STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

INDIAN RIVER EDUCATION ASSOCIATION,	:	
Charging Party,	:	
v.	:	**U.L.P. No. 90-09-053**
BOARD OF EDUCATION OF THE INDIAN RIVER SCHOOL DISTRICT,	:	
Respondent.	:	

The Indian River School District (hereinafter "District") is a public employer within the meaning of 14 Del.C. §4002(n), the Public School Employment Relations Act (Supp. 1990, hereinafter "PSERA" or "Act"). The Indian River Education Association (hereinafter "Association" or "IREA") is the exclusive bargaining representative of the certificated professional employees of the public school employer within the meaning of 14 Del.C. §4002(m).

The Association filed an unfair labor practice with the Public Employment Relations Board (hereinafter "PERB" or "Board") on September 12, 1991. The Charge alleges that by refusing to process grievances concerning alleged violations of the collective bargaining agreement through the negotiated procedure, the District committed an unfair labor practice in that it has refused to bargain in good faith, in violation of 14 Del.C. §4007(a)(5); and has interfered with and restrained an employee in or because of his/her exercise of his/her right, pursuant to 14 Del.C. §4003(2), to grieve through representatives of his/her choosing, in violation of 14 Del.C. §4007(a)(1). These sections of the PSERA provide:

> (a) It is an unfair labor practice for a public school employer or its designated representative to do any of the following:
> (1) Interfere with, restrain or coerce any employee in or because of any right guaranteed under this chapter.
> (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

The District filed its Answer on October 1, 1990. Efforts by the parties to stipulate the underlying facts in this matter were unsuccessful. A hearing was held on January 11, 1991. The parties agreed to brief the legal issues and the final brief was received on May 15,1991.

FACTS

The Board of Education of the Indian River School District and the Indian River Education Association were parties to a three year collective bargaining agreement. This agreement expired on July 1, 1989; however, there is no dispute that the terms of this agreement were in continuing effect at all times relevant to this dispute.

Article XVII of the collective bargaining contains the parties' grievance procedure, which provides, in relevant part:

> A. Definitions
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> A "grievance" shall mean a complaint by a teacher that there has been, according to the teacher, a violation or inequitable application of any of the provisions of this Contract....
>
> The purpose of this procedure is to secure, at the lowest possible level, equitable solutions to the problems which may from time to time arise affecting teachers. Both parties agree that these proceedings will be kept as informal and confidential as may be appropriate at any level of the procedure...
>
> D. Initiation and Processing
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> 1. Level One
>
> a. All grievances will be initiated within thirty calendar days (excluding vacation days) of the date of the alleged violation.
>
> b. A teacher with a grievance will first discuss it with his principal either individually or through the Association's building representative, with the objectives of resolving the matter informally.
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> c. If within five (5) school days the teacher is not satisfied with the disposition of his grievance, he may file a written grievance with his principal and building representative. The building representative and the principal, after having researched the problem, shall meet with the teacher and present a solution or announce no solution.
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> 2. Level Two

a. Within five (5) days of the receipt of the decision by the principal, the decision of the principal in regard to such appeal may be further appealed to the Superintendent. The appeal shall include a copy of the decision being appealed.

b. Appeals to the Superintendent shall be heard by Superintendent within ten (10) days of his receipt of the appeal. Written notice of the time and place of the hearing shall be given to the aggrieved employee, his selected representatives and any administrator who has thus far been involved in the grievances.

c. Within five (5) school days of the hearing, the Superintendent shall communicate in writing his decision to the teacher.

3. Level Three

a. In the event the aggrieved is not satisfied with the disposition of his grievance at Level Two, he may appeal the decision of the Superintendent to the President of the School Board in writing within five (5) days. The appeal shall include a copy of all decisions rendered at Levels One and Two.

b. Within ten (10) days after receiving the written appeal, the Board shall meet with the aggrieved member and his representative.

c. Within ten (10) days of hearing the appeal, the Board shall communicate its written decision to the aggrieved employee and the President of the I.R.E.A.

