

**STATE OF DELAWARE**  
**PUBLIC EMPLOYMENT RELATIONS BOARD**

<b>APPOQUINIMINK EDUCATION ASSOCIATION,</b>	)	
<b>DSEA/NEA,</b>	)	
	)	
<b>Charging Party,</b>	)	
	)	<b>ULP No. 98-09-243</b>
<b>v.</b>	)	
	)	
	)	
<b>APPOQUINIMINK SCHOOL DISTRICT,</b>	)	
	)	
<b>Respondent.</b>	)	

The Appoquinimink Education Association, DSEA/NEA (hereinafter “AEA” or “Association”) is an employee organization within the meaning of 14 Del.C. Section 4002(h) and the exclusive bargaining representative of the Appoquinimink School District’s certificated classroom teachers, within the meaning of 14 Del.C. Section 4002(i). The Appoquinimink School District (hereinafter “District”) is a public school employer within the meaning of 14 Del.C. Section 4002(n). The controlling statute is The Public School Employment Relations Act, 14 Del.C. Chapter 40 (1984) (hereinafter “Act” or “PSERA”).

**BACKGROUND**

1. The parties negotiated a three-year collective bargaining agreement for the period commencing July 1, 1993 and ending on June 30, 1996.
2. Discussions concerning a successor Agreement commenced during the spring of 1996, but were subsequently suspended in April, 1996, until after the conclusion of the school year.
3. At the April meeting the parties discussed ground rules governing the negotiations and agreed to extend the 1993-96 Agreement until a successor Agreement was ratified. Mark Zawislak, the chief spokesperson for the District, agreed to provide a written extension agreement for signature at the next bargaining session.

4. When the parties next met on July 2, 1996, the parties together drafted the following document which was signed by Mr. Zawislak and Vickie Shaffner, AEA President:

AEA Proposal 7-2-96

The parties agree that the terms and conditions of the current Collective Bargaining Agreement will remain in effect until a successor agreement is ratified.

5. The subsequent negotiations continued until February, 1997, when, at the request of the District, a Mediator was appointed pursuant to 14 Del.C. §4014(b) to assist the parties in reaching agreement.

6. Unable to bring the parties to settlement on all of the unresolved issues, the Mediator recommended the remaining unresolved issues be certified for Fact-finding.

7. On January 22, 1998, the PERB appointed a Fact-Finder pursuant to 14 Del. C. 4015(b).

8. On March 17, 1998, the Fact-Finder conducted a public hearing at which time the parties presented testimony, documentary evidence and argument in support of their respective positions. Supplemental information was also provided after the close of the fact-finding hearing.

9. On May 12, 1998, the Fact-Finder issued his findings of fact and recommended settlement.

10. Thereafter, the parties met on May 19, 1998, to discuss the Fact-Finder's report.

11. The parties met with representatives of the PERB on Thursday, May 28, 1998. At that time, the unresolved issues included proposals by the District involving the calculation of the disability benefit and the dental benefit.

12. At the meeting of May 28, 1998, each party submitted a position statement addressing the Fact-Finder's report. The Association accepted the Fact-Finders recommended settlement, in its entirety. The District accepted the Fact-Finder's recommended settlement except for that portion reducing the disability benefit for all employees except the two prior employees then receiving the higher disability benefit under the 1993-1996 collective bargaining agreement.

13. By the conclusion of the meeting on May 28, 1998, the parties agreed, in concept, to the terms of a successor agreement.

14. The Association scheduled a ratification vote by the general membership for 4:00 p.m., on Tuesday, June 2, 1998. The District's Board of Education was to review the settlement on the evening of June 2, 1998.

15. During the morning of June 2, 1998, Marilyn Scheel, a member of the AEA bargaining team, distributed an electronic mail message to AEA members requesting that they move to delay ratification because not all of the tentative agreements had yet been reduced to writing and/or signed by authorized representatives of the parties. These included: Dental, Health, Flex, Salary Retro Pay, EPER Positions and Retro Pay, Transfer/Reassignment, Grievance, Fair Share.

