

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

CAPE HENLOPEN EDUCATION ASSOCIATION, :
Charging Party, :
v. : U.L.P. No. 90-01-047
BOARD OF EDUCATION OF THE CAPE :
HENLOPEN SCHOOL DISTRICT, :
Respondent. :

The Board of Education of the Cape Henlopen School District (hereinafter "District") is a public employer within the meaning of the section 4002 (m) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (Supp. 1982, hereinafter "Act"). The Cape Henlopen Education Association (hereinafter "Association") is the exclusive bargaining representative of the public employer's certificated professional employees within the meaning of 14 Del.C. section 4002(h).

The Cape Henlopen Education Association filed an unfair labor practice charge against the Board of Education of the Cape Henlopen School District on January 11, 1990. The complaint charges the District with refusing to participate in the processing of a grievance regarding a matter encompassed by the terms of the collective bargaining agreement in violation of the District's duty to bargain in good faith under 14 Del.C. section 4007 (a)(5) and with interfering

with and restraining an employee in or because of the exercise of his right to grieve through representatives of his choosing, in violation of 14 Del.C. section 4007 (a)(1).

There being no material dispute of the underlying facts, the parties mutually stipulated to the facts and no hearing was required. The parties responsively briefed the legal issues with the final brief being received on April 19, 1990. An amicus brief was jointly filed in support of the District's position by the Brandywine and Colonial Boards of Education.

FACTS

The stipulated facts are set forth below, in their entirety:

"The parties hereto, by counsel, hereby stipulate that the following facts are true and correct, and shall be applicable to the above-referenced proceeding.

"The predecessors of the parties hereto entered into their first negotiated agreement on May 14, 1969. The first negotiated agreement involving the Cape Henlopen Education Association covered the time period 1976-78. All of these early agreements stated they covered professional employees and defined them as 'teachers, guidance counselors, librarians, and nurses under contract to the Board...', the same language that appears in the current contract. Since 1969, the negotiated agreements between the parties have contained schedules defining the amount of local funds to be received by special duty personnel, including coaches and advisors, for extracurricular student activities.

"Before the Schroeder grievance, there was no other grievance

filed by a special duty employee seeking a hearing pursuant to the grievance procedure in connection with removal, non-renewal or suspension from a special duty position.

"The parties entered into a collective bargaining agreement for the 1989-92 school years that includes a grievance procedure, Article III, ending in arbitration. The arbitration is advisory in nature, not binding. The parties negotiated and included in the agreement a special duty pay schedule covering coaches of various sports, coaches of cheerleaders, majoretts, band director and other sport-support activities, advisors to various extracurricular activities such as dramatics, the newspapers and yearbooks and the mathematics teams, and Department Chairpersons. In addition to what was actually incorporated in the 1989-92 agreement at Article 4.2 and Appendices IV through VI, during the negotiations the Board submitted a proposal on May 1, 1989 that included a detailed procedure for the selection of persons to fill special duty positions, a copy of which is attached hereto. That proposal did not become part of the 1989-92 agreement.

"When the Head Football Coach, Robert Schroeder, a professional employee of the Board was suspended for a year by the Board for allegedly coaching out of season, the CHEA, on his behalf, filed a grievance and eventually sought to arbitrate the issue under the Just Cause provision of the collective bargaining agreement, Article 5.2, which states that '[] no disciplinary action including the following: discharge, discipline, reprimand, reduction in rank or compensation, shall be taken against any professional employee without just cause. Any such action asserted by the Board, or any agent representative thereof, shall be subject to the grievance procedure herein set forth.'

Although the collective bargaining agreement was not executed until December 5, 1989, after the grievance was filed, the agreement was retroactive to July 1, 1989. Also, the previous agreement was the same in all material respects. The Board contended throughout every level of the grievance process that special duty pay positions were not covered by the collective bargaining agreement, and based on that position, denied the employee's grievance and refused to participate in, or pay its share of the costs of, the arbitration.

"In the case of a coach, the services are provided on a seasonal basis, limited by the duration of the activity or sport. With respect to football, the coaching services begin in September and are completed at the end of the high school football season in late November. On completion, the coach is entitled to receive the entire amount of special duty pay allocated to the position. Under rules prescribed by DSSAA, a coach is prohibited from performing further coaching duties until the official beginning of the high school athletic season for the following year.

"Mr. Schroeder was first hired by the District under a State Professional Employees Contract as a science teacher in 1977."

