

STATE OF DELAWARE  
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE TROOPERS' ASSOCIATION,	:	
	:	
Petitioner,	:	
	:	
v.	:	<u>U.L.P. No. 92-06-075</u>
	:	
DIVISION OF STATE POLICE, DEPARTMENT OF	:	
PUBLIC SAFETY, and STATE OF DELAWARE,	:	
	:	
Respondent.	:	

BACKGROUND

On June 26, 1992, the Petitioner filed an unfair labor practice complaint with the Public Employment Relations Board (PERB). The complaint charges the Respondent with failing to maintain the current level of benefits set forth in the collective bargaining agreement during the period of negotiations, mediation and/or fact-finding for a successor agreement in violation of sections 1607(a)(5) and (a)(6) of the Police Officers' and Firefighters' Employment Relations Act, 19 Del.C. Chapter 16 (1986), hereinafter the "Act".

Section 1607, Unfair Labor Practices - Enumerated, provides in relevant part:

(a) It is an unfair labor practice for a public employer or its designated representative to do any of the following:

(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

(6) Refuse or fail to comply with any provision of this chapter or with rules and regulations established by the Board pursuant to its responsibility to regulate the conduct of collective bargaining under this chapter.

On July 6, 1992, the Respondent's Answer to the complaint was filed with the Public Employment Relations Board. A copy of the Answer was mailed directly to the Petitioner.

On July 17, 1992, the Petitioner filed a Motion to Enter Judgment or Alternatively Reply to Respondent's New Matter. Two copies of the Petitioner's Motion were hand delivered to the Respondent. The basis for the Petitioner's Motion to Enter Judgment was the Respondent's failure to comply with PERB Regulation 5.3, Answer to Charge, which requires at paragraph (a) that an Answer be "sworn to before any person authorized (to) administer oaths".

On July 17, 1992, the Respondent filed a Motion To Amend Answer and an Amended Answer to correct the deficiency cited by the Petitioner.

### FACTS

For the period July 1, 1989, through June 30, 1991, the Petitioner and Respondent were parties to a collective bargaining agreement. Article 14, Clothing Allowance, of that agreement provides, in relevant part:

14.2 Non-uniformed personnel shall receive Six Hundred Fifty Dollars (\$650) each year for the year beginning July 1, 1989, and ending June 30, 1990, and Seven Hundred Dollars (\$700) each year for the year beginning July 1, 1990, and ending June 30, 1991, as a clothing allowance in accordance with the following limitations:

14.3 Supervisors of detectives and other employees whose primary duties are administrative in nature will not qualify for any clothing allowance as they are expected to report for work in uniform. Detectives and supervisors of detectives who spend a substantial part of their time conducting in-depth investigations into matters of criminal nature, including interviews of witnesses, victims and suspects will qualify for a full allowance.

14.4 Evidence technicians will receive Three Hundred Twenty Five Dollars (\$325) for the purchase of civilian type clothing for court appearances. Effective July 1, 1990, this special payment shall be increased to Three Hundred Fifty Dollars (\$350) annually.

14.5 The Superintendent shall, at his discretion, have the authority to add positions to the list of positions entitled to receive a full or partial clothing allowance.

For the period July 1, 1989, through December 31, 1989, the non-uniform personnel assigned to the State Bureau of Investigation (SBI) received a partial (one-half) clothing allowance. Effective January 1, 1990, and at all times thereafter, they received the full clothing allowance.

In April, 1991, the parties entered into negotiations for a successor agreement.

In June, 1992, the Respondent advised the non-uniform personnel assigned to the State Bureau of Investigation that, effective July 1, 1992, only the Captain would receive the full clothing allowance. All other non-uniform personnel were reduced to one-half of the full allowance. This notification resulted in the filing of the above-captioned unfair labor practice complaint.

Collective bargaining culminated in July, 1992, when, after unsuccessful efforts to mediate a settlement, the parties agreed to the terms of a successor contract by accepting the recommendations of a fact-finder.

