STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

SMYRNA EDUCATORS' ASSOCIATION,	:	
Charging Party,	:	
v.	:	U.L.P. No. 87-08-015
BOARD OF EDUCATION OF THE SMYRNA SCHOOL DISTRICT,	:	
Public School Employer.	:	

DECISION

The Board of Education of the Smyrna School District (hereinafter "District" or "Respondent") is a public employer within the meaning of 14 Del.C. section 4002(m). The Smyrna Educators' Association (hereinafter "Association" or "Charging Party") is the exclusive bargaining representative of the public school employer's certificated professional employees within the meaning of 14 Del.C. section 4004.

An unfair labor practice charge was filed on August 31, 1987 by the Smyrna Educators' Association against the Board of Education of the Smyrna School District. The charge alleges that by freezing the local salary supplements of all teachers at the 1986-87 school year level

without first negotiating the matter with the exclusive bargaining representative "the Public School Employer has interfered with, restrained and coerced its employees in the exercise of rights guaranteed under the Act [14 Del.C. Chapter 40, The Public School Employment Relations Act], and has failed to bargain collectively in good faith with the Charging Party" in violation of 14 Del.C. 4005 (a) (1) and (5).

The District filed its Answer on September 4, 1987. In an attempt to define the issue(s) and to assist the parties in reaching a voluntary settlement, an informal conference was held on Wednesday, September 9, 1987. The parties were unable to reach agreement and a public hearing was held on Friday, September 11. Post-hearing briefs were received from both parties on September 24.

FACTS

The District and the Association are parties to a collective bargaining agreement for the period of July 1, 1986 through June 30, 1988. Article XXVIII of this agreement, Local Salary Schedule for Teachers and Nurses, contains an empty salary matrix (with "Years of Experience" on the vertical axis and Educational Degree Level along the horizontal axis) with the following text:

> These figures are not available at this time, but will be available by July 15, 1986. The salary scale will reflect 100% of both fiscal 87 Equalization Funds and the recently passed increase in the school tax rate, less O.E.C. [sic, Other Employment Costs]

Beginning July 1, 1987 Step 17 will be added to the local salary schedule.

Beginning July 1, 1987 85% of the increase of Division III money will be applied to the local salary schedule on a percentage basis. Other employee costs will be deducted just from the 85% of the Division III funds.

Beginning July 1, 1987 an across the board increase will be added to the local salary scale from a sum derived from fringe and extra-duty increases of 12% less O.E.C. (Approximate increase - $100) [Association Exhibit 1; page24]

In early April of 1987, The Smyrna School District was aware that financial problems existed within the district. The severity of the situation was such that insufficient funds were available to meet the June payroll and the District borrowed $168,000 for this purpose. The District also requested assistance from both the Department of Public Instruction and the State Budget Office in identifying the source and magnitude of its deficit.

On June 29, 1987, District and Association representatives met, at the District's invitation, to discuss the financial circumstances of the District. The discussion at this meeting included not only the general financial situation existing in the District at that time, but also the District's belief that teachers' salaries had been overpaid during the 1986-87 school year. The District also requested from the Association suggestions for resolving the financial problem.

On July 9, 1987, Mr. Larry Kopenhaver was hired to replace the

former Administrative Assistant to the District. The position of Administrative Assistant is primarily responsible for the business administration of the district, including budgeting, payroll and accounting functions.

On or before August 5, 1987, Mr. Kopenhaver prepared a memorandum outlining his recommendations for the handling of the financial problem which read as follows:

1. The following shall be applicable to all employees whose salary is based on the local teachers salary schedule and/or are members of the S.E.A. (or are eligible to be members).

2. Local salaries for the group defined above shall be held (frozen) at the 86-87 amounts until there is a reconciliation {sic} of the over payment of local salaries during 86-87. Payment of State salary amounts are not to be affected by this policy.

3. The "Agreement" between the S.E.A. and the Board is for the period July 1, 1986 - June 30, 1988, this two year period shall be utilized to reconcile the over payment of local salary amounts during the first year by adjusting local salary amounts during the second year to achieve a correct sum for the entire contractual group known as the S.E.A. and for every individual for whom this policy is applicable (see above).

