

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

DELAWARE STATE UNIVERSITY CHAPTER,	:	
AMERICAN ASSOCIATION OF UNIVERSITY	:	
PROFESSORS,	:	
	:	
Charging Party,	:	
	:	
v.	:	<u>U.L.P. No. 95-10-159</u>
	:	
DELAWARE STATE UNIVERSITY,	:	
	:	
Respondent.	:	

STIPULATION OF FACTS ¹

1. The Delaware State University Chapter of the American Association of University Professors (“AAUP”) is an employee organization within the meaning of 19 Del.C. §1302(h) and is the exclusive bargaining representative of Delaware State University’s full-time “voting” faculty as defined by Delaware State University, including Departmental Chairpersons and Academic Directors, professional librarians, counselors, research faculty, extension agents, department and library assistants, and half-time faculty. ²

2. Delaware State University (“University”) is a public employer within the meaning of 19 Del.C. §1302(n).

¹ The Delaware State University Chapter of the American Association of University Professors and Delaware State University, through their counsel, submitted the included Stipulation of Facts thereby eliminating the need for an evidentiary hearing.

² Stipulations 1 and 2 are solely for the purpose of the fact hearing that has been called by the Executive Director of the Public Employment Relations Board. In agreeing to these Stipulations, the University does not waive any right it may have to contest the Public Employment Relation Board’s jurisdiction. In agreeing to the limited use of these stipulations, the AAUP does not waive its contentions that the Board has jurisdiction over the University and that the University is precluded from raising the jurisdictional issue.

3. The AAUP and the University have been parties to a series of collective bargaining agreements including the current agreement (“Agreement”) effective from September 1, 1994 until August 31, 2000.³

4. On April 30 and May 13, 1993, the AAUP and the University executed an Economic Reopener Addendum which expressly amended various provisions of the 1990-94 collective bargaining agreement between the parties (“Former Agreement”).⁴

5. Section 17.12 of the Former Agreement⁵ governed the administration of the Merit Compensation Program. That provision stated, in relevant part, as follows;

17.12.1 Annual Announcement of the Program by the University President

No later than September 15, of each year of this Agreement, the President of the University shall announce to the University community the availability of the Merit Compensation Program for that academic year. The sum of money available will be equal to one and one-half (1 1/2%) percent of the total annual salaries (not including benefits) paid to members of the bargaining unit, calculated from the previous Academic Year. In addition, no fewer than twenty (20%) percent ~~or more than forty (40%) percent~~ of bargaining unit members shall receive a merit award. In addition to notifying the College community, the President or his or her designee shall simultaneously notify department chairpersons and directors of administrative areas of the availability of the program.

17.12.2 Criteria At the time the College President announces the availability of the Merit Compensation Program, he or she shall also announce the specific criteria, which shall be the following: exceptional performance in teaching or assigned duties for non-teaching members of the bargaining unit; meritorious research, writing or other professional achievement appropriate to the discipline; or extraordinary service to the College community or the external community.

6. On April 24, 1995, the AAUP, by its then-President, Professor Barbara Steward, filed a Step 1 grievance.⁶ The grievance provides:

TO: Vice President Tossie Taylor

³ A copy of this Agreement was attached to the Stipulation of Facts.

⁴ A copy of the Former Agreement and the Economic Reopener Addendum were attached to the Stipulation of Facts.

⁵ Article XVII includes the amendments negotiated as part of the Economic Reopener Addendum.

⁶ A copy of this grievance was attached to the Stipulation of Facts.

⁷ Copies of neither the referenced merit application nor the referenced bulletins and/or editorials were included with the grievance included in the Stipulation of Facts.

I hereby file a formal grievance under Article XIV - 14.5.1 of the Collective Bargaining Agreement.

Provisions of the Grievance allegedly violated:
include 5.3, 5.5, 6.2, 6.13, 11.5, 17.12.2, 17.12.4

Statement of Grievance:

The President, Vice President for Academic Affairs, and the Dean of the School of Arts and Sciences of Delaware State University violated and/or misapplied and/or misinterpreted the above-cited provisions of the Collective Bargaining Agreement when they failed and refused to award Dr. Jane Buck, the Chief Negotiator for the Delaware State University Chapter of the American Association of University Professors a merit increase of \$2,102.00. (See attached merit application) Dr. Buck has frequently and publicly criticized the Administration to the faculty, the Board of Trustees, the local press and to state legislators (see attached negotiations bulletins and opinion editorials) ⁷ and has filed grievances against the Administration.

