

procedure, the Union filed for arbitration pursuant to Section 18 of the current collective bargaining agreement which provides, in relevant part:

Step Five: Appeal to Arbitration

(b) The Arbitrator shall be selected from the membership of the American Arbitration by mutual agreement of the County and the FOP. In the event the parties cannot agree on a selection within ten (10) working days after it is known that resort to arbitration must be had, such Arbitrator shall be selected under the Voluntary Rules of the American Arbitration Association.

An arbitrator was selected and on July 28, 1995, the American Arbitration Association notified the parties that the dates of September 27, 28, 29 and October 18, 1995, were reserved for the arbitration hearing.

On September 8, 1995, counsel for the County agreed to accept service of subpoenas executed by the arbitrator for numerous police officers in the bargaining unit to appear and testify at the arbitration hearing. The subpoenas were personally served upon the respective officers by the Department's Internal Affairs Unit ("IA"). During the serving of the subpoenas, the IA officer made comments to several of the subpoenaed police officers which the FOP maintains were intended to intimidate and/or prejudice the individual officers and members of the bargaining unit as a whole. Believing that the comments had the effect of compromising the integrity of the arbitration process in violation of the collective bargaining agreement, the FOP requested a pre-arbitration conference with the arbitrator.

Following a teleconference on September 19, 1995, involving the arbitrator and representatives of both parties, the arbitrator denied the FOP's request for an evidentiary hearing concluding that "The Union's remedy, if any, lies in another forum or through the filing of another grievance."

Thereafter, on or about September 25, 1995, the FOP served upon IA a subpoena duces tecum issued by the arbitrator on September 22, 1995,

requesting numerous documents it considered necessary to prepare for the scheduled arbitration hearing. After discussions with the County attorney, the FOP served written notice upon the arbitrator of its intent to file an unfair labor practice charge protesting the comments attributed to IA during service of the subpoenas to the individual officers. The FOP also advised the arbitrator that the County was objecting to the subpoena duces tecum claiming it was overly broad and that certain information was privileged. The FOP requested that the scheduled arbitration be postponed until the unfair labor practice charge was resolved.

By letter dated September 25, 1995, the County objected to postponing the arbitration hearing. It objected to the subpoena duces tecum claiming that it was "not only unseasonable but also duplicative, overbroad, burdensome and requests documents that are privileged."

Following a second teleconference on September 25, 1995, the arbitrator postponed the arbitration hearing until January 17, 18, 19, 22 and 24, 1995, so that the issues involving both subpoenas could be resolved through the processing of the instant unfair labor practice charge.

The unfair labor practice charge, filed with the Public Employment Relations Board ("PERB" or "Board") on September 26, 1995, and amended on September 27, 1995, alleges that the comments made by IA during the service of the subpoenas and the County's refusal to comply with the subpoena duces tecum violate Sections 1607(a)(1), (2) and (5), of the Act.

The County filed its answer on September 28, 1995, denying that the comments attributed to the IA officer constitute a violation of the Act and, by way of an affirmative defense, contesting the jurisdiction of the PERB to hear and resolve the issues raised in the complaint.

Following an informal conference on October 5, 1995, involving representatives of the PERB and of each party, it was agreed that the parties would address the following issues concerning the jurisdiction of the PERB:

1. Assuming the truth of the allegations set forth in paragraph 14 of the Complaint, does the PERB have jurisdiction to determine whether the statements set forth therein, considered either individually or together, constitute a violation of 19 Del.C. §1607(a)(1), (2) and/or (5), as alleged?
2. Does the PERB have jurisdiction to determine whether the Respondent's refusal to comply with the arbitrator's subpoena of documents constitute a violation of 19 Del.C. §1607(a)(1), (2) and/or (5), as alleged?
3. Does the PERB have jurisdiction to determine whether the Respondent's refusal to produce relevant documents for use in an arbitration proceeding constitute a violation of 19 Del.C. §1607(a)(1), (2) and/or (5), as alleged?