4. For those persons who were on the payroll in 86-87, but not in 87-88, there appears to be no practical way to reconcile the over payment of their local salary amounts.

5. For new persons on the payroll in 87-88, their salaries will be governed by paragraphs 1, 2, and 3. [Assn. Ex. 7; page 2]

These recommendations were distributed to the Board of Education members for consideration, by Superintendant DiNunzio on August 5, 1987. The covering memo to the Board Members read:

> The enclosed suggested policy is provided for discussion concerning local teacher salaries. Please review so we can discuss thoroughly at the August 11th agenda session.
>
> [Assn. Ex. 7; page 1.]

On August 11, the Board of Education met for a work session. There was no official Board action taken on Mr. Kopenhaver's recommendations at this session; however, the recommendations were discussed by the Board in a private session immediately following the public portion of the meeting. The monthly Board of Education meeting was scheduled for the following week on Wednesday, August 19.

On or about August 16, the District Superintendant was contacted by the President of the Board of Education and directed to notify the Association that the Board was considering a wage freeze. The Superintendant called the President of the Association on Monday, August 17 and asked her if she and another Association representative could meet with him and a Board member to "have a chitchat about teachers money and rumors." At no time during this telephone conversation was the issue of freezing wages raised. Because of legitimate personal reasons, neither the Association President nor Vice President was immediately available and it was subsequently agreed that the meeting would take place on Friday, August 21.

On August 19, at the scheduled meeting of the Smyrna Board of Education, the Board voted to adopt the recommendations of the Administrative Assistant, thereby freezing the local salaries at the

86-87 levels. As part of the wage freeze, no advancement was given to individual teachers for increasing either the number of years of experience or educational attainment.

POSITIONS

District:

The District maintains that because the projected revenues from the 1986 referendum and matching Equalization Funds thereby made available were significantly overestimated, the application of the salary matrix formula for the 1986-87 school year resulted in an overpayment to teachers during that year; consequently, the District alleges that teachers may have already received, in year #1 (1986-87), the full benefit of the two year contractual salary upgrades. It is the District's position that because it may have already provided the full benefit contractually agreed to, it has not altered the terms and conditions of employment of its teaching staff.

In the alternative, the District argues that even if it should be determined that the freezing of salaries constitutes a unilateral change or modification of a mandatory term and/or conditions of employment, in order to satisfy its statutory obligation to bargain in good faith, its need only provide notice of its willingness to bargain prior to the time at which it finalized its plan. The District asserts that it met this obligation by meeting with the immediate past president of the Association on June 29, 1987 to and by the telephone contact initiated by the Superintendant to the Association President on August 17. The District maintains that because the Association did not

pursue these opportunities, it forfeited its opportunity to be involved in the decision-making process.

The District also argues that unilateral alterations of mandatory subjects of a collective bargaining agreement do not constitute unfair labor practices where there exists either a waiver, an emergency or an impasse. It maintains that it was here faced with a real emergency, i.e., a financial crisis and at the time of its action, it had received from both its Administrative Assistant and the Department of Public Instruction preliminary information which it believed to be reliable and credible, that teachers had been overpaid during the 1986-87 school year. This fact, coupled with the existing financial problems constituted, in the mind of the Board, a substantial justification for its action which was intended to prevent the further improper expenditure of public monies. The District asserts that the PERB must take these factors into consideration and that District should not be compelled to negotiate under such circumstances of doubt and uncertainty; consequently, its action should not be deemed to constitute an unfair labor practice.

The District's final position is that to grant the Association's requested remedy requiring the Board to grant increases under the contractual language would not only result in an economic cost to the Board over and above what is contractually required but also be in violation of the express statutory prohibitions of 14 Del.C. sections 4013(3) and 4006(h)(2).