16. The parties met during June 2, 1998, and together drafted a document signed by Zen Marusa, the District's Personnel Director, Vickie Shaffner, the President of AEA and the Chair of the AEA negotiating team, DSEA representative Rudy Norton.

17. At approximately 4:00 p.m., on June 2, 1998, the general membership of AEA met to consider the contract tentatively agreed to by the negotiating teams. The proposed Agreement was read aloud by the Chair of the AEA negotiating committee. Less than a majority of those present voted to accept the proposed Agreement.

18. At its meeting on the evening of June 2, 1998, the Board of Education voted to unilaterally implement its last, best contract offer. Doing so necessarily altered the status quo of mandatory subjects of bargaining,

19. At approximately 8:19 a.m. on Wednesday, June 3, 1998, the District's Superintendent sent the following electronic mail message to Marilyn Scheel, who had initiated the E-mail seeking a delay in the ratification vote:

I received your notice and will forward copies to  
Dave Williams, Rudy Norton, and the PERB board.  
It is unfortunate that you would do this and I will  
discuss this with you.

20. On June 3, 1998, the District's Superintendent wrote directly to all teachers, advising them, *inter alia*, of the District's decision to unilaterally implement its last offer.

21. By memorandum dated June 3, 1998, the District's Personnel Director informed all bargaining unit employees that if they desired dental coverage under the imposed Agreement, enrollment was required by 12:00 noon, June 5, 1998.

22. By memorandum dated June 11, 1998, the AEA requested to meet with the District concerning: "Article 26-Fringe Benefits, Section E; Article 13-Teacher Evaluation, Section F; and Appendix H.

23. By memorandum dated June 16, 1998, the District denied the AEA's request to meet.

24. By letter dated June 12, 1998, counsel for the District informed the two former employees then receiving a disability benefit calculated pursuant to the terms of the 1993-1996 Agreement of a reduced benefit pursuant to the terms of the unilaterally imposed Agreement.

25. The legality of the Board's meeting on June 2, 1998, was challenged in a Complaint filed with the State Department of Justice. In an opinion dated July 6, 1998, the Department of Justice directed that the Board hold a second meeting and provide a public summary of the discussions and the result of the vote to unilaterally impose its last offer.

26. On August 4, 1998, the Board of Education met to comply with the directive of the Department of Justice.

On September 28, 1998, the Association filed an unfair labor practice charge alleging conduct by the District in violation of the Public School Employment Relations Act, 14 Del.C. Ch. 40, (hereinafter "the Act"), specifically:

1. The decision by the District's Board of Education to impose its last best offer constitutes an unfair labor practice under 14 Del.C. §4007 (a)(5) because it unilaterally changed terms and conditions of employment while the 1993-1996 Agreement remained in effect by virtue of the parties' agreement to extend the 1993-1996 Agreement until a successor agreement was ratified.
2. The June 3 letter from Superintendent Marchio constituted an act by a Public School Employer which tended to dominate and interfere with the administration of a labor organization

in violation of 14 Del. C. §4007(a)(2) and constituted an act by a Public School Employer which violated the District's obligation to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate bargaining unit in violation of 14 Del. C. §4007 (a)(5).

3. The June 3 e-mail message from Tony Marchio to Marilyn Scheel constituted an act by a Public School Employer which tended to interfere with, restrain or coerce an employee because of the exercise of a right guaranteed under 14 Del.C. Chapter 40, in violation of 14 Del.C. §4007(a)(1).

In addition to its request for an Order directing the District to cease and desist from such conduct the Petitioner also requested that the PERB issue preliminary relief in the form of an Order returning the parties to the *status quo ante* as it existed under the 1993-1996 Agreement.

