

PUBLIC EMPLOYMENT RELATIONS BOARD

STATE OF DELAWARE

BRANDYWINE AFFILIATE/NCCEA/DSEA/NEA :  
Suite 205 :  
Prices Corner Center :  
3202 Kirkwood Highway :  
Wilmington, DE. 19802, :  
 :  
Complainant, : U.L.P. No. 1-9-84-6B  
 :  
BRANDYWINE SCHOOL DISTRICT BOARD :  
OF EDUCATION :  
Pennsylvania Avenue :  
Claymont, DE. 19703, :  
 :  
Respondent. :

The dispute presented for adjudication results from an alleged violation of §4007(a)(a) and §4007(a)(5) of the Public School Employment Relations Act, 14 Del.C. §§4001 - 4018 (Supp.1982), hereinafter referred to as the Act. The charge was filed on September 12, 1984 by the Brandywine Affiliate/NCCEA/DSEA/NEA, hereinafter complainant or Association, against the Brandywine School District Board of Education, hereinafter respondent or District.

FACTS

The Association and District were parties to a collective bargaining agreement effective September 1, 1982 and expiring August 31, 1984. In the spring of 1984, the parties entered into negotiations over a successive agreement. On July 26, 1984, the District presented the Association with a three year salary proposal.

On August 20, 1984, the President of the District Board of Education notified the Association President, by letter, of the District's position regarding the expiration of the current agreement on August 31, 1984 and pending conclusion of the bargaining process. This letter stated:

1. The nonsalary provisions of the collective bargaining agreement which expires August 31, 1984, shall continue to apply.
2. Local salary supplements for teachers shall be based on credited experience, September 1, 1984, and shall be the lesser amounts specified by Schedule C of the expiring agreement of the schedule submitted by the Board of Education last month for consideration by the Association. In either case, the degree level credited to an employee for 1984-85 shall apply.
3. Extra Pay for Extra Responsibility (EPER) shall be the amounts specified in Schedules D (1 to 4) of the expiring agreement for experience levels achieved September 1, 1984.

As of August 20, 1984, the parties had not reached impasse as to the salary issue.

On September 1, 1984, the District implemented its proposal of August 20, 1984. The effect of item #2 of this policy was to reduce the salaries of fourteen (14) bargaining unit employees below the salary level those teachers would have received under the 1983-84 contractual salary schedule. The District has continued to pay these employees at the lesser salary level which was determined by comparing cell by cell the District's July 26 proposal with the 1983-84 contractual salary schedule (Schedule C, above).

As a result of the District's action, the Association filed an unfair labor practice complaint alleging that the District has failed to bargain in good faith by unilaterally altering the existing salary schedule by refusing to pay all of its public school employees the local salary supplement indicated by the 1983-84 contractual salary schedule. The Association also alleges that the District has interfered with, restrained and coerced its employees in the exercise of rights guaranteed to them under the Act by instituting a unilateral change in the terms and conditions of employment without negotiation.

The District denies it has breached its duty to bargain in good faith with the Association. It asserts that the Association, under the guise of maintaining the status quo, is seeking to undermine the District's good faith bargaining position by forcing the District to perpetuate existing inequities under the 1983-84 contractual salary schedule. The District maintains that such inequities are the result of the New Castle County School District local salary schedule of 1981-82 which was inequitable and poorly conceived. The District further contends that it would be practically impossible for the District to negotiate a salary decrease for the fourteen affected employees in order to preserve the salary equity which the District established in its proposal of July 26. The District takes the position that the circumstances underlying and surrounding its implementation of the August 20 policy justify the actions taken and insulate such action from the Association's unfair labor practice charge.

The parties have agreed in a written stipulation to the facts here presented. Legal briefs in support of the parties' respective positions have been submitted to the Public Employment Relations Board.

At the time of this decision, negotiations continue as to a new and successive salary schedule. Agreement has not yet been reached.

### ISSUE

The issue is whether the respondent has engaged in and/or is engaging in an unfair labor practice, in violation of §4007(a)(1) and §4007(a)(5) of the Public School Employment Relations Act, 14 Del.C. §§4001-4018 (Supp.1982), by failing to pay fourteen (14) teachers the salary increment to which their level of education and total years of experience entitled them according to the salary schedule which represented the status quo, without first bargaining, at least to the point of impasse, with the exclusive representative of such employees.