By letter dated April 10, 1990, Indian River High School mathematics teacher Adele Jones and Indian River High School Industrial Arts teacher Todd Cropper were advised by Director of Personnel, Dr. Toomey, that:

> ...due to a reduction in student enrollment, we [the District] will not be able to retain your services at the Indian River High School for the 1990-91 school year. As a tenured teacher you have the right to replace the least senior teacher in your area as provided by the Reduction in Force policy. Therefore, should you choose to exercise this right, you will be assigned to...

Ms. Jones was offered an alternative assignment at Sussex Central High School and Mr. Cropper was offered a half time assignment at Selbyville Middle School and a half time assignment at Indian River High School. Both Jones and Cropper advised Dr. Toomey by letter that each would accept the indicated transfer rather than resign their employment.

After first meeting informally with Indian River High School Principal Dr. Patterson, both Ms. Jones and Mr. Cropper filed formal grievances on or about May 22, 1990, which

allege that they were involuntarily transferred to their alternative assignments in violation of Article XIV, section B, subsections 2, 3, and 4 of the collective bargaining agreement. Through identical letters, Dr. Patterson responded to each grievance:

> In response to your written grievance dated May 22, 1990, I researched the cited Contract provisions which were allegedly violated, i.e., XIV, Section B, 2, 3 and 4.
>
> Since the personnel action in which you were involved was specifically part of a Reduction in Force, the Contract provisions which you have cited were clearly not violated. You have cited provisions dealing with an involuntary transfer. An involuntary transfer and a reduction in force are completely different and separate actions. This is clearly indicated by their separation as concepts.
>
> One is included only in the District Policy (RIF), while the other is only in the negotiated contract. Additionally, a RIF clearly offers a teacher the "right to replace" another staff member, while an involuntary transfer provides no such option.
>
> Therefore, for the reasons stated above, the solution I have determined is to deny your grievance, since I find no Contract violation.

By letters dated May 30 and May 31, respectively, Ms. Jones and Mr. Cropper submitted level two grievances to Dr. Hudson, District Superintendent. Without convening meetings with either grievant and/or his representative, Dr. Hudson issued the following identical response to each grievant on June 13, 1990:

> It is quite clear in the letter Dr. Toomey sent you dated April 10, 1990 that you were involved in a reduction in force due to declining enrollment.
>
> Dr. Patterson informed you in his letter dated May 25, 1990 that the contract had not been violated because the issue of reduction in force is not addressed in it. Since a reduction in force is not included in IREA/Board of Education contract, there is no basis for a grievance hearing.

By separate letters dated June 15, 1990, the grievants each submitted a level three grievance to Harry Dukes, III, President of the Indian River Board of Education. Without convening meetings with either grievant and/or his representative, Mr. Dukes issued the following identical response to each grievant on July 5, 1990:

> The Indian River Board of Education approved your reduction in force (RIF) at the April 10, 1990 Board Meeting due to a decrease in enrollment at the Indian River High School.

Since (RIF) [sic] was not a component of the IREA/Board of Education Contract when you were reduced in force, there is no provision for you to file a grievance and to be heard by the Board.

ISSUE

Whether the District, by denying grievants hearings at levels 2 and 3 of the grievance procedure, as required by contract, unilaterally altered the status quo of a mandatory subject of bargaining, in violation of 14 Del.C. §§4007(a)(1) and (a)(5)?

PRIMARY POSITIONS OF THE PARTIES

Association:

The Association asserts that under the terms of the contractual grievance procedure and the rights granted by the PSERA, the grievants were entitled to hearings for the purpose of presenting their arguments that the involuntary transfer provisions of the contract were violated. In denying the Level II and Level III hearings, the District ruled on the merits of these grievances without affording the grievants or the Association the right to present its evidence and arguments. The Association alleges that by refusing to process the grievances through the contractual procedure, the District has unilaterally altered the status quo of a mandatory subject of bargaining. Under the PSERA a unilateral change in a mandatory subject of bargaining constitutes a violation of the employer's duty to bargain in good faith.