On October 9, 1998, the District filed its Answer denying the allegations set forth in the Charge and contesting the request for preliminary relief

The request for preliminary relief is based solely upon the District's unilaterally imposing its last offer. Had it not done so, the disability benefits would not have been reduced. The Charge was bifurcated in order to expedite a ruling not only as to the request for preliminary relief but also as to whether or not, based upon the facts presented, the District violated 14 Del. C. §4007(a)(5), by unilaterally implementing its last offer after rejecting the Fact-Finder's recommended settlement.

A hearing was held before the Executive Director of the PERB on Tuesday, November 17, 1998 and Friday, November 20, 1998, at which time the parties presented testimony and documentary evidence in support of their respective positions. Closing argument was submitted in the form of expedited, simultaneously filed written briefs.

The decision denying AEA's request for preliminary relief was issued on Wednesday, December 2, 1998. The following opinion and decision addressing whether the District violated 14 Del. C. §4007(a)(5) by unilaterally implementing its last offer after rejecting the Fact-Finders recommended settlement is based upon the record thus compiled.

## PRINCIPAL POSITIONS OF THE PARTIES

**Association:** The Petitioner contends that the extension agreement not only bound the parties to abide by the terms of the 1993-96 Agreement but also extended the duty to bargain until a successor Agreement was ratified. Consequently, the District was precluded from unilaterally altering any provision of the 1993-96 Agreement.

14 Del.C. Chapter 40, neither defines when the duty-to-bargain ceases nor authorizes an Employer to unilaterally declare that its duty-to-bargain has ended and unilaterally impose whatever terms and conditions it chooses. Where public employees have no right to strike, such action should not be available to an Employer even after the exhaustion of the formal impasse resolution procedures.

Even if the PERB is reluctant to find that a public school employer may never unilaterally alter the status quo of a mandatory subject of bargaining, the facts of the current matter do not entitle the District to unilaterally impose its last offer. After the District rejected the Fact-Finder's recommended settlement continuing negotiations resulted in the tentative resolution of all outstanding issues. Yet, within hours after the Association's membership failed to ratify the tentative agreement, the Board voted to unilaterally impose its last offer without attempting to determine the reason for the failed ratification or whether additional discussions might prove fruitful.

AEA requests that an order be issued returning the parties to the *status quo ante*, as it existed under the 1993-96 Agreement.

**District:** The District points out that the parties to the 1993-1996 Agreement are the Board of Education and the Appoquinimink Education Association. The Agreement provides, in relevant part:

Article I, Negotiations of Successor Agreement, provides:

- B. This Agreement shall be in effect until June 30, 1996.
- C. This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by both parties.

Article 31, Duration of Agreement:

A. This contract covers three school years, 1993-94, 1994-95, 1995-96. This contract expires on June 30, 1996 unless extended by agreement of both parties.

The District asserts that Mr. Zawislak had limited authority only to enter into tentative agreements which were non binding until ratified by the Board and the AEA membership. Mr. Zawislak did not seek the prior approval of the Board before signing the extension agreement nor did he subsequently provide a copy to the Board members, except for Board Member Thomas and the Board did not subsequently ratify the extension agreement.

Even if Mr. Zawislak represented to the Association that he was authorized to sign an extension agreement such representation, in the absence of proof that the Board did or said something upon which the Association reasonably relied, does not constitute apparent authority.

Even if Mr. Zawislak is found to have possessed authority to enter into an extension agreement, he exceeded that authority by signing this specific agreement permitting the Association to “unilaterally, indefinitely extend the Agreement notwithstanding the Board’s negotiation to impasse and the AEA’s bad faith in declining to ratify the tentative agreement.”

The District maintains that impasse is reached after collective bargaining has run its course. Here, the fact-finding process was completed without a settlement being reached. Citing private sector precedent and §4002(k), of the Act, the District argues that having satisfied its duty to negotiate in good faith the District properly exercised its statutory right to implement its last, best offer.

The District also argues that to continue all of the terms of an expired agreement indefinitely would vest in the AEA the power to unilaterally and indefinitely perpetuate an Agreement beyond fact-finding regardless of the economic condition of the District and violate public policy.