### OPINION

Delaware public school boards and the exclusive representatives of public school employees are obligated under the Public School Employment Relations Act (14 Del.C. Chapter 40) to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment". 14 Del.C. §4001(b), §4002(e). "'Terms and conditions of employment' means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions". 14 Del.C. §4002(p). It is clear that the legislature intended all matters concerning or related to these specified terms and conditions of employment to be mandatory subjects of bargaining for all public school employers and employee

representatives entering into the collective bargaining process. Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D., Del.PERB, U.L.P. No. 1-3-84-3-2A (August 14, 1984). The parties to this dispute clearly have an express statutory duty to bargain a mandatory term and condition of employment, i.e. salaries. A unilateral change in such a term and condition of employment, by an employer, without prior impasse, violates the employer's statutory duty to collectively bargain because it undermines the process of mutual resolution of disputes relating to such mandatory matters. Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D., Del.PERB, U.L.P. No. 1-2-84A (July 23, 1984).

Maintaining stability during the negotiation process is a crucial factor in continuing the orderly and uninterrupted operations of the public school system and to maintaining an environment where the parties are free to negotiate in good faith on an equal basis. To permit one of the parties to impose a unilateral change in a mandatory subject of bargaining, without prior negotiation at least to the point of impasse, jeopardizes the desired stability and permits one party to effectively circumvent the collective bargaining process, thereby creating the potential for unfair advantage. Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D. (July 23, 1984), Supra.

Where the employer first informs the union of its [the employer's] proposed actions under circumstances which afford a reasonable opportunity for counter proposals and arguments, the District asserts impasse is not always necessary prior to implementing a change in a mandatory subject of bargaining. The District cites a number of National Labor Relations Board cases in support of this position. N.L.R.B. v. Citizens Hotel Co., 5th Cir., 326 F.2d 501 (1964); N.L.R.B. v. J.P. Stevens & Co., Inc., 5th

Cir., 538 F.2d 1152 (1976); N.L.R.B. v. United Nuclear Corporation, 10th Cir., 381 F.2d 972 (1967). The Fifth Circuit Court of Appeals applied this doctrine in N.L.R.B. v. Tex-Tan, Inc. (5th Cir., 318 F.2d 472 (1963)) with clarity where it found an employer not guilty of an unfair labor practice in a situation where the employer initiated a wage increase prior to impasse. The court carefully noted that the proposed change had been fully discussed as to the nature and kind of wage change and the general proposed timing of the employer's action. There was no ultimatum or improper condition attached to the discussion and subsequent implementation. The employer in this case was compelled to make such changes by economic necessity which was due to chaotic conditions created by a union job action. Without commenting on the validity of the Tex-Tan holding, the critical differentiation between the Tex-Tan case and N.L.R.B. v. Katz (369 U.S. 736 (1962)) is the prior notification and consultation with the union in Tex-Tan which was lacking in Katz. In N.L.R.B. v. Crompton-Highland Mills (337 U.S. 217 (1949)) however the Supreme Court found an employer guilty of an unfair labor practice where, prior to impasse, a wage increase was instituted which was greater than the employer's prior proposals during the course of collective bargaining. The employer's prior proposal in that case had been rejected as being insufficient by the union. Under these circumstances it was ruled that the employer failed to perform its statutory duty to bargain by its action with respect to the wage increase.

In the present case the Brandywine Board implemented neither a wage increase nor the same proposal it had made to the Association on July 26, 1984. There had been no negotiations between July 26 and August 20 due to the explained absence of the Association's chief negotiator,

of which the District had prior knowledge. In fact, it was not until September 25, 1984, the next negotiation session subsequent to the District's July 26 salary proposal that salary was next discussed. However, on September 1, 1984, the School District had already implemented a hybrid structural matrix adjustment which unilaterally reduced the salaries of fourteen bargaining unit employees for the 1984-85 school year. The remaining employees were to be properly paid according to the 1983-84 salary schedule at the experience level mandated by the PERB decision in Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D. (July 23, 1984, Supra.).

It is apparent tht the structural salary changes unilaterally implemented by the District were neither first discussed with nor rejected by the Association. The Association was notified of the District's intent to alter the salary matrix only ten days prior to the date of implementation. The parties agree that no impasse existed at that point. Although prior notice was given to the Association regarding the District's intended action, subsequent meaningful negotiations between the parties prior to implementation is critically lacking. Negotiations as to salary are continuing as of the date of the issuance of this decision.