PRINCIPAL POSITIONS OF THE PARTIES

COUNTY:

Issue No. 1: The Respondent characterizes the statements attributed to the IA officer as trivial, isolated, ambiguous and susceptible to innocent interpretation. It maintains that such statements, whether considered individually or together, cannot reasonably be construed as violating Sections 1607(a)(1), (2) and/or (5) of the Act, as alleged.

The Respondent also contends that the arbitrator is without authority to issue a subpoena compelling either an individual police officer to appear at the arbitration hearing or the production of documents. Therefore, it would be inappropriate for the PERB to require the County to issue a statement indicating that there is an "obligation," i.e., legal duty on the part of the employees to attend the arbitration hearing, as requested by the Petitioner.

Issue No. 2: In the absence of a judicial determination or other forum of competent jurisdiction that the arbitrator's subpoena duces tecum creates a legal obligation on the part of the County to provide the subpoenaed documents, the County argues that its refusal to comply with the subpoena duces tecum does not constitute a per se violation of 19 Del.C. §1607(a)(1), (2) and/or (5).

Issue No. 3: The Respondent acknowledges that arguably the PERB has jurisdiction to entertain a petition alleging that a refusal to provide certain information constitutes a violation of Section 1607(a)(1), (2) and/or (5), of the Act.

It further contends that the subpoena duces tecum "is not only unreasonable but also duplicative, overbroad, burdensome and in large part objectionable in that it requires the release of privileged information." In this regard, it has provided the Petitioner with all documents or items to which it is entitled under the Law Enforcement Officer Bill of Rights, 11 Del.C. §9200 et. seq.

The Respondent also cites several private sector cases decided by the National Labor Relations Board for the proposition that the employer's duty to provide information needed by the bargaining representative for the proper performance of its duties is not absolute and subject to specific limitations.

FOP:

Issue No. 1: The Petitioner argues that the comments attributed to IA during the service of the subpoenas are, in themselves, coercive and intimidating. Because the grievance procedure lies at the heart of the labor contract's system of self-government and is intended to assure the Union and its members of a fair and impartial hearing, the alleged comments, if true,

compromise the integrity of the grievance procedure and violate Section 1607(a)(1), (2) and (5), of the Act, as alleged.

The Petitioner further argues that the statutory obligation of a witness to attend the arbitration hearing is irrelevant to the issue of the PERB's jurisdiction to administer and enforce the Act.

Issue No. 2: The Petitioner maintains that when a duly appointed arbitrator issues a subpoena there is a threshold recognition, if not a presumption, that the material sought is necessary to an understanding and determination of the dispute. Therefore, the Petitioner contends that the PERB has jurisdiction to enforce the subpoena since a refusal to provide the information sought constitutes a failure to bargain in good faith.

Even in the absence of a subpoena, the PERB has independent jurisdiction to require an employer to produce information which is necessary and relevant to the resolution of a pending dispute. The Petitioner contends that the Respondent is also obligated to provide relevant information under the Voluntary Rules of the American Arbitration Association which are incorporated by reference into the collective bargaining agreement, specifically Rule 28.

Issue No. 3: The Petitioner contends that pursuant to 19 Del.C. Ch. 16, the PERB has independent jurisdiction to determine whether the County's refusal to provide the requested information constitutes a violation of the Act, irrespective of the collective bargaining agreement which provides for binding arbitration.

DECISION

Issue No. 1: The position of the Respondent concerning the issue of jurisdiction of the PERB to hear evidence concerning the statements attributed

to IA consists essentially of argument as to why the alleged statements cannot reasonably be construed as violating Section 1607(a)(1), (2) and/or (5) of the Act and disputing the appropriateness of the requested remedy.

Concerning the issue of jurisdiction, Section 1606, Public Employment Relations Board, provides:

The Board, established by Section 4006 of Title 14, known as the "Public Employment Relations Board," shall be empowered to administer this chapter under rules and regulations which it shall adopt and publish.

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:
- (1) Interfere with, restrain or coerce any employee in or because of the exercise of any right guaranteed under this chapter.
 - (2) Dominate, interfere with or assist in the formation, existence or administration of any labor organization.
 - (5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit.