The District contends that disability benefits for retirees is a permissive subject of bargaining which could be unilaterally modified upon the expiration of the 1993-96 Agreement.

The District maintains there is no basis for severing the 1993-96 Agreement. Consequently, should AEA prevail order returning the parties to the *status quo ante* must apply to the Agreement, as a whole.

### ISSUE

**Whether by unilaterally imposing its last offer following the conclusion of the Fact-finding process the District violated 14 Del.C. §4007(a)(5), as alleged? If so, what is the appropriate remedy?**

### PRINCIPAL TESTIMONY OF THE WITNESSES

Mark Zawislak testified that he was assigned in 1996 by the District Superintendent, Tony Marchio, to be the chief negotiator for the Appoquinimink School District. Mr. Zawislak did not personally meet with the Board prior to the meeting in April, 1996, at which time ground rules were discussed and the parties agreed to extend the 1993-96 collective bargaining agreement until a successor agreement was ratified. Mr. Zawislak testified unequivocally that Superintendent Marchio was present at that April meeting. He specifically recalled his embarrassment when he introduced the Superintendent as Mr. Marusa rather than Mr. Marchio.

Although Mr. Zawislak was to draft the extension agreement, his trip to the 1996 Olympics Games intervened and he forgot to do so. At the next meeting on July 2, 1996, the parties jointly drafted the extension agreement which he and AEA President, Vickie Shaffner, signed.

Mr. Zawislak believed he was authorized to execute the extension agreement and in doing so bind the District. From his involvement in prior negotiations, most specifically the negotiations culminating in the 1993-96 Agreement when a similar extension agreement was executed, Mr. Zawislak considered extending the current agreement during collective bargaining negotiations to be the accepted practice. When informed by Mr. Zawislak that a similar document had been executed at the start of the prior negotiations Superintendent Marchio did not object to the agreement extending the term of the 1993-96 Agreement.



Mr. Zawislak has no formal training or background in labor law. He does not know when impasse occurs or what options, if any, are available to an employer when impasse is reached. Because of their lack of expertise, both he and his successor, Dr. Freeman Williams,<sup>1</sup> requested that the District's attorney conduct the negotiations. Mr. Zawislak continuously up-dated and informed Superintendent Marchio concerning the details of the contract negotiations

Mr. Zawislak frequently met with the Board to advise the members of the Board to advise the members of the bargaining progress. Although he did not provide the Board with a copy of the extension agreement he advised them “. . . we were abiding by the terms of the old contract until we had negotiated a new contract. That was the topic of discussion at several Executive sessions regarding the fact that we were living by the terms of the old contract . . .”

Mr. Zawislak testified that he did not fully comprehend the difference between “ratification of a contract” and “bargaining a new contract”. Mr. Zawislak believed that Superintendent Marchio was advising the Board concerning the negotiations and that any objection by the Board concerning the conduct of the negotiations would be communicated to him.

Mr. Zawislak did not recall whether Board member Dave Thomas was present on July 2, 1996, when the extension agreement was signed. Nor did he recall giving Mr. Thomas a copy of the extension agreement. When Mr. Zawislak left on medical leave in approximately August, 1996, he gave his negotiations manual to Superintendent Marchio. The first page of the manual was a copy of the extension agreement.

Mr. Zawislak believed the Board's impatience in reaching settlement resulted from a belief that modifying the disability clause required a new contract. Mr. Zawislak denied telling Rudy Norton, the DSEA representative, that he had consulted with the Board and was authorized to sign the extension agreement.