#### ISSUES

1. Shall the Petitioner's Motion for Judgment or Respondent's Motion to Amend its Answer be granted?
2. If the Respondent's Motion prevails, is the dispute a proper subject for deferral to the negotiated grievance/arbitration procedure?
3. If the dispute is not deferred, did the June, 1992 notice reducing the clothing allowance of the affected non-uniform employees effective July 1, 1992, constitute a unilateral change in a term and condition of employment after the expiration of the collective bargaining agreement and during the period of negotiation, mediation, and/or fact-finding, for a successor agreement without impasse in violation of section 1607(a)(5) and (a)(6) of the Act, as alleged?

## PRINCIPAL POSITIONS OF THE PARTIES

### RESPONDENT (State of Delaware):

Issue No. 1: The Respondent maintains that it complied with the requirements set forth in Regulation 5.8 (c) of the Board's Rules and Regulations. Therefore it's Motion to Amend its Answer should be granted.

Issue No. 2: The Respondent requests that the complaint be deferred to the contractual grievance/arbitration procedure. It argues that Petitioner's charge clearly involves a dispute over the interpretation of a provision of the collective bargaining agreement, namely Article 14. It cites the National Labor Relations Board (Collyer Insulated Wire, 192 NLRB 837 (1971)) and the Delaware Supreme Court (City of Wilmington v. Local 1590, IAFF, 385 A.2d 720 (1986)) for the proposition that the proper forum for the resolution of disputes requiring contractual interpretation is the grievance/arbitration procedure negotiated by the parties for this purpose.

The Respondent contends the Delaware PERB also adopted this principle in Fraternal Order of Police, Lodge No. 1 v. City of Wilmington (Del.PERB, ULP No. 89-08-040 (12/18/89)), wherein it held that when a decision turns on the interpretation of a provision(s) contained in a collective bargaining agreement which also contains procedures for the final and binding resolution of contractual disputes, "...it is prudent and reasonable for this Board to afford those procedures the full opportunity to function".

Issue No. 3: The Respondent maintains that the affected employees are not entitled to a full clothing allowance under either Article 14.2, 14.3 or 14.4 of the collective bargaining agreement. What clothing allowance, if any, they receive is at the discretion of the Superintendent in accordance with Article 14.5.

Because it acted in conformance with the applicable provisions of the collective bargaining agreement, Respondent maintains it cannot have committed the unfair labor practice alleged and moves for the dismissal of the complaint.

PETITIONER (DSTA):

Issue No. 1: The Petitioner argues that because the Respondent's initial Answer contained no sworn affidavit as required by PERB Regulation 5.3(c), all allegations set forth in the Complaint are deemed to have been admitted and the Petitioner is, therefore, entitled to judgment.

Issue No. 2: The Respondent disagrees that the matter is proper subject for deferral to the negotiated grievance/arbitration procedure. It argues that because the non-uniform personnel assigned to SBI received a full clothing allowance from July, 1990, until notified in June, 1992, that effective July 1, 1992, their clothing allowance would be reduced to one-half, the pivotal issue is the employer's failure to maintain the current level of benefits during the period of negotiations, mediation and/or fact-finding for a successor agreement and not the interpretation of a provision of the collective bargaining agreement, as the Respondent contends.

Issue No. 3: The Petitioner argues that under Article 14 of the collective bargaining agreement the Superintendent's authority/discretion is limited to adding positions to the list of personnel entitled to receive a full or partial clothing allowance and does not include the authority to reduce positions from a full to partial clothing allowance.

The Troopers' Association maintains that the PERB has previously determined that when, during the period of collective negotiations, mediation and/or fact-finding for a successor agreement, an employer fails to maintain the current level of benefits set forth in the collective bargaining agreement, it violates sections 4007 (a)(5) and (a)(6) of the Public School Employment Relations Act, 40 Del.C. Chapter 40 (1982).<sup>1</sup>

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<sup>1</sup> §§4007 (a)(5) and (a)(6) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1982), are identical to §§1607(a)(5) and (a)(6) of the Police Officers' and Firefighters' Employment Relations Act, 19 Del.C. Chapter 16 (1986).