Association:

The Association contends that the mere fact that unilateral action

was taken concerning a mandatory subject of bargaining constitutes a per se violation of the employer's statutory duty to bargain. It alleges that by August 6 the District was considering freezing teachers salaries. It argues that by failing to notify and subsequently negotiate any proposed modifications with the Association prior to implementing the salary freeze, the District committed an unfair labor practice in violation of the Act.

The Association urges rejection of the District's "financial emergency" defense on the basis that it constitutes a bargaining position rather than a justification for avoiding the statutory duty to bargain. The Association maintains that to excuse the District from its statutory duty to bargain, based on alleged financial necessity, is inconsistenct with the purpose and policy of the Public School Employment Relations Act since the destablizing impact of permitting unilateral changes in mandatory subjects of bargaining would destroy the unique balance necessary to maintain an effective and meaningful collective bargaining environment.

ISSUE

Whether the District committed an unfair labor practice in violation of sections 4005 (a) (1) and (5), of the Act when it froze teacher salaries without first bargaining the matter with the exclusive representative of affected employees?

OPINION

Salaries clearly constitue a mandatory subject of bargaining. The Public School Employment Relations Act (14 Del.C. Chapter 40) obligates "boards of education and school employee organizations which have been certified as representing their school employees to enter into collective bargaining with the willingness to resolve disputes relating to terms and conditions of employment..." [14 Del.C. sec.4001(2)] where terms and conditions of employment includes "matters concerning or related to wages [and] salaries...". 14 Del.C. sec. 4002(p). Further, the statutory obligation to collectively bargain is defined as "... the performance of the mutual obligation ... to confer and negotiate in good faith with respect to terms and conditions of employment and to execute a written contract incorporating any agreements reached." 14 Del.C. sec. 4002(e).

The Delaware Public Employment Relations Board has established that the duty to bargain mandatory terms and conditions of employment requires that neither party unilaterally change the status quo of such subjects, at least until the parties reach impasse in their negotiations. Appoquinimink Education Association v. Board of Education of the Appoquinimink School District, Del.PERB, ULP No. 1-12-83A (July, 23, 1984); Brandywine Affiliate/NCCEA/DSEA/NEA v. Brandywine School District Board of Education, Del.PERB, ULP No. 1-9-84-6B (November 20, 1984). An employer's unilateral change in conditions of employment under negotiation, without impasse, violates the duty to bargain and undermines the bargaining process. NLRB v. Katz, 369 U.S. 736 (1962). Known as the "Katz Principle", this fundamental tenet of labor law was specifically adopted by the Delaware PERB in Appoquinink Education Assn. case (Supra.). Although both the

Appoquinimink (Supra.) and Brandywine (Supra.) cases dealt with situations where an alleged unilateral change occured after the expiration date of an existing contract and during the period of negotiations for a successor agreement, the duty to bargain terms and conditions of employment also attaches when either party desires a change during the term of a contract. The Public Employment Relations Board has previously concluded that experience gained in the private sector, while not necessarily providing an infallible basis for decision in the public sector, is nonetheless a valuable source of reference. Seaford Education Assn. v. Bd. of Ed. of Seaford School District, Del. PERB, No. 2-2-84S (March 19, 1984), Slip Op. at 5. In this regard, the United States Supreme Court in interpreting the National Labor Relations Act held that "...the duty to bargain unquestionably extends beyond the period of contract negotiation and applies to labor managment relations during the term of the agreement". NLRB v. Acme Industrial Co., 385 US 432 (1967). Unilateral disruptions are unlawful because they frustrate the statutory obligation of parties to establish working conditions through collective bargaining.

The threshhold question in this case is whether the District's freezing of teachers' salaries at the 1986-87 level for the 1987-88 term constitutes such a unilateral, and therefore illegal, change. It is important to understand that the District's action froze the salaries in two ways: 1) In computing individual salary levels, the District did not recognize credit for either an additional year of service during 1986-87 or additional education an individual may have gained since July 1986; therefore, the District did not advance individual salaries within the matrix along either the years of service

or educational attainment axes; and 2) The District did not advance the entire matrix (i.e., increase each cell) in the manner prescribed under Year 2 of Article XXVIII of the current collective bargaining agreement between the parties.