Dave Thomas, a member of the Appoquinimink School Board, testified that as the “Board Representative” on the District's bargaining team he attended approximately 90% of the bargaining

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<sup>1</sup> Mr. Zawislak was on medical leave of absence from approximately August, 1997, until February, 1998. During his absence Dr. Williams served as the chief spokesperson for the District.

sessions primarily as an observer. Although he was not present at the meeting of July 2, 1996, he was given a copy of the extension agreement by Mr. Zawislak approximately one (1) week later. Mr. Thomas believed the document reflected the AEA's intent "to protect their people so we [Board] could not change anything from the past years . . ." Mr. Thomas did not inform the Board of the extension agreement

Mr. Thomas testified that as individual issues were resolved, the tentative agreements were initialed and the negotiations proceeded. The only change to the 1993-96 Agreement during the negotiations concerned the AEA Hiring Agreement which the Board voted to accept. The entire contract consisting of all tentative agreements was subject to ratification by both the Board and the general membership of AEA. When the Board voted on June 2, 1998, to impose its last, best offer Mr. Thomas did not consider it necessary to raise the existence of the extension agreement because it was not part of the package that had been negotiated or its last, best offer which the Board was considering imposing.

Superintendent Marchio testified that the Board never formally acted upon the extension agreement dated July 2, 1996, which Mr. Marchio first saw during the discussions in preparation for the unfair labor practice hearing. Subsequent to June 30, 1996, the District continued to operate under the terms of the 1993-96 Agreement after being advised by counsel that doing otherwise might be perceived as an unfair labor practice.

Superintendent Marchio did not recall attending any of the negotiating sessions involving a successor to the 1993-96 collective bargaining agreement. He believed that, as the chief negotiator for the District, Mr. Zawislak was responsible for coordinating the negotiating sessions. Although he could discuss issues the final decision was reserved to the Board.

Rudy Norton, a Staff Representative for the DSEA and the chief spokesperson for the AEA bargaining team, testified that the agreement to extend the 1993-96 Agreement occurred when the parties met in April, 1996. Although Mr. Zawislak frequently signed the tentative agreements reached by the parties during the course of the negotiations, Mr. Norton was aware there were occasions when Mr. Zawislak had prior discussions with the Board before doing so. According to Mr. Norton, Mr. Zawislak

stated that he had discussed extending the 1993-96 Agreement with the Board prior to signing the document.

While he acknowledged that the entire package of tentative agreements is subject to ratification by both the AEA membership and the Board, Mr. Norton did not consider the extension agreement to be a tentative agreement. He did not sign the extension agreement because it was an agreement between the AEA and the District and not a tentative agreement concerning a term of the successor agreement being negotiated. Mr. Norton believes that the extension agreement extends the 1993-96 Agreement indefinitely until such time as a successor agreement is ratified. Prior to signing the extension agreement there was no discussion concerning its status should impasse occur. Mr. Norton contends that the current impasse has no impact upon the terms of the extension agreement.

Vickie Shaffner, the President of AEA, has participated in numerous prior negotiations in the Appoquinimink School District. Ms. Shaffner testified that extending an existing contract during the negotiation of a successor agreement: “. . . was something that we had always done before with the District - Come up with a document like this.” At the time the agreement was reached Mr. Norton requested that it be in writing. There was no objection from the District and Mr. Zawislak agreed to prepare the document and bring it to the next meeting. At the meeting of July 2, 1996, Mr. Zawislak stated that he had simply forgotten to prepare the document so it was drafted and signed at the meeting. Mr. Zawislak made no comment about having discussed the extension agreement with the Board. Like Mr. Norton, Ms. Shaffner considered the 1993-96 Agreement binding until a successor agreement was ratified.

The ground rules agreed upon by the parties provided that tentative agreements would be initialed by the two (2) chief spokespersons, Mr. Zawislak for the District, and Mr. Norton, for the Association. The AEA was aware that, on occasion, Mr. Zawislak did discuss specific issues with the Board before signing the tentative agreement reached at the bargaining table. Ms. Shaffner was unaware of any discussions between Mr. Zawislak and the Board concerning the extension agreement. All tentative agreements were marked “TA” and signed by the chief negotiators From July 1, 1996, until June 2, 1998,

when the Board unilaterally implemented its last, best offer, the parties at all times operated under the provisions of the 1993-96 Agreement.