Consistent with both the Superior Court and the Chancery Court of the State of Delaware, the Public Employment Relations Board in Appoquinimink Ed. Assn. v. Bd. of Ed. of Appoquinimink S.D. (July 23, 1984, Supra.) applied the principles governing the violation caused by unilateral changes in the terms and conditions of employment during the collective bargaining process, as set forth in N.L.R.B. v. Katz (Supra.). The Brandywine School District maintains the Katz decision supports its position herein in that the Supreme Court did not forbid all unilateral change by employers, even absent impasse. The District further asserts that the current facts present

a circumstance which, under Katz, could or should be accepted as excusing or justifying unilateral action. A careful reading of Katz requires a rejection of this argument. Unilateral action by the employer without prior discussion with the employee representative constitutes a per se refusal to bargain about the affected condition of employment being negotiated. N.L.R.B. v. Katz (Supra.). In Katz, the Supreme Court also noted in closing that unilateral change would rarely be justified "by any reason of substance". Upon reviewing the record, it must be concluded that the Brandywine District's unilateral action is not justified by any such reason of substance. The District argues that its unilateral change was necessitated by a need to create a primary bargaining position without which the District would be forced to jettison its goal of establishing an equitable salary schedule. In short, the District unilaterally set the stage to proceed with salary negotiations from a point where it felt negotiations should properly begin. This was accomplished by adjusting the salary matrix to a position which the District felt was more "equitable" to all teachers in the district. However, the word "equitable" is a value laden term and represents the essence at which the principles of collective bargaining are aimed. The creation and existence of an equitable state does not readily lend itself to unilateral imposition by only one of the interested parties. It is most effectively accomplished through bilateral negotiations and compromise. The Public School Employment Relations Act requires the use of the collective bargaining process where mandatory subjects are involved. Conversely, there is no requirement that either of the parties accede to the substantive position of the other. The District's argument here represents the antithesis of this statutory scheme in that it abandons the process in favor of adopting



its own desired end result. At best, the District's justification for its unilateral imposition of a change in the salaries of bargaining unit employees is purely speculative and prospective in nature. Such action is in direct opposition to the statutory purposes of collective bargaining in the Delaware public school system.

Finally, the District supports its position by arguing the absence of any intention to undermine the bargaining position of the Association. The Katz case clearly establishes that the duty to collectively bargain terms and conditions of employment may be violated without a general failure of subjective good faith. The employer may maintain "every desire to reach agreement ... on an overall collective agreement and earnestly and in all good faith bargain to that end" and still commit a per se refusal to bargain as to a particular mandatory subject of bargaining. It is not doubted that the District was moved by well meaning intentions to adopt changes which it felt were necessary to establishing a more equitable salary matrix. However, such equitable adaptations are properly the subject of collective bargaining where they relate to mandatory subjects of bargaining. The District acknowledges that the parties have in the past worked together to minimize inequities under prior contracts. Despite its benevolent motivations, the District's unilateral change in the salary levels of bargaining unit employees constitutes a per se refusal to bargain with the Association, in violation of 14 Del.C. §4007(a)(5).

#### CONCLUSIONS OF LAW

Based on the foregoing, I make the following conclusions of law:

1. The Brandywine School District is a Public School Employer

within the meaning of §4002(m) of the Act.

2. The Brandywine Affiliate/NCCEA/DSEA/NEA, is an Employee Organization with the meaning of §4002(g) of the Act.
3. The Brandywine Affiliate/NCCEA/DSEA/NEA, is the Exclusive Bargaining Representative of the School District's certificated professional employees within the meaning of §4002(j) of the Act.
4. The District violated §4007(a)(5) of the Act by failing to pay fourteen (14) bargaining unit employees the salary increment to which their level of education and total years of experience entitled them according to the salary schedule which represented the status quo without first bargaining, at least to impasse, with the exclusive bargaining representative of such employees.
5. By engaging in the conduct described in ¶4, the District did not violate §4007(a)(1) of the Act. There is not sufficient evidence on the record to warrant a finding that the District interfered with, restrained or coerced any employee in or because of the exercise of any right guaranteed under this Chapter.

#### REMEDY

Pursuant to 14 Del.C. §4006(h)(2), the Board of Education of the Brandywine School District is ordered:

- A. To cease and desist from:

1. Continuing to implement this salary schedule which unilaterally decreases the wages of fourteen (14) teachers and which was instituted without first bargaining the issue, at least to the point of impasse, during the pendency of the negotiations.

B. Take the following affirmative action:

1. Recognize the current level of education and the 1984 total years of service credit for all teachers and to pay all teachers according to the 1983-84 contractual salary schedule which represented the status quo as of August 31, 1984.
2. Pay the fourteen (14) teachers currently receiving a rate of pay less than that to which they are entitled under the 1983-84 contractual salary schedule that higher rate of pay to which they are so entitled under the above salary schedule according to their current education level and total years of experience.
3. The proper rate of pay is to be effective as of September 1, 1984, and pay adjustments are to be made retroactive to September 1, 1984.
4. Notify the Public Employment Relations Board in writing within thirty (30) calendar days from the date of this Order of the steps that have been taken to comply with the Order.

It is so ordered.

Charles D. Long

Charles D. Long, Executive Director  
Delaware Public Employment Relations  
Board

D. Murray-Sheppard

Deborah L. Murray-Sheppard, Adm. Asst.  
Delaware Public Employment Relations  
Board