It has been firmly established that failure to advance teachers within a salary matrix in recognition of years of service and level of education constitutes a unilateral change in violation of the Act where the employer does not first negotiate with the exclusive representative of affected employees. In Appoquinimink Ed. Assn. (Supra.) the Public Employment Relations Board found:

> By unilaterally failing to recognize a year of service credit for all teachers earning such credit in 1982-83 school year and failing to pay such teachers the salary increment to which their total years of experience entitled them, without bargaining at least to the point of impasse, the School Board violated section 4007(a)(5) of the Act.

Further, Brandywine Affiliate (Supra.) found the Board of Education guilty of an unfair labor practice in violation of 14 Del.C. section 4007(a)(5) where it failed "... to pay fourteen bargining 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 the point of impasse, with the exclusive bargaining representative...".

Concerning the freezing of the overall salary matrix at the 1986-87 levels, the District was contractually obligated to compute a second

year matrix based on the agreed upon formulation found in Article XXVIII. No evidence was presented nor testimony received that any effort was made to generate such a matrix. Beyond the contractual obligation, there exists a statutory obligation for parties to establish terms and conditions of employment through the collective bargaining process. Mr. Koppenhaver testified that he believed he had a choice of either generating a Year 2 matrix based on revenue estimates or freezing the existing matrix and waiting until firm revenue figures were received by the District later in the school year. We find, however, that the District's alternatives under the present circumstances were to 1) generate and implement a second year salary matrix as prior matrices had been generated and as was contractually required, or 2) negotiate any alternative arrangement with the Association. In no case, however, was the District permitted the right to alter a mandatory subject of bargaining by unilaterally implementing an alternative method of compensation, prior to negotiation with the Association.

We do not find that the District was required to pay more in Year 2 than the salary levels paid in Year 1; only that it was required to make a good faith effort to meet its contractual obligation to pay according to the Year 2 agreement which established both the method and measures for determining the composition of the salary matrix. The issue of recouping any overpayments is outside of the issue here presented. Quite simply, what was required was that the District use its best available methods and information to determine what the adjusted matrix for 1986-87 should have been and distribute the additional monies identified in the 1987-88 formula in constructing a

Year 2 schedule in accordance with the contract. Any other method of generating the schedule or determining pay levels of employees would constitute a change in "terms and conditions of employment" requiring prior negotiation with the Association.

The District contends that it was justified in freezing salaries based on the existing "financial crisis". If such a financial emergency existed in August and September of 1987, it was incumbent upon the Respondent to clearly establish its existence and the need for the immediate action which it undertook. The District, however, failed to show any substantial reason why it could not pay according to its contractual obligation. Neither testimony nor evidence was presented that established the District lacked Fiscal Year 1988 funds sufficient to meet its obligations nor is there evidence of any external freezing of local funds nor of an impending 1987-88 deficit. The District only established that a financial shortcoming existed in the Smyrna school district in June of 1987, the impact of which was to bring to the District's attention financial problems resulting from not reconciling projections and actual revenues for fiscal year 1987. This financial problem affected, among other expenditures, the accuracy of the Year 1 Teacher Salary Matrix. Freezing teachers' salaries was the District's choice of action during a period of review and reconciliation. The need for this immediate and limited action is unsupported by the evidence.

Finally, the District argues that it met its bargaining obligation by making a good faith effort to advise the Association of the problem and to thereby provide the Association with the opportunity to request bargaining, if they so desired. The meeting of June 29 and the