Regardless of the context within which disputed conduct occurs, the jurisdiction of the PERB to hear and resolve unfair labor practice complaints involving employers, employee and exclusive bargaining representatives as defined in the Act is unconditional. The fact that the disputed conduct occurred within the context of the grievance procedure does not strip the PERB of its statutory duty to administer the Act including the resolution of alleged unfair labor practices.

Issue No. 2: The County has raised numerous objections to the subpoena duces tecum. Only after these objections are resolved can the extent

and reasonableness of the County's noncompliance, if any, be considered. With the exception of the impact of the Law Enforcement Officers Bill of Rights, to resolve the County's objections necessarily requires an evaluation of the nature and scope of the underlying dispute of the grievance which is the subject of the arbitration.

The PERB has steadfastly maintained that it is not a substitute for the grievance procedure and will not become involved in the processing of substantive issues, thereunder. Once selected and appointed, the arbitrator is responsible for the conduct of the arbitration process. Accordingly, a resolution of the County's objections to the documents sought by the Petitioner necessarily and directly impact upon the fair and informed resolution of the underlying substantive issue before the arbitrator and is, therefore, within the exclusive authority of the arbitrator.

Until the objections of the County have been resolved, there can be no determination of whether its failure to comply with the directive of the arbitrator, regardless of what form that directive may take, constitutes a violation of 1607(a)(1), (2) and/or (5), as alleged.

If it is determined that the County has not complied and continues in its refusal to comply with the arbitrator's determination after her consideration of the County's objections, then will PERB address the issue of whether it has jurisdiction to consider whether the County's conduct constitutes a violation of 1607(a)(1), (2) and (5) of the Act, as alleged, and, if so, to order appropriate relief.

Likewise, the issues of privilege under the Law Enforcement Officers Bill of Rights need only be addressed if the County refuses to comply with the

decision of the arbitrator by claiming that certain documents are privileged under the Law Enforcement Official Bill of Rights.

Issue No. 3: For the same reasons set forth in Issue No. 1 above, it is determined that PERB has jurisdiction to determine whether, independent of the binding arbitration provision contained in the negotiated grievance procedure, refusal to produce relevant documents for use in an arbitration proceeding constitutes a violation of 1607(a)(1), (2) and/or (3), as alleged.

However, consistent with the discussion and determination reached concerning Issue No. 2 and the PERB's limited deferral policy, the resolution of the County's objections to the information requested by the Petitioner is within the exclusive province of the arbitrator selected by the parties to hear and resolve the underlying substantive issue.

DECISION

Consistent with the foregoing discussion it is determined that, with regard to:

Issue No. 1: Assuming the truth of the allegations set forth in paragraph 14 of the Complaint, the PERB has jurisdiction to determine whether the statements set forth therein, considered either individually or together, constitute a violation of Section 1607(a)(1), (2) and/or (5), as alleged.

Accordingly, an evidentiary hearing is scheduled for Thursday, November 16, 1995, commencing at 10:00 a.m. The parties will be advised of the location.

Issue No. 2: Whether the PERB has jurisdiction to determine whether the Respondent's refusal to comply with the arbitrator's subpoena of documents constitutes a violation of Section 1607(a)(1), (2) and/or (5), as alleged, is not ripe for determination by the PERB, at this time.

The resolution of the objections by the County to the documents requested by the Petitioner is deferred to the arbitrator for resolution. This issue, including a consideration of privilege and the impact of the Law Enforcement Officers Bill of Rights, will be held in abeyance until such time as it is determined that an issue exists.

Issue No. 3: The PERB does have jurisdiction to determine whether the Respondent's refusal to produce relevant documents for use in an arbitration proceeding constitutes a violation of Section 1607(a)(1), (2) and/or (5), as alleged.

Consistent with the decision reached in Issue No. 2, the objections raised by the County to the documents requested by the Petitioner is deferred to the arbitrator for resolution. This issue, including a consideration of privilege under the Law Enforcement Officers Bill of Rights will be held in abeyance until such time as it is determined that an issue exists.

IT IS SO ORDERED.

/s/Charles D. Long, Jr.
Executive Director
Del. Public Employment Rel. Bd.

/s/Deborah L. Murray-Sheppard
Principal Assistant
Del. Public Employment Rel. Bd.

Dated: November 2, 1995