## OPINION

### Issue No. 1: PERB Regulation 5.8, Amendment of Complaint and/or Answer,

provides:

c. Subject to the approval of the Board, an Answer may be amended, in a timely manner, upon motion of the party filing it. Such motions shall be in writing, unless made at the hearing and before commencement of testimony. In the event the Complaint is prejudiced by the amendment, a motion for continuance will be granted.

Respondent's Motion to Amend its Answer was filed on July 17, 1992, the same day it received the Petitioners' Motion for Judgment on the Pleadings. There is, therefore, no reasonable basis to reject the Respondent's Motion to amend its Answer as untimely. To rule otherwise would effectively render PERB Regulation 5.8(c) meaningless. The Respondent's Motion to Amend its Answer filed pursuant to PERB Regulation 5.8 therefore supersedes the Petitioner's Motion for Judgment and is granted. Conversely, the Petitioner's Motion for Judgment is denied. Because the amended Answer does not prejudice the Complaint, no continuance is required nor was one requested.

Issue No. 2: Neither party argues that the clothing allowance constitutes other than a term and condition of employment which is a mandatory subject of collective bargaining. 2

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2 19 Del.C. §1602(d): "Collective bargaining" means the performance of the mutual obligation of the public employer through its designated representative and the exclusive bargaining representative 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. However, this obligation does not compel either party to agree to a proposal or require the making of a concession.

19 Del.C. §1602(n): "Terms and conditions of employment" means matters concerning or related to wages, salaries, hours, grievance procedures and working conditions; provided, however, that such term shall not include those matters determined by this chapter or any other law of the State to be within the exclusive prerogative of the public school employer.

The PERB first addressed the parties' obligation to maintain the status quo of a mandatory subject of bargaining following the expiration of a collective bargaining agreement in Appoquinimink Education Association v. Board of Education (Del.PERB, ULP No. 1-2-84A (7/23/84)). The issue in Appoquinimink involved the District's failure to advance individual teachers to the next step of the salary matrix at the beginning of the next school year after the expiration of the collective bargaining agreement and during the period of negotiation of a successor agreement. The interpretation of the salary matrix was not in issue and no contractual interpretation was required. The PERB assumed jurisdiction for the purpose of determining whether the District's action constituted a violation of §4007 (a)(5) and (a)(6) of the Act, as alleged.

Citing NLRB v. Katz (U.S., 369 US 736 (1962)), the PERB concluded:

An employers' unilateral change in the conditions of employment which are under negotiation, without impasse, violates the employer's duty to collectively bargain in that it undermines the bargaining process.

In so deciding the PERB observed:

The importance of maintaining the prevailing terms and conditions of employment during the period until new terms and conditions are reached by agreement is fundamental to creating an environment in which collective bargaining can most successfully be undertaken. An important factor in determining the status quo after the expiration of a collective bargaining agreement is the terms and conditions of employment prevailing under the expired collective bargaining agreement ... The issue before us is not the extension of a clause of an expired collective bargaining agreement ... but rather the maintenance of the relationship which existed at the time of the expiration of the agreement .... Where a prior Agreement specifically addresses the term or condition of employment at issue in an unfair labor practice complaint of this nature, the specific provisions of that Agreement may provide insight into the relationship which

existed and action which may be necessary to maintain the status quo.<sup>3</sup> Appoquinimink, (Supra.). [Emphasis added]

These principles were applied in the case of New Castle County Vo-Tech Education Association v. Bd. of Education (Del.PERB, ULP No. 88-05-025 (8/19/88)), the case cited by the Petitioner for the proposition that an employer violates its duty to bargain in good faith when "... during the period of negotiations, mediation, and/or fact-finding for a successor agreement, the Employer fails to maintain the current level of benefits set forth in the collective bargaining agreement". [Emphasis added]

The circumstances present in New Castle County Vo-Tech (Supra.) involved a change in the amount of the employee's contribution to the monthly medical insurance premiums after the expiration of the collective bargaining agreement. As in Appoquinimink (Supra.), the interpretation of the applicable contract language was not in dispute. The PERB accepted jurisdiction for the purpose of determining whether the employer's action violated §§4007 (a)(5) and (a)(6) of the Act. The PERB concluded:

The status quo, as it relates to the payment of medical insurance premiums, includes not only the dollar amount contributed by the employer but also the amount of money, if any, paid by employees. Any unilateral change in this relationship constitutes an impermissible change in the status quo through the alteration of a term and condition of employment and, therefore, violates the Act. New Castle County Vo-Tech, (Supra.)