Remedy Sought by Grievant/or AAUP

Immediate payment of \$2,102.00, to be paid in a lump sum, with interest calculated at 10% per annum from 1 March 1995. Said amount shall be added to Dr. Buck's base salary.

7. On April 24, 1995, the AAUP, by its then-Contract Administrator and Grievance Officer, M.E. Phillips, submitted a written request for information. ⁸ The request, addressed to J.R. Mims, provides:

Under the terms of Article 14.4.6, please provide by no later than Wednesday, May 3:

- a) access to the merit applications and supporting documentation of all unit members who were awarded merit this year, and
- b) copies of all the recommendations for merit forwarded by each of the Chairs and each of the Deans.

8. On May 2, 1995, University Contract Administrator James R. Mims responded to Phillips. ⁹ Mr. Mims' letter provided:

This is in response to your request for information addressed to me and dated April 24, 1995.

Article 14.4.6 of the Collective Bargaining Agreement requires the University to provide information "pertaining to the grievance ... needed by the grievant or the association on behalf of the grievant to investigate and process a grievance..." From the sweeping nature of the request for information, as well as the complete lack of

⁸ A copy of this request for information was attached to the Stipulation of Facts.

⁹ A copy of Mr. Mims' response was attached to the Stipulation of Facts.

substantiation or support for the allegations of the grievance filed on behalf of Dr. Buck, it is evident that the information being requested is not needed to investigate and process a grievance, but instead is being requested in order to search for a grievance.

Therefore, at this time I ask that you submit a proper request for information pursuant to Article 14.4.6. In such a request, indicate in what way the information requested by you pertains to the grievance and is needed to process the grievance, and explain in detail how each element of information requested is related to the specific allegations of the grievance. In addition, I advise that you limit the scope of the request in a reasonable fashion.

Please remember that pursuant to Article 14.4.6, the University has seven days from a valid request to produce the requested information.

9. Section 14.4.2 of the Agreement suspends the processing of grievances during the summer. Therefore, neither the AAUP nor the University took further action on the Grievance or the AAUP's information request until the beginning of the next academic year.

10. On August 28, 1995, Professor Jane Buck, who had become President of the AAUP, wrote to Mims.¹⁰ Dr. Buck's letter provides:

I know, I know, the devil made you do it: Your letter of 2 May regarding the above matter wasn't really your letter; it was prepared by and sent upon advice of counsel.

You may recollect the matter of my grievance of two years ago regarding merit pay. At that time, the Chapter requested information relevant to that grievance which, categorically, is virtually the same as the information requested at this time. Then as now, the Administration was determined to evade production of the required information and, in fact, waited until the day before the arbitration hearing to make the files available. In the prior case, the Administration made the lame argument that "official file" as used in Article 14.4.6 meant the "official personnel file." The Arbitrator rejected this argument and found that the Administration had violated this article. He did remark: "Although separated by a fine line, there is a significant difference between requesting documents necessary to investigate and process a grievance and documents requested in order to search for a grievance." Your 2 May letter parrots these remarks and declares, as if saying it made it so, that the present request for information is being made in order to search for a grievance.

Happily, neither the Chapter nor the Administration must any longer concern itself over which side of the "fine line" a particular request for information may be found. As you know, since the time of that earlier arbitration, the state legislature enacted the Public Employment Relations Act. The Act provides that the University commits an unfair labor practice in the event that it "refuse[s] to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit, except with respect to a discretionary subject."

¹⁰ A copy of Dr. Buck's letter was attached to the Stipulation of Facts.

The Chapter has been advised that this provision is very similar to its counterpart in the National Labor Relations Act. Under the NLRA, the good faith bargaining obligation includes the employer's obligation to provide information requested by the union that is necessary and relevant to the investigation and processing of a particular grievance or relevant and necessary to contract administration and enforcement. Under the NLRA, the union does not have to file a grievance in order to trigger this obligation. Information needed simply to monitor contract compliance, with or without a pertinent grievance having been filed, must be provided upon request. In short, labor relations conducted under the aegis of the NLRA do not allow for the kind of cat-and-mouse game hitherto played by this Administration when it comes to responding to requests for information needed by the Chapter.