telephone coversation between Superintendant DiNunzio and Association President Arnold are relied upon to support this position. What constitutes good-faith bargaining can only be determined from a review of the totality of conduct by the parties, on a case by case basis. The National Labor Relations Board has gone so far as to state that no party may institute a change in a term or condition of employment covered in a current collective bargaining agreement without the consent of the other party. C & S Industries, Inc., 158 NLRB 454 (1966). While we need not venture so far in this decision, we do hold that there existed a duty to bargain, the first step of which required the District to provide the Association with adequate notice that it was considering or desirous of altering a mandatory subject of bargaining whose terms were addressed in the existing collective bargaining agreement. The circumstances surrounding the June 29 meeting, without more, do not constitute adequate notice or an effective offer to bargain. It is unrealistic to believe that on June 29 the Association was in a position to offer informed suggestions for resolving the District's financial difficulties when the District itself claimed an inability to do so based on a lack of finite information. At no time thereafter was there meaningful two-way discussions between the parties. At no time did the District make a proposal to the Association involving a salary freeze nor did it attempt to follow up or to schedule a meeting for this purpose. The Association did not become aware of the "freeze" until the Board passed its resolution on August 19. The only other contact with the Association was the August 17 telephone invitation from Superintendant DiNunzio to Association

President Arnold to "chit-chat about teacher's money and rumors". This conversation, occurring only two days prior to the scheduled school board meeting, cannot reasonably be considered as a good-faith offer to bargain.

In conclusion, the Smyrna School District was required to adhere to the agreed upon mandatory terms and conditions of employment during the term of an existing collective bargaining agreement, and to bargain desired modifications with the exclusive representative of the affected employees. Enforcement of this requirement subjects the District to no greater economic cost than it voluntarily agreed to during its contract negotiations with the Association.

CONCLUSIONS OF LAW

1. The Board of Education of the Smyrna School District is a Public School Employer within the meaning of 14 Del.C. section 4002(m).

2. The Smyrna Education Association is an Employee Organization within the meaning of 14 Del.C. section 4002(g).

3. The Smyrna Education Association is the Exclusive Bargaining Representative of the certificated professional employees of the Smyrna School District within the meaning of 14 Del.C. 4002(j).

4. Wage and salary levels of certificated professional employees within the Smyrna School District are a mandatory subject of collective bargaining within the meaning of 14 Del.C. sections 4002(e) and (p).

5. By its August 19 resolution, the District unilaterally instituted a change in a mandatory subject of bargaining in violation of 14 Del.C. section 4007(a)(5) by refusing to pay teachers the salary

increment to which their total years of experience and educational attainment entitled them, without first bargaining at least to the point of impasse with the exclusive bargaining representative of affected employees.

6. By its August 19 resolution, the District unilaterally instituted a change in a mandatory subject of bargaining in violation of 14 Del.C. section 4007(a)(5) in adopting a salary matrix which was not in accord with the provisions of the current collective bargaining agreement, without first bargaining at least to the point of impasse with the exclusive representatative of affected employees.

7. By the totality of its conduct, the Board of Education of the Smyrna School District has interfered with restrained and coerced its employees in the exercise of rights guaranteed under the Public School Employment Relations Act, in violation of 14 Del.C. section 4005(a)(1).

WHEREFORE THE BOARD OF EDUCATION OF THE SMYRNA SCHOOL DISTRICT IS HEREBY ORDERED TO:

A. Cease and Desist from continuing to implement the 1986-87 salary matrix.

B. Cease and Desist from continuing to pay teachers in the Smyrna School District at an Experience-Education matrix position which is less than that to which they are thereby entitled.

C. Take the following affirmative action:

1. Generate a Year 2 salary matrix as prescribed by Article XXVIII of the current collective bargaining agreement

2. Recognize the current level of education and the 1987 total

years of service credit for all teachers in determining individual salary levels within the Year 2 matrix.

3. Pay all teachers the salary to which they are entitled under the terms of the collective bargaining agreement and the provisions of this order, asa set forth above.
4. The proper rate of pay is to be effective as of July 1, 1987 and pay adjustments are to be made retroactive to July 1, 1987.
5. Meet with the authorized representatives of the Association to advise and discuss with them the finalized Year 2 salary matrix.
6. Notify the Public Employment Relations Board in writing within thirty (30) calendar days from the date of this Order of the steps taken to comply with the Order.

IT IS SO ORDERED.

Charles D. Long, Jr.

CHARLES D. LONG, JR.
HEARING OFFICER

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD
PRINCIPAL ASSISTANT, PERB

OCTOBER 26, 1987