Ms. Shaffner did not discuss nor did she present the extension agreement for ratification to the general membership because it was not a tentative agreement. It was a document she was authorized to sign as the President of the Association.

Emily Carpenter, a member of the Association's negotiating team wrote the extension agreement. She was present during the preliminary discussions and the signing of the document. There was no discussion concerning any impact upon the extension agreement if the parties reached or either party failed to ratify the package of tentative agreements reached by the negotiating teams. Ms. Carpenter also believes the extension agreement perpetuates 1993-96 until a successor agreement is ratified by both parties.

### **FINDINGS OF FACT**<sup>2</sup>

The record supports the following findings:

1. Through its Superintendent, the Appoquinimink School Board designated Mark Zawislak as its representative to meet with the authorized representatives of AEA for the purpose of negotiating a successor to the 1993-96 collective bargaining agreement.

2. Superintendent Marchio was present at the meeting in April, 1996, at which time the parties discussed and agreed to execute a written agreement extending the term of the 1993-96 collective bargaining agreement until a successor agreement was ratified by both parties.

3. The extension agreement was drafted by the parties on July 2, 1996, and signed by Mr. Zawislak, for the District, and Vickie Shaffner.

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<sup>2</sup> The findings of fact necessarily required credibility considerations which most frequently involve the recollection and perception of witnesses rather than the truthfulness of the testimony, itself. As one would expect considering their position as chief spokesperson and AEA President, respectively, the testimony of Mr. Zawislak and Ms. Shaffner was accorded significant weight. Both were highly credible witnesses in that they responded to the questions asked of them promptly and directly.

4. The subject of the extension agreement was discussed by Superintendent Marchio and Mr. Zawislak prior to its signing. Superintendent Marchio was informed that a similar document was signed during prior negotiations and he did not object to the agreement extending the term of the 1993-96 Agreement.

5. Mr. David Thomas was the Board's designated representative on the District's negotiating committee and attended approximately 90% of the negotiating sessions.

6. Although Mr. Thomas had no prior knowledge of the extension agreement, he was given a copy by Mr. Zawislak within approximately one (1) week after its execution.

7. Mr. Thomas did not object to the document. He simply placed it in his personal file but did not distribute the document to the individual Board members nor did he advise them of its existence.

9. Although Superintendent Marchio did not attend the bargaining session on July 2, 1996, when the document was signed, he received a copy of the extension agreement on page one (1) of the negotiations manual given to him by Mr. Zawislak who went on medical leave of absence in approximately August, 1996.

### **DISCUSSION**

The District's contention that the 1993-96 Agreement expired at midnight on June 30, 1996, because it was not modified by "an instrument in writing duly executed by both parties", as required by Article 1, Section C, is misplaced.

Article 1, Negotiations of Successor Agreement, provides, in relevant part:

C. This Agreement shall not be modified in whole or in part by the parties except by an instrument in writing duly executed by the parties.

Article 31, Duration of Agreement, provides, in relevant part:

A. This contract covers three school years, 1993-94, 1994-95, 1995-96. This contract expires on June 30, 1996, unless extended by agreement of both parties.

Rather than modifying the 1993-96 Agreement the extension agreement of July 2, 1996, was intended to extend the term of the Agreement. Compliance with a provision of an existing Agreement does not constitute a modification of that Agreement. The critical determination is whether the extension agreement signed by the District's spokesperson and the Association's President was "by agreement of both parties", as required by Article 31.

The District's contention that Mr. Zawislak's lacked authority to enter into an extension agreement and in so doing bind the Board is unpersuasive. The ground rules governing the negotiations were discussed when the parties met in April, 1996. At this meeting extending the 1993-96 Agreement until a successor agreement was in place was also discussed and agreed upon. Not only was Superintendent Marchio present at the April meeting he subsequently received Mr. Zawislak's bargaining manual containing a copy of the written extension agreement executed on July 2, 1996, when Mr. Zawislak went on medical leave in approximately August, 1996. Whether or not Superintendent Marchio actually reviewed the manual or simply passed it along to Mr. Zawislak's successor, Dr. Freeman Williams, is irrelevant since he had actual knowledge of the agreement since the meeting in April, 1996. Superintendent Marchio neither objected to the agreement extending the 1993-96 Agreement nor did he consider necessary to inform the Board.