Of course, there has been very little experience with Delaware's new bargaining law, and it may be the case that the bargaining obligation noted above may be interpreted differently. But is it really necessary that we become parties to an unfair labor practice case to find this out?

It is foolish and unproductive to do as the Administration did two years ago and require that the Chapter present to an Arbitrator the issue of whether the Administration's refusal to produce relevant information was a violation of Article 14.4.6, or for the Administration to do as it did two years ago and produce that information the day before an arbitration hearing. The purpose of a grievance procedure and the exchange of information during that process is to assure that both parties have as complete an understanding of the relevant facts as possible without which a resolution of the underlying grievance, short of a costly arbitration, becomes far more problematic.

Perhaps the Administration feels sufficiently flush with money to waste it on consulting with lawyers on how to evade the Chapter's request for information, or some future arbitration over the issue, or in defending an unfair labor practice charge, or all of the above. The Chapter, however, has an obligation to its members to be prudent with resources, and it is the Chapter's conclusion that the most efficient mechanism for resolving this dispute about information is to proceed with an unfair labor practice case.

Therefore, please be advised that, if the Chapter has not received, within five days of your receipt of this letter, the Administration's written agreement that it will produce the information requested by the Chapter, the Chapter will initiate an unfair labor practice proceeding over the Administration's violation of its obligation to bargain in good faith.

11. On September 6, 1995, Mims responded.¹¹ His letter provided:

This is in response to your letter dated August 28, 1995.

In your letter, you state the following:

The Chapter has been advised that this provision [i.e., the good faith bargaining provision] is very similar to its counterpart in the National Labor Relations Act. Under the NLRA, the good faith bargaining

¹¹ A copy of Mr. Mims's response was attached to the Stipulation of Facts.

obligation includes the employer's obligation to provide information requested by the union that is necessary and relevant to the investigation and processing of a particular grievance or relevant and necessary to contract administration and enforcement.

Assuming arguendo the correctness of your contention that federal labor law is applicable to labor relations on this campus, the following is also true under the same body of law: in response to a request for information by a union, an employer may request clarification and/or comply with the request to the extent it encompasses necessary and relevant information.

In my May 2, 1995, correspondence to Ms. Phillips, I requested that the Association submit a proper request for information indicating in what way the information requested by it pertained to the grievance and was needed to process the grievance and explaining in detail how each element of information requested was related to specific allegations of the grievance. Because the Association has failed to supply the University with a proper request for information, there is no way for the University to determine what portions of the information requested, if any, are necessary and relevant to the processing of a grievance or for any other purpose. You yourself recognize that information requested must be "necessary and relevant." The University asks only that the Association indicate how the information requested is necessary and relevant, or, in the alternative, that it limit the scope of its request and provide similar support for the more limited request.

I look forward to discussing this issue with you further.

12. Buck replied on September 15, 1995.¹² Her letter stated:

I wish that you had more carefully read my letter of 28 August 1995. Of course, the Association did not and does not contend that "federal labor law is applicable to labor relations on this campus." The Chapter does contend that a sensible and constructive bargaining relationship requires that information, in the exclusive possession of the Administration, which bears upon the processing of grievances and the monitoring of contract compliance be provided in a timely manner and without the hair-splitting that has characterized the Administration's responses to the Chapter's request for information pertinent to the above-captioned grievance.

In a final effort to forestall the effort and expense that will attend the filing of an unfair labor practice charge with the State of Delaware Public Employment Relations Board and in accepting the Administration at its word that it "asks only that the Association indicate how the information requested is necessary and relevant" (emphasis in the original), the Chapter presents the following.

We cite only one of the allegations raised in the grievance, the violation of Article 17.2.2, which details the criteria applicable to merit awards. In order to evaluate and process the above captioned grievance (although, as pointed out in my 28 August letter to you, the Association is entitled to information beyond and independent of any particular grievance in order to monitor compliance with the Collective Bargaining Agreement), the Chapter has requested: (1) access to the merit applications and supporting documentation of all unit members who were awarded

¹² A copy of Dr. Buck's reply was attached to the Stipulation of Facts.

merit this year; and (2) copies of all the recommendations for merit forwarded by each of the Chairs and each of the Deans.