The Association argues that the Public Employment Relations Board has jurisdiction over substantive grievability/arbitrability questions that arise in the context of an unfair labor practice proceeding. Cape Henlopen Education Assn. v. Bd. of Education, Del.PERB, U.L.P 90-01-047 (5/22/90); affirmed, Cape Henlopen Education Assn. v. Bd. of Education, Review of the Executive Director's Decision, U.L.P 90-01-047 (8/28/90). The IREA charges that by refusing to process the grievances without the statutory or contractual authority to do so, the District has appointed itself as the sole determiner of what constitutes a valid grievance.

The Association avers that applying the guidelines established by the Supreme Court in AT&T Technologies (475 U.S. 643 (1986)), as adopted by the PERB in Cape Henlopen (Supra.), that "...in the absence of any express provision excluding a particular grievance from arbitration, ... only the most forceful evidence of a purpose to exclude the claim ... can prevail", these disputes were clearly grievable. The Association relies on the contractual grievance definition for the proposition that there is no basis for this Board to conclude with positive assurance that the grievance clause clearly excludes the issue raised by the grievances.

The Association concludes that the PERB should reject the District's argument that if this Board does reach the issue of grievability, that it then proceed to a merits determination finding the District's interpretation of the contractual provisions to be "correct". The Association contends that for the PERB act as arbiter of the merits of the grievances and also resolve the underlying contractual dispute as the District's requests, is unnecessary to resolving the unfair labor practice charge.

District:

The District asserts that the unfair labor practice charge should be summarily dismissed because it fails to establish a legally sufficient basis for finding that an unfair labor practice was committed. It argues that the Association has failed to provide any evidence that the District unilaterally changed the status quo or interfered with the grievant's selection of union representatives. At most, it urges, the complaint alleges that the District violated the contractual grievance procedure.

The District argues that the IREA is attempting to have the PERB determine that an employer's failure to comply with a contractual grievance procedure is a per se violation of the PSERA. It asserts that neither the Act nor existing PERB caselaw support this proposition. Further, it argues that under a per se ruling, the District would lose the right to interpret the

contract, as set forth in the collective bargaining agreement.[1] Because the Public Employment Board has no general jurisdiction to enforce collective bargaining agreements, the District argues that it should rule that an employer does not commit an unfair labor practice if the employer, based on a reasonable interpretation of the collective bargaining agreement, concludes that a particular claim or class of claims is not subject to the grievance process.

The District asserts that the PERB may only interpret collective bargaining agreements to the extent necessary to decide an unfair labor practice charge. The District contends that adoption of the per se rule urged by the Association would essentially convert every alleged breach of a collective bargaining agreement into a potential unfair labor practice. It argues that the Association's premise that the Public School Employment Relation Act creates an implied right to have every grievance processed in accordance with the Association's view of the collective bargaining agreement is flawed in that while the Act directs the parties to negotiate contractual grievance procedures, it does not require that every violation of the collective bargaining agreement constitutes an unfair labor practice. Because the General Assembly did not grant this Board the authority to enforce collective bargaining agreements, the District argues that for the PERB to assert jurisdiction over purely contractual disputes would constitute a usurpation of the general jurisdiction of the judiciary.

OPINION

There can be no dispute but that the grievance procedure is a mandatory subject of bargaining. With passage of the Public School Employment Relations Act, the General Assembly explicitly expanded the mandatory scope of bargaining for public school employers and employees by including at §4002(r) under the definition of "terms of conditions of

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1 The IREA/ Indian River Board of Education collective bargaining agreement does not include a provision for arbitration of disputes. The final appeal of a grievance is to the Board of Education.

employment", "...matters concerning or related to... grievance procedures". In interpreting this change by the Legislature from the predecessor Act, the PERB held:

> 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. Cape Henlopen, (Supra., at p. 512).

