

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

RED CLAY EDUCATION ASSOCIATION,	:	
Charging Party,	:	
	:	
v.	:	<u>U.L.P. No. 90-06-051</u>
	:	
BOARD OF EDUCATION OF THE RED CLAY	:	
CONSOLIDATED SCHOOL DISTRICT,	:	
Respondent.	:	

The Board of Education of the Red Clay Consolidated School District (hereinafter "District") is a public employer within the meaning of section 4002 (n) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (as amended 1990, hereinafter "Act"). The Red Clay 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 (i).

The Red Clay Education Association filed an unfair labor practice charge against the District on June 21, 1990. The complaint charges the District with refusing to bargain in good faith in violation of 14 Del.C. section 4007 (a)(5). A hearing was held on September 18, 1990, for the purpose of establishing the underlying facts. The parties agreed to brief the legal issues and the final brief was received on October 29, 1990.

FACTS

The Red Clay Education Association and the Red Clay Consolidated School District were at all times relevant to this dispute parties to a three year collective bargaining agreement. This agreement expired on August 31, 1990, and this charge arises out of efforts to negotiate a successor thereto.

By letter dated January 23, 1990, the Association, through its President, Marilyn Little, notified the District's Acting Director of Personnel Services, Diane Dunmon, of its desire to begin negotiations for "a successor Agreement on or about March 1, 1990". Also by letter dated January 23, the Association requested data it considered necessary in order to prepare for the negotiations. By letter dated February 6, 1990, Ms. Dunmon acknowledged receipt of the Association's request to commence negotiations. This letter further provided that Ms. Dunmon would contact the Association's representative "very shortly to set a date for a meeting to receive [the Association's] initial proposal". On March 12, the Association again requested the data it had specified in its January 23 letter, emphasizing that six weeks had passed since its initial request.

On April 4, 1990, the electorate of the Red Clay School District defeated a referendum which would have increased local revenues.

The Association followed up its initial requests to start negotiations with a memo to Ms. Dunmon dated April 11, 1990, in which it proposed that the initial negotiation meeting take place at 4:30 p.m. on April 30. Having received no response to this memo, the Association President wrote directly to the President of the Board of Education on April 25, 1990. In this letter, the Association noted

that Article 2, Section 2.6 of the current agreement required that negotiations over a successor agreement will begin no later than six (6) months prior to the expiration date of the contract. The Association further detailed the chronology of correspondence before April 25 and specifically requested that the Board 1) identify its Negotiations Team and name a Spokesperson, and 2) set a date, time and location prior to May 4, 1990, for the initial meeting.

Also by letter dated April 25, Ms. Dunmon acknowledged receipt of the Association's April 11 letter and requested that negotiations begin after the May 17 meeting of the Board of Education, stating: "It is necessary for the Board to determine the direction which they choose to pursue in negotiations at this time". The letter promised that the District would contact the Association after the May meeting of the Board in order to set up a meeting date and location.

On May 7, representatives of the Association attended a meeting at the request of the District Superintendant, Dr. Johnson. This meeting was attended by representatives of all five bargaining units representing District employees. Dr. Johnson expressed the District's desire, in light of the budget problems and defeat of the April 4 referendum, to extend the current contract to March 1, 1991 and to defer the initiation of negotiations until October, after the date of the next scheduled referendum.

By letter dated May 16, the Association advised the District that it considered the District's request of May 7 unacceptable. The Association suggested an alternative approach of entering into expedited bargaining on "non-financial items" for the period of June 18 through August 3, and resuming bargaining after the October referendum

on "all remaining issues". The Association further suggested extending the current agreement through October 30, 1990.

On May 30 and June 5, the Association leadership met with an "ad hoc" committee of three members of the Board of Education, at the committee's request. During the course of the meetings, the Board members again suggested that negotiations be deferred until after the October referendum. Topics of discussion also included matters which were not directly related to the bargaining process.

On June 7, the Association President forwarded a letter to the President of the Board of Education which began:

The Association Negotiating Team and Executive Committee have reviewed the Board's proposal and rationale as presented at our meetings on May 30 and June 5, 1990 regarding your request to delay the start of negotiations until next October. We are deeply disappointed that you find our two-part plan unacceptable. While we understand that this is a busy time and a period of transition, we also feel that one of the most critical priorities of the Board is the timely negotiating of contractual agreements with those employees who will be called upon to implement the programs of this district. We cannot accept that the Board and Dr. Green are too busy to do this. Further, we cannot accept that you have unilaterally determined that the district will head in new directions and our concerns as addressed through the collective bargaining process must wait until those directions are determined. Many basic concerns on the part of the staff exist and will continue to exist regardless of new directions. Substantive changes to contract language are possible when the

parties mutually agree they are appropriate based on full and deliberate planning, the existence of conditions conducive to such changes, and experience which builds mutual trust between the parties. A whirlwind summer of nebulous committee involvement is not a substitute for this...