Relevance of the information (please note that in identifying certain aspects of the relevance of this information, the Association is not saying that there are not other aspects of relevance): (1) a review of the merit applications and supporting documentation of those who received merit awards will facilitate an evaluation of the relative merits of the applications of those who received awards and of the application of the Grievant (we hurry to add that we recognize that this assertion of relevance regards more directly those allegations of contractual breach that constitute disparate treatment; so we note also that such a review will disclose whether or not successful applicants premised their applications upon the contractually stipulated criteria or otherwise; and (2) the copies of all the recommendations for merit forwarded by each of the Chairs and each of the Deans will disclose whether the Administration adhered to those criteria noted above or employed criteria that are not contractually recognized.

Need for the information: With respect to both categories of information requested by the Association, please note that the Association would be entitled to this information even if there were not a pending grievance. In this particular case, the Chapter needs this information in order to assess the merits of the grievance. It really is that simple. Even the most rudimentary understanding of grievance processing includes recognition that information or access to it in order to decide whether the grievance warrants further pursuit. It is nearly as rudimentary that grievances are more likely resolved sooner rather than later and before arbitration rather than as a result of arbitration when the parties know the facts.

Although the Chapter is not eager to proceed before the Public Employment Relations Board, neither is the Chapter willing to submit to further delay if the delay is primarily attributable to what time will be needed by the Administration's attorney to concoct new theories for withholding the information or even to re-frame the old ones. Thus, the Chapter asks that you notify it within five working days after your receipt of this letter (no later than 22 September 1995) that the Administration will produce the requested information, in which case we can discuss how that can be managed with the least inconvenience to all concerned. In the event that the Administration refuses to produce the information, either you can inform the Association of that or you can simply not respond at all within those five days. If refusal it is, please instruct the Administration's attorney not to bother with a written reply, thus saving the Administration and Delaware taxpayers the attendant expense.

So which is it, Jim, the lady or the tiger?

13. The AAUP filed an Unfair Labor Practice Charge on October 5, 1995.

14. The AAUP and the University selected James W. McMullen to arbitrate the grievance. On April 25, 1996, Arbitrator McMullen denied the AAUP's request that the processing of the Grievance be stayed pending PERB's decision in this case. ¹³

15. A hearing on the Grievance was scheduled for September 26, 1996.

¹³ A copy of Arbitrator McMullen's denial letter was attached to the Stipulation of Facts.

16. In preparation for the hearing, the AAUP obtained a Subpoena Duces Tecum, signed by Arbitrator McMullen. The subpoena was served on the University's counsel. ¹⁴ The Subpoenas commanded production of the following documents:

- a) copies of each merit application and supporting documentation for all unit members for academic years 1993-1994 and 1994-1995.
- b) copies of all recommendations for merit forwarded by each Chair and each Dean in academic years 1993-1994 and 1994-1995.
- c) copies of all announcements of criteria for Merit Compensation issued by the University or its President for academic years 1993-1994 and 1994-1995.
- d) copies of all directives establishing procedures for the Merit Compensation determination for academic years 1993-1994 and 1994-1995.

17. The University moved to quash the subpoena. ¹⁵

18. On September 20, 1996, the University transmitted to the AAUP material responsive to paragraphs (c) and (d) of the subpoena.

19. The AAUP opposed the Motion, but agreed to accept information limited to academic year 1993-1994. ¹⁶

20. On September 23, 1996, Arbitrator McMullen denied the Motion to Quash as limited to academic year 1993-1994. He granted the Motion with respect to academic year 1994-95. ¹⁷

21. On September 25, 1996, the University granted the AAUP access to material responsive to paragraphs (a) and (b).

22. Arbitrator McMullen conducted an evidentiary hearing in Dover, Delaware, on September 26 and December 3, 1996.

23. Arbitrator McMullen issued his decision on the grievance on March 5, 1997. ¹⁸

BACKGROUND

¹⁴ A copy of the Subpoena Duces Tecum was attached to the Stipulation of Facts..

¹⁵ A copy of the University's Motion to Quash and accompanying exhibits was attached to the Stipulation of Facts.