ISSUE

Whether or not the District by refusing to participate in the arbitration of an employee's grievance protesting his one year suspension from the position of head football coach violated 14 Del. C. Sections 4007 (a) (1) and (5), as alleged.

OPINION

Both the Association and the District submitted detailed and comprehensive briefs supporting their respective positions. Each cites numerous court decisions, in both Delaware and other jurisdictions, and arbitration awards issued in similar disputes involving other parties. The substance of the parties' arguments addresses the question of whether the position of football coach is covered by the terms of the collective bargaining agreement and, therefore, protected by the just cause provision contained in Article V. The issue before the Public Employment Relations Board, however, is whether the District violated Sections 4007 (a) (1) and (5), of the Public School Employment Relations Act by refusing to process the question of Mr. Schroeder's status as head football coach to arbitration, as provided for in Article III of the collective bargaining agreement.

The District argues that Leone v. Kimmel (Del. Supr., 335 A. 2d 290 (1975)), a matter involving the Milford School District's failure to renew the coaching contracts of several high school football coaches, is controlling in this matter. In Leone, Vice Chancellor Marvel ruled "that coaches, when acting as such, are not within the protection of the Teacher Tenure Act, that their duties are not certified by State law or paid with State funds, and that 'it is established that no hearings are required under Delaware statutory law and none are required by the Constitution in connection with the awarding of contracts for extra-curricular football coaching'". [1] The decision of Vice Chancellor Marvel determined the status of the

[1] Respondent's Answering Brief at page 9.

coaches under Delaware statutory law. His decision does not address the issue currently before the PERB involving the interpretation and application of the provisions of the collective bargaining agreement.

Having lost their Chancery action, the teachers in Leone amended their Superior Court complaint to raise the issue of whether they were entitled to the protection of the 'just cause' provisions appearing in the negotiated Agreement. The amended complaint was disposed of by Judge Christie in his opinion of February 18, 1975, in which he awarded summary judgement for the Milford School District. In the opinion it was determined that "...the failure to grant a new contract for coaching to the plaintiff is not, in my opinion, a matter within the coverage of the Professional Negotiation Agreement". [2] In reaching this decision, the Superior Court relied upon both the specific facts, as they existed in the Milford School District, and the language of the collective bargaining agreement in effect between the parties.

The factual record in the current dispute in the Cape Henlopen School District differs in several respects from that of Leone, (Supra.). In Leone, the collective bargaining agreement contained no reference to coaches or other "extra pay for extra responsibility" positions. The collective bargaining agreement in Cape Henlopen, however, contains negotiated provisions which apply to coaches as well as other extra pay for extra responsibility positions. [3]

[2] Leone v. Kimmel (Supra.)

[3] Article IV, Salary and Fringe Benefits

Further, the record in Cape Henlopen establishes the existence of prior bargaining between the parties during the most recent negotiations concerning the method of selecting teachers to fill "extra pay for extra responsibility" positions, including coaching.

Other circumstances also serve to distinguish Leone from the current matter. Since the decision in Leone, the state legislature passed into law the Public School Employment Relations Act of 1982 (14 Del. C., Chapter 40). This legislation replaced the prior Chapter 40, the Professional Negotiations and Relations Act. Section 4008 of the prior act entitled Obligations of both parties; arbitration, provided at paragraphs (a) and (c), respectively:

(a) The board of education or its representative and the exclusive negotiating representative of the public school employees, through their designated officials or representatives, and upon the request of either party, shall have the duty to negotiate in good faith with respect to salaries, employee benefits and working conditions.

(c) No contract or agreement executed between the 2 parties shall specify directly or indirectly binding arbitration or decision-making by a third party or parties. The rights of the public through their elected or appointed board of education in final policy making are not subject to negotiation.

Under the current Public School Employment Relations Act (the

replacement legislation of 1982) the duty to bargain was expanded to include:

...matters concerning or related to wages, salaries, hours, grievance procedures and working conditions...

However, this obligation does not compel either party to agree to a proposal or require the making of a concession. 14 Del.C. section 4002(e). [emphasis added]

Section 4002 (b) of the current law defines grievance arbitration:

'Arbitration' means the procedure whereby the parties involved in a labor dispute over the interpretation or application of an existing collective bargaining agreement submit their differences to a third party for a final and binding decision.