The Petitioner construes the holding in New Castle County Vo-Tech too narrowly. While the nature of the triggering incident may vary from case to case, the rule of Appoquinimink and New Castle County Vo-Tech remains unchanged. The critical question is whether or not the action complained of constitutes a unilateral change in the status quo of a term and condition of employment after the expiration of the collective bargaining agreement and during the negotiation, mediation,

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<sup>3</sup> See also Brandywine Affiliate /NCCEA/DSEA/NEA v. Board of Education, (Del. PERB, ULP No. 1-9-84-6B (1984)).

and/or fact-finding for a successor agreement, without impasse, in violation of §§1607(a)(5) and (a)(6) of the Act.

Here, the Petitioner alleges in its position that an unfair labor practice was committed by the Employer when it unilaterally reduced a benefit guaranteed under Article 14, Clothing Allowance, of the collective bargaining agreement.

The Respondent answers that the Petitioner's interpretation of Article 14 is incorrect and unsupported by either its application or history. The Respondent argues that non-uniform personnel of SBI are not guaranteed a clothing allowance by Article 14 (1), (2), or (3). Consequently, they are entitled under Article 14 (4) only to whatever allowance, if any, is authorized by the Superintendent, at his or her discretion. To support its position, the Respondent argues, without contradiction, that from July 1, 1989 until January 31, 1990, the non-uniformed personnel assigned to SBI received only a partial (one-half) clothing allowance even though the contract was in effect during that period.

The Respondent also relies upon demands allegedly made by the Petitioner during the recently concluded contract negotiations to include the non-uniform personnel of SBI in the group of employees guaranteed a full clothing allowance under Article 14 (b), the very benefit to which the Union now claims they are entitled under the expired Agreement.

An important factor to consider when determining the status quo of a term and condition of employment to which the parties remain bound after the expiration of the collective bargaining agreement is the relevant language of the collective bargaining agreement itself. Appoquinimink (Supra.).

In 1989, the PERB first addressed the situation where the meaning and intent of the relevant contract language was in dispute. It held that where a complaint alleging an improper post-expiration change in a term and condition of employment requires the interpretation of contract language, deferral to the binding

grievance/arbitration procedure negotiated by the parties for resolving such questions is appropriate. Fraternal Order of Police, Lodge No. 1 v. City of Wilmington, Del.PERB, ULP No. 89-08-040 (12/18/89).

In 1991, the PERB extended its discretionary limited deferral policy by deferring to the contractual grievance/arbitration procedure a matter requiring the interpretation of contract language wherein the decision of the arbitrator was advisory only. Red Clay Education Association v. Board of Education, Del.PERB, AULP No. 90-08-052 (2/4/91).

It is apparent from the pleadings filed by the parties in the current matter that the interpretation of the disputed contract language, namely Article 14, is required in order to establish the status quo. No valid reason has been offered why this matter should be treated differently from the established case law discussed above.

#### DECISION

The processing of this unfair labor practice complaint is stayed pending the exhaustion of the parties' contractually agreed upon grievance/ arbitration procedure.

The PERB shall retain jurisdiction for the express purpose of reconsideration, on application of either party, for any of the following reasons:

1. that the arbitral process has been unfair;
2. that the dispute is not being resolved through the contractual grievance/arbitration procedure with reasonable promptness;
3. that either party refuses to abide by an arbitrator's decision;
4. that the statutory claim is not resolved by the grievance/

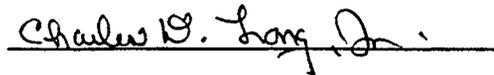
arbitration procedure; and/or

5. the issue has been satisfactorily settled between the parties  
in contract negotiations.

The parties are ordered to notify the Public Employment Relations Board of compliance with this Order.

**IT IS SO ORDERED.**

August 4, 1992



CHARLES D. LONG, JR.  
Executive Director  
Delaware PERB