The District errs in its argument that the Association has not charged it with unilaterally altering or repudiating the negotiated procedures. The Association charges that the District's actions violate the clear language of the contract as it relates to a mandatory subject of bargaining, and therefore constitute a per se refusal to bargain in violation of 14 Del.C. §4007(a)(5).

This Board has consistently held that its jurisdiction encompasses interpretation of a collective bargaining agreement where an unfair labor practice charge involves an allegation that requires a determination of whether one party has unilaterally altered the status quo as it relates to a mandatory subject of bargaining. In determining the status quo in cases where the parties are bound by a valid collective bargaining agreement, contractual language which is clear and unambiguous on its face effectively establishes the status quo. Local 1590, IAFF, et.al., v. City of Wilmington, Del.PERB, U.L.P. No. 89-09-041 (1/23/90), p.469.

The grievance procedure lies at the heart of the continuous collective bargaining obligation and constitutes the primary vehicle by which the parties' agreement is defined and refined during its term. For the agreement as a whole to have real meaning, it is incumbent upon the parties to administer the grievance process in accordance with the agreed upon contractual terms. Article XVII of the applicable 1986-89 agreement provides at Level One that the building representative and the principal "shall meet with the teacher" pursuant to the filing of a written grievance, at Level Two "appeals to the Superintendent shall be heard by the Superintendent", and at Level Three, upon appeal of the Superintendent's decision, the Board

"shall meet with the aggrieved member and his representative". (emphasis added) The IREA alleges that the District unilaterally altered the terms of the grievance procedure when it failed to meet with the grievants and their representatives prior to the issuance of a decision at Levels Two and Three. It is undisputed that no meetings occurred prior to the issuance of the decisions rejecting the grievances. The contractual requirement that grievance appeals be heard by the Superintendent at level two and the President of the School Board at level three is clear and unambiguous on its face. There is no provision within the agreement which waives these meetings on the basis that the District representatives dispute the grievability of the issue presented. Nor is there any evidence on the record that denial of hearings was an accepted practice between these parties.

By issuing decisions without affording the grievants and their representatives the hearings which were required by the negotiated grievance procedure, the District unilaterally altered the status quo of the grievance procedure. This decision does not depend upon the intent or motivations of the District, but rather results from the employer's misunderstanding as to its basic obligations under the Act. The District could have reached the same conclusion without facing the time and expense of unfair labor practice proceedings had its representatives at Levels II and III followed the grievance procedure to which it was contractually committed before issuing the decisions.

The parties expended great time and energy in arguing the issue of grievability and whether the PERB is responsible for determining grievability issues. Consistent with the Board's decision in Cape Henlopen (Supra.), the PERB is clearly charged with administering the unfair labor practice provisions of the PSERA. To the extent that an unfair labor practice proceeding requires a determination of grievability, this Board will rule. In this case, the District has argued that the matter in dispute was not subject to the grievance procedure because the ultimate reassignment of the grievants originated with a decision by District administrators that enrollment projections for the upcoming academic year necessitated a

reduction in force at the Indian River High School. Because the existing agreement does not include provisions establishing Reduction In Force procedures, the District concluded that the matter in question was not subject to the grievance procedure because it did not involve a contractual matter. Conversely, the Association asserts that while the matter may have originated as a result of a projected need to reduce the teaching force at the High School, the ultimate outcome was that the grievants were required to accept designated positions in other schools or find employment elsewhere; therefore, the Association filed the grievances based on a alleged misapplication by the District of the involuntary transfer provisions of the agreement.

