitration, in *AFSCME 1102 v. Wilmington* (ULP No. 05-04-477, Del. PERB, PERB Review of Hearing Officer's Decision, V PERB 3515, 3518 (2006)).

Binding grievance arbitration was the final step in the parties' contractual grievance procedure under the 1998-2002 collective bargaining agreement. Binding grievance arbitration is also the final step of the grievance procedure in the 2005-2008 proposal the University unilaterally implemented and directed its managers and supervisors to follow. It is undisputed that DSU's last, best and final offer in the on-going interest arbitration proceeding also includes binding grievance arbitration. By and through all of its proposals, DSU has clearly indicated its willingness to continue to arbitrate grievances, despite its stated intention in its letter to the Union in July, 2005. Any confusion which exists around this issue was created by the University's conflicting communications.

Under these circumstances, we find that the record supports the conclusion that by and through all of its actions during the negotiation process, DSU clearly indicated its intent to continue to arbitrate grievances. Its letter to the Union, which was subsequently quoted in an August 18, 2005 letter DSU sent to all bargaining unit members, is inconsistent with its position in negotiations, and therefore violates its duty to bargain in good faith. On this point, the Board reverses the conclusion of the Executive Director.

Finally, AFSCME requests in its appeal that "the Union be allowed to proceed with a factual hearing to determine what financial remedies are appropriate for bargaining unit members who were deprived of specific benefits because of DSU's unfair labor practice." In the hearing, AFSCME clarified its request as seeking the option to return to the Executive Director for a ruling should DSU not fully restore the benefits it unilaterally modified.

A remand to the Executive Director or retention of jurisdiction by this Board is not necessary in this case. The statute provides a mechanism for enforcement of Board orders at 19

Del.C. §1309(b). Should enforcement of this order be necessary, AFSCME has recourse to petition this Board for such enforcement.

DECISION

Consistent with the foregoing discussion, this Board affirms the Executive Director's decision that by and through its actions and conduct Delaware State University violated its duty under the Public Employment Relations Act to bargain in good faith and interfered with the existence and administration of a labor organization. By so doing, DSU violated 19 Del.C. §1307(a)(2) and (a)(5).

The Board reverses the Executive Director's decision that AFSCME Locals 1007 and 1267 violated their duty to bargain in good faith under 19 Del.C. §1307(b)(2).

The Board also reverses the Executive Director's conclusion that the University did not violate the statute when it refused to arbitrate grievances after July 1, 2005, because that conclusion is not supported by the record or law.

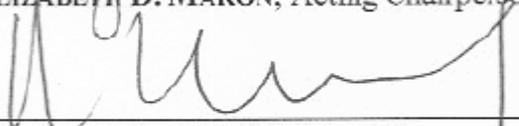
WHEREFORE, Delaware State University is hereby ordered to:

1. Return to the status quo ante on all mandatory subjects of bargaining as those terms are established by the 1998-2002 collective bargaining agreement and the practices of the parties thereunder.
2. Make bargaining unit members whole for any changes which resulted from the University's illegal imposition of its negotiating proposal for the contract to be effective July 1, 2005.
3. Cease and desist from refusing to arbitrate grievances which have arisen since July 1, 2005.

IT IS SO ORDERED.



ELIZABETH D. MARON, Acting Chairperson



R. ROBERT CURRIE, JR., Member



KATHIA A. KARSNITZ, Member

Dated: November 14, 2006