The letter concludes:

...We urge the Board to reconsider our earlier proposal. If that is not possible, we expect negotiations in the conventional manner to begin immediately. I ask that the Superintendent contact our office by Friday, June 15, to confirm a date for the initial meeting. We suggest June 28 or 29 for that meeting with your team and chief spokesperson.

Having received no response from the District, the Association filed this unfair labor practice on June 21, 1990.

ISSUE

Whether the Board of Education of the Red Clay Consolidated School District engaged in conduct which constituted a refusal to bargain in good faith in violation of section 4007(a)(5) of the Public School Employment Relations Act?

PRIMARY POSITIONS OF THE PARTIES

Association:

The Association contends that, when viewed in their totality, the District's actions are so evasive and dilatory as to evidence a refusal to bargain in good faith. The Association asserts that the delays which the District contends resulted from the unavailability of

then Superintendent Johnson 1 or from the change in superintendents are unjustifiable because at no point was the Superintendent a member of the District's negotiating team. The RCEA notes that during the federal desegregation case, the District never requested an extension in filing a response to the Association's request to commence traditional bargaining, but rather simply chose to ignore the request altogether. The District, it asserts, was incapable of participating in good faith negotiations because at the time this charge was filed it had not yet fully constituted its bargaining team.

The Association rejects the District's assertion that collective bargaining sessions were held between the parties. The RCEA maintains there was no exchange of proposals, no establishment of ground rules, and no substantive proposals offered. The Association argues that during the six months immediately preceeding the filing of this charge, it attempted without success to convince the District to commence negotiations. While the Association made an effort to accomodate the District's concerns regarding its financial outlook as expressed by the Superintendent and the ad hoc committee of Board members, it maintains that these discussions were not a substitute for the collective

1 Employer Exhibit 3 (received during the hearing), a calendar of Dr. Johnson's activities for the period of June 11 - 20, 1990 lists the Superintendent's activities as:

June 11: Preparation for testimony in Federal Court

June 12-15: Testify in Federal Court proceeding

June 18-20: Assist with preparation of documents for submission to Federal Court.

bargaining process. Although the RCEA suggested the bifurcated bargaining plan in an effort to get negotiations moving, the District was unwilling to engage in any substantive negotiations until after the fall referendum.

The Association argues that the record in this case establishes that the District adopted a strategy of refusing to negotiate rather than assume the risk of having to make non-monetary concessions during the course of negotiations. The RCEA asserts that the District has presented no legitimate justification for its dilatory tactics which constitute an unfair labor practice.

District:

The District argues that the unfair labor practice charge should be dismissed for several reasons. First, it asserts that in order to determine whether the duty to bargain in good faith has been met, it is necessary to consider the totality of conduct of the parties and the reasonableness of the positions taken in the course of the collective negotiations. In its Answering Brief, the District concludes:

...After considering the totality of the circumstances surrounding the bargaining between these parties, including the School District's financial crisis, the meeting and correspondence between the parties, the exchange between the parties of proposals and counter proposals, the contents of those proposals, and the reasonableness of the Respondent's rejection of the Union's proposals, there can be no doubt that there was no refusal to bargain in good faith.

The District argues that the discussions between the

Superintendent and RCEA representatives and the subsequent discussions between the ad hoc committee of Board members and the Association leadership were "part and parcel of the collective bargaining process. Citing General Electric Co. (173 NLRB 253, 69 LRRM 1305 (1968)), it argues that these "preliminary matters are just as much a part of the process of collective bargaining as the negotiations over wages, hours, etc.". Further, the District contends that in light of the totality of the circumstances, it adopted a reasonable position. It likens its position with regard to the District's financial concerns to the emergency situation which the NLRB found to be justifiable for delaying negotiations in NLRB v. Minute Maid (5th Cir., 283 F.2d 705 (1960)).

Secondly, the District argues that the duty to bargain in good faith does not compel it to agree to the Association's proposed bifurcation of the bargaining process. It cites numerous private sector cases for the proposition that the insistence of a party on bargaining over non-economics first constitutes a refusal to bargain in good faith. It contends that attempting to reach agreement on all non-economic issues exclusively first would have prevented the District from entering into meaningful negotiations.