A determination as to whether the subject of a particular grievance falls within the contractual definition of a grievance does not require a review of the merits of the underlying dispute. In this case, whether the grievants were RIFF'ed or involuntarily transferred requires an interpretation and application of the substantive terms of the collective bargaining agreement over which this Board will not exercise jurisdiction. The proper forum for the resolution of the merits argument is the grievance procedure. Red Clay Education Assn. v. Bd. of Education, Review of the Executive Director's Decision, A.U.L.P. No. 90-08-052A (2/4/91, p. 607). It is necessary only to examine the grievance definition in order to determine whether this dispute is excluded from its coverage.

A grievance is defined under subsection A, Definitions, of Article XVII, Grievance Procedures as follows:

> A "grievance shall mean a complaint by a teacher that there has been, according to the teacher, violation or inequitable application of the provisions of this contract. (emphasis added)

The language of the agreement is clear and unambiguous. This language is expansive in scope and requires that a proper grievance include two components: 1) a complaint by a teacher and 2) a charge that a contractual provision has either be violated or applied inequitably in the opinion of that teacher. This provision is not unclear on its face, nor does it create an ambiguity with respect to the intent of the parties. The grievance definition is broader than the definition

which the PERB interpreted and applied in the Cape Henlopen (Supra.) case. [2] Clearly the threshold question of "grievability" is met when the grievance is filed by an eligible teacher and cites specific contractual provisions which that teacher alleges were violated or misapplied. Interpreting this language to permit the District to prohibit invoking the grievance procedure based solely upon its unilateral determination that the matter in question is not covered by the contract is contrary to both the contractual language of Article XVII and the intent of the PSERA. The negotiated grievance procedure is entitled to great weight and should be afforded the full opportunity to function. F.O.P. Lodge No. 1 v. City of Wilmington, Del.PERB, U.L.P. No. 89-08-040 (12/18/89, p. 449). Absent an express provision to preclude an issue from the grievance process, only the most forceful evidence of an intent to exclude the matter from the negotiated procedure can prevail.

In ruling on the grievances without affording the grievants and their representatives their contractual rights to present their arguments, the District altered the status quo as to a mandatory subject of bargaining, in violation 14 Del.C. §4007(a)(1) and (a)(5). The District is hereby ordered to afford the grievants the hearings to which they were statutorily entitled under the contractual grievance procedure.

CONCLUSIONS OF LAW

1. The Board of Education of the Indian River School District is a public school employer within the meaning of §4002(m) of the Public School Employment Relations Act.

2. The Indian River Education Association is an employee organization within the meaning of §4002(g) of the Act.

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2 The applicable provision of the Cape Henlopen contract provided: "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."

3. The Indian River Education Association is the exclusive bargaining representative of the school district's certificated professional employees within the meaning of §4002(j) of the Act.

4. The grievance procedure is a "term and condition of employment" as defined at 14 Del.C. §4002(r) over which the public school employer and the exclusive representative are obligated to collectively bargain under 14 Del.C. §4002(e).

5. In issuing grievance decisions at Levels II and III without first holding the contractually required hearings, the District unilaterally altered the status quo as it related to the grievance procedure.

6. In unilaterally altering the status quo of a mandatory subject of bargaining, the District has violated its ongoing obligation to bargain in good faith in violation of 14 Del.C. §4007(a)(5).

7. In unilaterally altering the status quo of a mandatory subject of bargaining, the District has interfered with the rights guaranteed to employees under the PSERA, in violation of 14 Del. C. §4007(a)(1).

WHEREFORE, THE PARTIES ARE HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

1. The Board of Education of the Indian River School District is ordered to cease and desist from engaging in conduct in dereliction of its duty to collectively bargain in good faith with the exclusive representative of its professional employees.

2. The District is hereby ordered to afford to the grievants and their representatives the hearings to which they are statutorily entitled under the contractual grievance procedure at levels two and three.

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 usually 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 Public Employment Relations Bd.

Charles D. Long
CHARLES D. LONG, JR.
Executive Director
Delaware Public Employment Relations Bd.

DATED: July 19, 1991