Two conclusions are apparent from this language. First, Section 4002 (e) expanded the scope of mandatory bargaining subjects to include the subject of a grievance procedure. Secondly, grievance arbitration, whether binding or advisory, is not prohibited under the Act. These provisions evidence a legislative intent that although the content of a collective bargaining agreement cannot be imposed upon the parties, they may agree that once agreement is reached disputes concerning the interpretation or application of the Agreement are to be resolved through the negotiated grievance procedure, where the parties have so provided.

Also of significance, in my opinion, is the post Leone adoption by the Delaware Supreme Court of a policy favoring the voluntary resolution of labor disputes. City of Wilmington v. Wilmington

Firefighters Local 1590, Del. Supr., 385 A.2d 720 (1978). City of Wilmington v. Fraternal Order of Police, Del. Supr., 510 A. 2d 1028 (1986).

It is in this context that the current dispute must be resolved. The Association and the District voluntarily entered into a collective bargaining agreement for the 1989-92 school years. Article III of the Agreement contains a grievance procedure for the resolution of disputes concerning the interpretation or application of its terms. Article III, Section 3.1 provides:

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

The fourth and final step of the negotiated procedure, Arbitration, provides:

The arbitrator shall be limited to a ruling on whether or not there has been a misinterpretation, misapplication, misrepresentation, inequitable application or violation of any areas which have been mutually agreed upon as being subject to and resolvable by the Cape Henlopen School District Grievance Procedure. It is expressly understood that the arbitrator shall have no power to alter the terms of the Agreement.

Arbitration is established by contract and a party is, therefore, obligated to arbitrate those matters which are contractually required. Consistent with the Delaware Supreme Court's decision in City of

Wilmington v. Wilmington Firefighters (Supra.), the negotiated grievance procedure, including arbitration, is entitled to great weight and is not to be dispensed with lightly.

The Cape Henlopen Education Association has raised the issue of arbitrability by filing an unfair labor practice charge with this Board. The PERB has previously determined that "The unfair labor practice forum is not a substitute for the grievance procedure and the Public Employment Relations Board has no jurisdiction to resolve grievances through the interpretation of contract language. It may, however, be necessary for the Board to periodically determine the status of specific contractual provisions in order to resolve unfair labor practice issues properly before it." Brandywine Affiliate, NCEA/DSE/NEA v. Brandywine School District, U.L.P. No. 85-06-005 (1986).

Although a question of first impression under the Public School Employment Relations Act, the issue of arbitrability has been resolved in the private sector through a series of suits filed under Section 301 (a), of the Labor Management Relations Act. [4] In addressing the Court's role in Section 301(a) actions, the United States Supreme Court, while reaffirming adherence to its long established policy that

[4] Sec. 301 (a): "Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organization, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to citizenship of the parties."

labor-management disputes concerning the interpretation or application of provisions contained in a collective bargaining agreement are best resolved through the negotiated grievance procedure, held that the threshold issue of whether a dispute is, in fact, proper subject matter for arbitration is a question to be resolved by the Court, and not by the arbitrator. Steelworkers v. Warrior and Gulf Navigation Co., 363 U.S. 574, 46 LRRM 2416 (1960). [5] The Court reasoned that the parties willingness to voluntarily enter into arbitration agreements would be severely undermined if an arbitrator was empowered to determine his own jurisdiction and "to impose obligations outside the contract limited only by his understanding and conscience." AT&T Technologies v. Communications Workers of America, US Supreme, 475 US 643 (1986).

Further, the United States Supreme Court established the following guideline for resolving questions of arbitrability:

Finally, where it has been established that where the contract contains an arbitration clause, there is a presumption of arbitrability in the sense that "[a]n order to arbitrate the particular grievance should not be denied unless it may be said with

[5] There is no provision in the Public School Employment Relations Act which directly corresponds to Section 301(a) of the federal Labor Management Relations Act. It is, however, consistent with the logic of Brandywine Affiliate (Supra.), Wilmington Firefighters (Supra.) and AT&T Technologies (Supra.) for the PERB to resolve arbitrability issues presented in unfair labor practice proceedings.

positive assurance that the arbitration clause is not susceptible of an interpretation which covers the asserted dispute. Doubts should be resolved in favor of coverage." *Warrior & Gulf*, 363 U.S. at 582-583. See also *Gateway Coal Co. v. United Mine Workers*, *supra*, at 377-378. Such a presumption is particularly applicable where the clause is as broad as the one employed in this case, which provides for arbitration of "any differences arising with respect to the interpretation of this contract or the performance of any obligation hereunder..." In such cases, [i]n the absence of any express provision excluding a particular grievance from arbitration, we think only the most forceful evidence of a purpose to exclude the claim from arbitration can prevail." *Warrior & Gulf*, *supra*, at 584-585. AT&T Technologies (Supra.).