¹⁶ A copy of the AAUP's Opposition was attached to the Stipulation of Facts.

¹⁷ A copy of Arbitrator McMullen's September 23, 1996, decision was attached to the Stipulation of Facts.

¹⁸ A copy of Arbitrator McMullen's March 5, 1997, decision was attached to the Stipulation of Facts.

In response to the filing of this charge on October 5, 1995, Delaware State University moved for its dismissal, asserting the Public Employment Relations Board lacked jurisdiction over the University because it was not a public employer within the meaning of 19 Del.C. §1302(n). A decision on the Motion to Dismiss was issued on April 1, 1996, finding DSU was a public employer within the meaning of the law. DSU appealed the jurisdictional issue directly to Chancery Court. Vice Chancellor Balick dismissed DSU's appeal on February 24, 1997.

ISSUE

1. Did Delaware State University refuse to bargain in good faith in violation of 19 Del.C. §1307 (a)(5) when it declined to provide documentation relating the awarding of merit compensation, as requested by the AAUP?

2. Did Delaware State University refuse to disclose public information in violation of 19 Del.C. §1307 (a)(8) when it failed to provide the AAUP with the requested information?

POSITIONS OF THE PARTIES

AAUP:

The AAUP charges the University unlawfully refused to provide documents which were necessary for the preparation of a grievance in violation of 19 Del.C. §1307(a)(5) and (a)(8). The AAUP asserts the information requested was clearly reasonable and necessary to the processing of the Buck grievance because consideration of the merits of the grievance required the comparison of Buck's qualifications for a merit award to those of successful applicants. It denies its request was for the purpose of "fishing for a grievance".

The AAUP argues it should not be required to process its request for information through the grievance procedure as this would defeat the purpose of the grievance procedure in providing for timely and expeditious resolution of disputes arising under the collective bargaining agreement. It asserts the University's duty to provide necessary information derives directly from its statutory duty to bargain in good faith, which is independent of the contractual grievance procedure.

It rejects the University's assertion the information sought is confidential, citing two arbitration awards which have rejected this argument under identical circumstances. It notes that merit pay applications are prepared to highlight faculty members' positive contributions, of which other faculty members are usually aware.

Finally, the AAUP asserts the applications for merit pay are "public records" within the meaning of 29 Del.C. §10002(g), as they form the basis for the expenditure of public funds. As the custodian of these records, the AAUP asserts DSU bears the burden of proving it was justified in denying access to these records.

University:

The University asserts its interest in preserving the confidentiality of the merit award process outweighs the AAUP's interest in gaining access to the requested information. It further asserts it was justified in denying the request for information because the AAUP intended to use the information only to search for a grievance. It argues at the time the Buck grievance was filed, the AAUP had no substantiation for its claim that Dr. Buck had been unfairly treated for any reason, let alone because of her union activity.

DSU asserts it is specifically exempted from the coverage of the Freedom of Information Act by 29 Del.C. §10002(g), except as to records which relate to the expenditure of public funds. Because the requested information did not relate to the expenditure of public funds, and therefore were not "public records", the University asserts it could not have violated 19 Del.C. §1307(a)(8). Further, even if the requested documents were related to the expenditure of public funds, they were excludable under 29 Del.C. §10002(d) because they are "personnel ... files, the disclosure of which would constitute an invasion of privacy."

OPINION

The duty to bargain in good faith is statutory in origin. 19 Del.C. §1301; §1302; §1307. The Public Employment Relations Board has long held "... the duty to bargain unquestionably extends beyond

the period of contract negotiation and applies to labor management relations during the term of the agreement.” Smyrna Educators’ Association v. Bd. of Education, Del.PERB, ULP 87-08-015 (1987, Binder I @ p. 207), citing NLRB v. Acme Industrial Co., 385 US 432 (1967). The grievance procedure lies at the heart of the continuous collective bargaining obligation and is the vehicle through which the parties’ agreement is defined and refined during its term. Indian River Education Assn. v. Bd. of Education, Del.PERB, ULP 90-09-053 (1991; PERB Binder I@ p. 667).