Lastly, the District argues that the Association's charge was prematurely filed because the RCEA did not wait until the date of its suggested negotiation meeting on June 28 or 29 before filing its charge. The District notes that the Association never contacted the District to confirm that its June 7 letter had been received and never contacted the District between June 15 and June 21 to inquire as to a response to its request for negotiations.

For these reasons, the District requests that the unfair labor

practice charge be dismissed.

OPINION

The Public School Employment Relations Act provides at section 4013(a) that "collective bargaining shall begin at least 90 days prior to the expiration of any current collective bargaining agreement". The collective bargaining agreement in existence at the time this charge was filed further established, at section 2.6, the intent and agreement of the parties concerning the start of the negotiation process for a successor agreement:

The parties agree to enter into negotiations over successor Agreement pursuant to and consistent with Chapter 40, Title 14, Delaware Code. Such negotiations will begin no later than six (6) months prior to the expiration of this Agreement. 2

"Collective bargaining" is defined in the Act as the "performance of the mutual obligation of a public school employer through its designated representatives and the exclusive bargaining representative to confer and negotiate in good faith with respect to terms and conditions of employment...". 14 Del.C. section 4002(e). This provision is explicit in requiring that a number of conditions be satisfied in order that true collective bargaining might occur. First, the involved parties must be the designated representatives of the public employer and the employees' exclusive bargaining representative. Secondly, the parties must meet and confer with respect to terms and

2 The existing Agreement had an expiration date of August 31, 1990.

and conditions of employment, and thirdly, this process must be conducted in good faith. Terms and conditions of employment are defined at 14 Del.C. section 4002(r). 3 The Act also requires that the parties execute a written contract incorporating any agreements reached.

Applying the statutory requirements for collective bargaining to the present facts, it cannot reasonably be concluded that the events occurring between January and June of 1990 constituted collective bargaining. The May 7 meeting called by Dr. Johnson to discuss the impact of the defeat of the referendum and to request that the unions consider extending the current agreements cannot be reasonably construed as a collective bargaining session as the meeting was between the Superintendent and representatives of allof the bargaining units in the District, together. The correspondence which followed, in which the Association suggested that it would be willing to a limited extension of the existing agreement if negotiations could begin immediately with respect to those areas which were not adversely impacted by the defeat of the referendum, was never subsequently discussed by these parties face-to-face in a negotiations forum. The next contact the Association received with regard to the status of negotiations came in the form of a request to "the Association leadership" from an self-described "ad hoc committee" of the Red Clay Board of Education. During her testimony, Acting Director of Personnel

3 "Terms and conditions of employment" means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions... 14 Del.C. section 4002 (r).

Services, Diane Dunmon, described the purpose of this meeting as being to allow the three Board members to make "their own personal plea to follow up on what Dr. Johnson had discussed at the earlies meeting". The fact that both the Superintendent and the various members of the Board of Education are clearly agents of the Board is not the same as their being designated as representatives of the Board for the purposes of collective bargaining. Ms. Dunmon further testified that the composition of the District's bargaining team was not finalized until late June or early July and that its Chief Spokesperson was not appointed by the Board until its July meeting. Clearly, the District failed to meet its obligation to designate representatives for the purpose of negotiations.

The second statutory requirement of collective bargaining is that the parties meet and confer with respect to matters concerning or related to wages, salaries, hours, grievance procedures and working conditions. Despite the numerous correspondences and the three meetings between District and Association representatives, there was no exchange of any substantive proposals with respect to terms and conditions of employment. The record supports the Association's claim that no negotiations took place prior to the filing of this charge on June 21. The obligation to negotiate with respect to terms and conditions of employment cannot be ignored or delayed simply because a party believes the timing is disadvantageous to its position or because it believes that other matters take precedence over its bargaining obligation at the time the obligation arises. Absent extreme circumstances beyond the control of an affected party, the duty to bargain collectively in good faith cannot be deferred. No such circumstances have been

established here. The fact that the referendum did not pass, that the District was in the middle of a change in Superintendents, and that the current Superintendent was involved as a major witness in a court action do not rise to the level of an emergency situation justifying delayed negotiations, as the NLRB found justifiable in NLRB v. Minute Maid (Supra.). The reasons relied upon by the District in this matter were reasonably foreseeable and were otherwise not of sufficient gravity to support a finding that the District was excused from its bargaining obligation.