The Court's position reflects a reasonable basis for resolving arbitrability issues. Applying the Court's logic to the current matter we find that the parties negotiated a rather broad and encompassing grievance procedure. There is no express provision excluding from that procedure the substantive issue of Mr. Schroeder's status as football coach. Nor is there other compelling evidence upon which to exclude the claim from arbitration. To the contrary, all of the contractual criteria necessary to constitute a valid grievance are met. As a science teacher, Mr. Schroeder qualifies as a professional employee of the Cape Henlopen Board of Education. His claim concerns an "alleged

violation, misinterpretation, inequitable application, or misapplication of a term of the Agreement". The record establishes that the District defended the grievant's claim through the grievance procedure up to arbitration on the basis that the grievant was not included within the terms of Article I, Recognition, of the Agreement, and, therefore, was not protected by the "just cause" provisions of Article V, or entitled to file a grievance under Article III. While the District's position may constitute a valid defense to be relied upon during the grievance procedure, it does not serve as a valid basis for refusing to participate in arbitration. Arbitration is the final step of the grievance procedure which is the agreed upon method for resolving disputes involving the interpretation or application of contractual terms. By refusing to participate in arbitration and thereby complete the contractual procedure for processing grievances the District, in effect, altered the status quo of a mandatory subject of bargaining.

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 Districts defense(s), including reliance on Article I, Recognition, are properly and exclusively within the province of the arbitrator.

The affirmative defenses set forth in the District's Answer to the unfair labor practice charge find their genesis in either Leone (Supra.) or specific provisions of the collective bargaining agreement. Each of these premises have been discussed and disposed of in the above text of this decision.

While the PERB acknowledges the interest in this matter expressed by other school districts within the State, the opinion and decision contained herein are based exclusively on the facts present in the Cape Henlopen School District. For this reason, the comments informally submitted by other districts have no bearing in this matter and received no consideration.

The content of the "Friends" brief submitted in support of the Respondent by the Brandywine and Colonial Boards of Education, with the knowledge of the Charging Party and to which the latter had an opportunity to respond in its reply brief was duly considered.

CONCLUSIONS OF LAW

1. The Board of Education of the Cape Henlopen School District is a public employer within the meaning of 14 Del.C. section 4002(m).
2. The Cape Henlopen Education Association is an employee organization within the meaning of 14 Del.C. section 4002(g).
3. The Cape Henlopen Education Association is the exclusive bargaining representative of the certificated professional employees of the Cape Henlopen School District within the meaning of 14 Del.C.

section 4002(h).

4. The grievance procedure is a mandatory subject of bargaining within the meaning of 14 Del.C. section 4002(e).

5. By refusing to participate in the arbitration of an employee's grievance the District has unilaterally altered the status quo of a mandatory subject of bargaining in violation of 14 Del.C. section 4007 (a)(5).

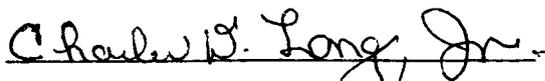
WHEREFORE, THE CAPE HENLOPEN BOARD OF EDUCATION IS HEREBY ORDERED TO:

A. Cease and desist from refusing to process the grievance in question through arbitration as required by Step 4 of the contractual grievance procedure.

B. Take the following affirmative action:

1. Within ten (10) days from the date of receipt of this decision, post a copy of the attached Notice of Determination in each location within the District where notices of general interest to affected employees are normally posted. The notice shall remain posted for a period of thirty (30) days.
2. Notify the Public Employment Relations Board in writing within thirty (30) days from the date of this Order of the steps taken to comply with this Order.

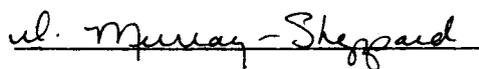
IT IS ORDERED.



CHARLES D. LONG, JR.

Executive Director

Delaware PERB



DEBORAH L. MURRAY-SHEPPARD

Principal Assistant

PERB

DATED: May 22, 1990