The law under the National Labor Relations Act concerning the obligation of an employer to provide information requested by an exclusive bargaining representative is clear and well settled.¹⁹ The United States Supreme Court held,, “There can be no question of the general obligation of an employer to provide information that is needed by the bargaining representative for the proper performance of its duties.” Acme Industrial, 385 US 432, 64 LRRM 2069 (1967). The National Labor Relations Board further clarified this axiom in Conrock Co & Teamsters Local 420 (NLRB, 263 NLRB 183, 111 LRRM 1271 (1982)):

It is well settled that an employer has an obligation, as part of its duty to bargain in good faith, to provided information needed by the Union to enforce and administer a collective bargaining agreement. An employer must furnish information that is of even probable or potential relevance to the Union’s duties. The refusal by an employer to provide relevant information requested by the union is a violation of Section 8(a)(5) and (1) of the Act.

The Court held in Acme (Ibid.) the grievance procedure can only function properly if procedures are in place which allow for the sifting out of “unmeritorious claims”; consequently, requiring an employer to provide information necessary for the union to perform its representative functions in administering the collective bargaining agreement fulfills the purposes of the statute. In Acme, as in the instance case, the issue concerned whether the employer was obligated to provide information to the union which would allow the union to decide whether to process a grievance.

A broad disclosure rule is crucial to the development of a meaningful collective bargaining relationship as contemplated by the statute. Pfizer, Inc. & IBEW Local 309, 268 NLRB 126, 115 LRRM

¹⁹ The Delaware Public Employment Relations Board has often repeated that decisions rendered under federal labor statutes provide guidance and are useful in determining cases arising before this Board, to the extent such cases interpret identical or significantly similar statutory provisions. This is the case in the instant matter.

1105 (1984). The Union is entitled to information if it is helpful in evaluating the merits of a contractual claim or has any relevance to the determination of whether or not to file a grievance. “It is not necessary that any grievances actually be outstanding or that the information be such as would clearly dispose of them.” Sheet Metal Contractors, 246 NLRB 140, 103 LRRM 1018 (1979). It is necessary only that the information requested be relevant to the Union’s performance of its duties as the bargaining representative of the employer’s employees.

The standard to be applied in determining the relevance of the requested information is a broad and liberal one. Information pertaining to employees within the bargaining unit is presumptively relevant and should be provided, particularly where it aids the arbitral process. Pfizer, (Supra.). Upon receipt of the requested information, the union can evaluate the information in light of the alleged contractual violation and decide not to file a grievance or to either pursue or withdraw a standing grievance. Similarly, once an issue reaches arbitration, the information may be relied upon by an arbitrator to uphold the employer’s position, as was the case in the two arbitration decisions concerning the two prior merit award grievances.

The exchange of information does not threaten the grievance process nor does it affect the authority of an arbitrator to make a binding construction of the parties’ collective bargaining agreement. Acme, (Supra.). In fact, the liberal exchange of information actually aids the collective bargaining process in that it allows both parties to sift out unmeritorious claims. The goal of exchanging information is to encourage resolution of disputes, short of arbitration, so that the system is not “woefully overburdened.” Pfizer, (Supra.), citing (Acme).

DSU’s assertion it had no obligation to provide the information because AAUP Grievance Officer Phillips’ request did not directly tie the request for information to pending grievance is misplaced. It is not necessary that an actual grievance be pending. Further, by its own admission, DSU was aware the AAUP was entitled to information which was necessary and relevant to investigate and process a grievance or to contract administration and enforcement. (emphasis added). Both the grievance and Phillips’ request for information were dated April 24, 1995. These parties had arbitrated a nearly identical issue less than two years prior. The arbitrator in that matter clearly relied upon a comparison of

applications in reaching his decision upholding the University's position. Under these circumstances the relevance of the information request to the grievance was obvious on its face.

DSU relies upon the arbitrator's decision on the 1993 grievance, which interpreted the parties' contractual provision concerning the exchange of information related to the processing of a grievance, in rejecting the AAUP's request for information. The instance charge addresses the issue of the parties' statutory obligation to bargain in good faith.²⁰ Whether the documents requested fall within the category of documents addressed in Article 14.4.6 does not impact the determination of the scope of the statutory obligation.

