

STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD

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BOARD OF EDUCATION OF THE CAPE	:	
HENLOPEN SCHOOL DISTRICT	:	
Appellant,	:	Appeal of the Executive
	:	Director's Decision
v.	:	<u>U.L.P. No. 90-01-047</u>
	:	
CAPE HENLOPEN EDUCATION ASSOCIATION,	:	
Appellee	:	

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Disposition of Appellant's Request for Hearing

On June 11, 1990, the Cape Henlopen Education Association (hereinafter "Association" or Appellee") filed an unfair labor practice with the State Public Employment Relations Board (hereinafter the "Board" or "PERB"). The Association alleged that the Board of Education of the Cape Henlopen School District (hereinafter the "Appellant" or "District") violated Section 4007 (a)(1) of the Public School Employment Relations Act, 14 Del. C. Chapter 40 (Supp., 1982) (hereinafter the "Act"), by refusing to arbitrate a grievance filed by teacher Robert Schroeder, protesting a one year suspension from his position as head football coach. The District refused to arbitrate the grievance because it believed the grievant, in his capacity as head football coach, was not eligible to participate in the arbitration procedure contained in Article III of the collective bargaining

agreement. In support of its position, the District maintained that the position of football coach was not intended to be included within the Recognition clause set forth in Article I of the collective bargaining agreement. The Association is of the opposite opinion.

The parties agreed to stipulate to the material facts and submit briefs setting forth the arguments supporting their respective positions. For this reason, it was not necessary that a hearing be held. In a decision issued on May 22, 1990, the Hearing Officer in this matter directed that the grievance protesting the suspension of Mr. Schroeder be submitted to arbitration for resolution in accord with the provisions contained in Article III, Grievance Procedure, of the collective bargaining agreement, which provide in relevant part:

Definitions:

3.1 A "grievance" is any claim by a professional employee(s) that there has been a violation, mis-interpretation, inequitable application, or mis-application of the terms of this Agreement.

3.2 An "aggrieved person" is any person or persons making the claim.

3.14 A grievance which is not resolved to the satisfaction of the aggrieved person at Level Three may be submitted to an arbitrator. This procedure must be initiated within ten (10) days following a decision at Level Three. Upon notification of the Board by CHEA said arbitrator shall be appointed by mutual agreement of the parties to this Agreement or, if unable to agree shall be appointed by the

American Arbitration Association. (emphasis added)

The Hearing Officer held that it is not the function of the Public Employment Relations Board to resolve grievances by interpreting contractual language where the parties have agreed to process such disputes through the negotiated grievance and arbitration procedure. He concluded that the grievance protesting the discipline assessed to Mr. Schroeder by the the District for the reason that it violated the "just cause" provision of Article V, as well as any contractual defenses relied upon by the District, including the disputed interpretation of Article I, Recognition, was properly within the exclusive jurisdiction of the arbitrator. It is from this decision that the District appealed.

In its June 5, 1990 request for review, the District petitioned the Public Employment Relations Board for a hearing and the opportunity to further file legal briefs and arguments on the issue.

In response to the District's request for appeal the Board, on June 14, 1990, requested from the District a statement setting forth the basis for the appeal.

On July 6, 1990, the District responded to the Board's request. The reason given by the District for requesting the hearing before the Board was to create an evidentiary record establishing the intent of the parties at the time the contractual language was adopted, how the language has been interpreted since its adoption and the proper interpretation of the contract language, in light of these historical factors.

On July 19, 1990, the PERB issued the following letter:

The policy of the Public Employment Relations Board  
is to review decisions on the basis of the record est-

abished by the parties below. Your letter of July 6, states that the reason for the requested hearing would be to create an evidentiary record intended to establish the intent of the parties at the time the contractual language [the Recognition clause] was adopted, the manner in which the employees have consistently interpreted the language since the date of its adoption and the proper interpretation of the language.

In accordance with the stated policy of this Board, your request for a hearing in the District's appeal of the above captioned decision is hereby remanded to the Office of the Executive Director for disposition.

The following opinion and decision of the Executive Director results from the Board's directive that he review and rule on the District's request for a hearing.

#### OPINION

In prior cases involving appeals, the Board has accepted appellate briefs setting forth the specific exceptions to a decision issued below the and arguments in support thereof. Prior to this matter, there has been no request by either a party or the Board for a hearing of any type. The propriety of the District's request is, therefore, a question of first impression.

As stated in its July 19th letter, the established policy of the

Board is to consider appeals based upon the record as it exists at the time of the appeal. For this reason, the filing of an appeal with the Public Employment Relations Board does not entitle a party to a hearing before the Board for the purpose of supplementing the record upon which the Hearing Officer's decision is based.

The District bases its decision not to participate in the arbitration procedure upon Article I., Recognition, which it argues does not extend to a teacher when he/she is functioning in the capacity of a coach. The Association, on the other hand, believes that it does. Addressing the question of arbitrability the Hearing Officer concluded:

It must be emphasized that the decision reached in this matter resolves only the issue concerning the District's obligation to arbitrate the substantive dispute under the contractual grievance and arbitration language. In deciding questions of arbitrability, it is essential that contract interpretation be limited to determining whether the disputed matter is included within the scope of the grievance and/or arbitration procedure. It is not the function of the Public Employment Relations Board to proceed further and rule on the merits of the underlying substantive issue by interpreting other contractual provisions. A consideration of the underlying substantive issue involving the alleged violation of Article V, Professional Employee Rights, Section 5.2, Just Cause Provision, and the District's defense(s), including reliance on Article I, Recognition, are properly and exclusively within the province of the

arbitrator. (emphasis added)

The practical effect of permitting the hearing which the District requests would be to relitigate the underlying issue already decided by the Hearing Officer. Granting the District's request would place before the PERB for its consideration and interpretation contractual provision(s) which the Hearing Officer has determined are proper subject matter for the grievance and arbitration procedure negotiated by the parties and, therefore, within the exclusive jurisdiction of an arbitrator. A party is not entitled as a matter of right to an evidentiary hearing after the close of the record and the issuance of a decision. To conclude otherwise would convert the appellate procedure into a re-hearing on the merits of an issue already decided.

The right of appeal to the PERB is for consideration of specific exceptions intended to establish that a decision issued below is not, as a matter of law, supported by the factual record or that prejudicial error involving a question of law has occurred during the processing of the complaint. There may, from time to time, arise extenuating circumstances, of which none are present here. For example, new or material facts may become known of which a party was not previously aware, through no fault of its own. In such cases, where justice and equity demand, the Board may, in its discretion, hold a hearing in connection with its review. Article VII, Formal Hearings, section 7.1. Rules and Regulations of the Public Employment Relations Board (1984).

DECISION

For the reasons set forth above, the District's request to hold a hearing so that "an evidentiary record can be created in order to establish the intent of the parties at the time the contractual language was adopted, the manner in which the employees have consistently interpreted the language since the date of its adoption and the proper interpretation of the language, in light of those historical factors", is denied.

August 2, 1990

(Date)

Charles D. Long, Jr.

Charles D. Long, Jr.

Executive Director