The PERB has held that it is necessary to examine the "totality of conduct" of the parties in ruling on alleged failures to bargain in good faith. Seaford Education Assn. v. Bd. of Education, Del.PERB, U.L.P. 2-2-84S (3/19/84). The test of "good faith" is a fluctuating one, "dependent in part upon how a reasonable man might be expected to react to the bargaining attitude displayed by those across the table". Times Publishing Company, NLRB, 72 NLRB 676, 19 LRRM 1199 (1947). In further defining the criteria for determining whether a party has engaged in "good faith bargaining" the PERB has held:

...The validity of a single position can only be ascertained from the overall record. While a party's posture as it relates to a particular subject, in and of itself might qualify as an unfair labor practice, viewed in light of continuing and evolving negotiations process, it may well prove otherwise. Seaford (Supra. at p. 7) [emphasis added]

The problem in this case is that there is no "continuing and evolving negotiations process". The District offered the same procedural suggestion on two separate occasions through two independent

messengers, and called it "bargaining". In its Answering Brief, it alleges that the Association insisted upon bifurcated bargaining. The established record does not support this contention. In fact, the Association suggested bifurcating the process only in response to the District's expressed concerns over the impact of the defeated referendum and its hopes of its passage by a revote in October. The Association made its bifurcated bargaining suggestion on two separate occasions, in a manner similar to the District's twice expressed desire to extend the contract and postpone negotiations. In its June 7 letter, the Association requested the commencement of traditional bargaining, thereby evidencing that it was not unlawfully insisting upon a bifurcation between monetary and non-monetary issues.

Finally, the District argues that this charge was prematurely filed because there was no reasonable opportunity for the District to respond to the Association's letter of June 7 requesting that negotiations begin on June 28 or 29. The District contends that it was precluded from responding before June 21 (the date on which this charge was filed) because then Superintendent Johnson had been tied up since the District's receipt of the letter with Federal Court proceedings. This argument is unconvincing. First, the RCEA's letter was specifically addressed to the President of the Board, on whom the obligation for insuring a timely response logically fell. Copies of the letter were also widely circulated by the Association to District officials (as evidenced by the "CC:" at the close of the letter) who had knowledge of Dr. Johnson's unavailability and who could have requested an extension on his behalf. Secondly, the District had first promised in Ms. Dunmon's February 6, 1990 letter to contact Association

representatives "very shortly to set a date for a meeting to receive initial proposals". Four and a half months later, that contact had not been made, no initial proposals had been exchanged, and another deadline had passed without District response. The District's conduct, viewed in its totality, requires a finding that it has failed to meet its obligation to meet and confer in good faith with the Association regarding terms and conditions of employment and has thereby violated 14 Del.C. section 4007(a)(5).

CONCLUSIONS OF LAW

1. The Red Clay Education Association is an employee organization within the meaning of section 4002(g) of the Public School Employment Relations Act.

2. The Red Clay Education Association is the exclusive bargaining representative of the the school district's certificated professional employees within the meaning of section 4002(j) of the Act.

3. The Board of Education of the Red Clay Consolidated School District is a public school employer within the meaning of section 4002(m) of the Act.

4. Upon the record established by the parties, the Hearing Officer finds sufficient evidence to sustain the charge that the Board of Education of the Red Clay Consolidated School District has refused to bargain in good faith or likewise violated 14 Del.C. section 4007 (a)(5).

WHEREFORE, THE PARTIES ARE HEREBY ORDERED TO TAKE THE FOLLOWING

AFFIRMATIVE ACTIONS:

1. The Board of Education of the Red Clay Consolidated Board of Education is ordered to cease and desist from engaging in conduct in dereliction of its duty to collectively bargaining with the exclusive representative of its certified professional employees.

2. The Board of Education of the Red Clay Consolidated School District and the Red Clay Education Association are ordered to engage in good faith collective bargaining with respect to terms and conditions of employment.

3. Within ten (10) calendar days from the date of receipt of this decision, post a copy of the Notice of Determination in each school within the District in places where notices of general interest are normally posted. This notice shall remain posted for a period of thirty (30) days.

4. Notify the Public Employment Relations Board within thirty (30) calendar days from the date of this Order of the steps taken to comply with this Order.

IT IS SO ORDERED.

D. Murray-Sheppard

DEBORAH L. MURRAY-SHEPPARD

Principal Assistant/Hearing Officer

Delaware PERB

Charles D. Long, Jr.

CHARLES D. LONG, JR.

Executive Director

Delaware PERB

DATED: December 7, 1990