DSU's position this matter is properly subject to the grievance and arbitration procedure and that PERB should, therefore, defer its decision to the contractual arbitration process is unpersuasive. PERB's limited discretionary deferral policy is inapplicable in this situation as a resolution of the substantive grievance would not resolve the statutory charge. Further, pre-arbitral deferral, in this case, would serve to defeat the purpose of the statute. PERB is charged with facilitating harmonious and cooperative relationships and is empowered to prevent the commission of any unfair labor practice. The continuing duty to bargain in good faith is statutory and failure to do so results in the commission of an unfair labor practice. The procedural issue of disclosure of information is but a preliminary step in the resolution of the underlying substantive issue and does not limit, but rather facilitates, the resolution of the dispute.

In these circumstances, we find no merit in encumbering the process of resolving pending ... grievances with the inevitable delays attendant to the filing, processing and submission to arbitration of a new grievance regarding the information request. Such a two tiered arbitration process would not be consistent with our national policy favoring the voluntary and expeditious resolution of disputes through arbitration. Nor would it be consistent with prior [National Labor Relations] Board decisions in this area. General Dynamics Copra, 268 NLRB 220, 115 LRRM 1199 (1984).

This logic is applicable and compelling under the Public Employment Relations Act.

The University's argument the information requested by the AAUP is confidential because applicants for merit awards believe their applications will only be reviewed by the chairpersons and administrators responsible for making recommendations is likewise unpersuasive. A claim of

²⁰ It must be noted that the Public Employment Relations Act did not become effective until September 25, 1994; consequently the AAUP had not recourse to the PERB at the time the first grievance was filed and arbitration decision issued.

confidentiality must be proven by the party asserting the claim. McDonald Douglas Corp., 224 NLRB 881, 93 LRRM 1280 (1976). A general claim of confidentiality must fail where there is no evidence the records requested are otherwise kept confidential for other purposes during the normal course of business, and that employees either actively sought to keep the records confidential or that an employee would reasonably expect the information to be confidential during the normal processing of a grievance. Pfizer, Inc., (Supra.). DSU has not substantiated its general claim of confidentiality. There is no evidence of record that applicants were advised or could reasonably believe their applications were confidential. The merit award process requires review of the applications by numerous persons including departmental chairperson, administrative directors, deans, vice presidents and the President of the University. Further it is illogical that the substance of successful merit award applications would be confidential if the program is intended to reward outstanding service and to motivate other employees to higher levels of contribution. For these reasons, the University's claim its interest in preserving the confidentiality of the merit program outweighs the AAUP's interest in the requested information fails.

Finally, the record created by the parties does not include sufficient information to resolve whether the information requested by the AAUP constituted public records under the Freedom of Information Act. It is, however, unnecessary to resolve this charge as Delaware State University clearly has an independent obligation under the Public Employment Relations Act to provide information to the AAUP which is reasonably necessary and relevant to the AAUP's duties as an exclusive representative in administering the parties' collective bargaining agreement.

CONCLUSIONS OF LAW

1. Delaware State University is a public employer within the meaning of 19 Del.C. §1302(n).
2. The Delaware State University Chapter of the American Association of University Professors is an employee organization within the meaning of 19 Del.C. §1302(h). It is the exclusive bargaining representative of Delaware State University's full time "voting" faculty, within the meaning of 19 Del.C. §1302(i).

3. By refusing to comply with the AAUP's request for information which was reasonably related to its responsibilities as an exclusive bargaining representative, Delaware State University failed to meet its duty to bargain in good faith, in violation of 19 Del.C. §1307 (a)(5).

4. The charge DSU has violated 19 Del.C. §1307 (a)(8) is dismissed without prejudice, as there is insufficient evidence on the record to conclude whether or not the information requested constitutes "public record" within the meaning of 29 Del.C. §10002(g).

WHEREFORE, Delaware State University is hereby ordered to:

- 1) Cease and desist from refusing to provide AAUP with information which is reasonably related to its duty of representation.
- 2) Post the enclosed Notice of Unfair Labor Practice for a period of thirty (30) days in all places where notices affecting bargaining unit employees are normally posted and in the administrative offices of the employer.

IT IS SO ORDERED.

/s/ Deborah L. Murray-Sheppard
DEBORAH L. MURRAY-SHEPPARD
Principal Assistant/Hearing Officer
Del. Public Employment Relations Bd.

DATED: 18 November 1997