Board member Thomas characterized himself as the "Board Representative" on the District's negotiating team. Mr. Thomas functioned primarily as an observer and provided input when requested. Mr. Thomas testified that he received a copy of the extension agreement within approximately one (1) week after the document was signed by Mr. Zawislak and Ms. Shaffner. He apparently did not consider it unusual or outside the scope of Mr. Zawislak's authority since he merely filed it away without distributing it to the other Board members or advising them of its existence.

The Association was aware of Superintendent Marchio's knowledge since he was present at the time the extension agreement was first discussed and agreed upon. Whether it was aware that Mr. Thomas also had actual knowledge of the agreement is irrelevant since the Association could reasonably expect

that the Board's representative on the District's negotiating team would be updated on the status of the negotiations including issues resolved and agreements reached during his absence.

The statutory duty to "confer and negotiate in good faith" requires that the designated bargaining representatives possess the necessary authority to make timely decisions and commitments inherent in the collective bargaining process envisioned by the Act. The parties are entitled to rely upon reasonable assertions made and agreements reached at the bargaining table; otherwise, meaningful bargaining could not occur.

It is undisputed these same parties entered into similar agreements as a matter of course during prior negotiations. No evidence was offered to establish, nor did the District argue, that any of the prior extension agreements required Board approval. Furthermore, extending the terms of the 1993-96 Agreement was mutually beneficial in that it assured stability and predictability until a successor agreement was in place.<sup>3</sup>

Considering these circumstances, AEA's reliance on Mr. Zawislak's authority to enter into a binding extension agreement was not unreasonable.

The District's conduct during the period of July, 1996, and June, 1998, also supports the existence of a binding agreement. Mr. Thomas testified that only one (1) change to the 1993-96 Agreement occurred during the period of the continuing negotiations. That change involving the AEA Hiring Agreement was, according to Board member Thomas, formally approved by a vote of the Board. Had the Board truly believed that the 1993-96 Agreement was not binding there was no reason for it to have "duly executed" a modification of the Agreement, as required by Article 1, Section C.

The District's argument that even if Mr. Zawislak possessed the requisite authority to enter into an extension agreement he lacked the authority to sign this specific extension agreement "permitting AEA to unilaterally, indefinitely extend the Agreement notwithstanding the Board's negotiation to impasse, and the AEA's bad

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<sup>3</sup> Even if one accepts the District's argument that actual authority was absent, it is clear under the facts presented that Mr. Zawislak had apparent authority to agree to extend the terms of the 1993-96 Agreement, the terms of which had been previously ratified by the Board. Cf. International Boiler Works Co. v. General Waterworks, Del. Supr., 372 A.2d 176 (1976) Billops et al. v. Magness Construction Company, Del. Supr., 391 A. 2d 196 (1978).

faith in declining to ratify the tentative agreement”, is likewise misplaced.<sup>4</sup>

The District’s contention is grounded upon two (2) assumptions: (1) The failure of the AEA membership to ratify the tentative agreement constitutes bad-faith bargaining; and (2) Absent a valid extension agreement there existed an absolute right to unilaterally alter the status quo of mandatory subjects of bargaining after the completion of the statutory fact-finding process.

With regard to the former, there has been no determination of bad-faith bargaining by AEA. A prerequisite to the initiation of fact-finding requires a determination by the PERB that the parties have, in fact, engaged in good-faith bargaining up to that point. No charge has been filed alleging bad-faith bargaining on the part of AEA, thereafter.

With regard to the latter, both the Superior and Chancery Courts of the State of Delaware have adopted the holding of the United State Supreme Court in NLRB v. Katz, (369 U.S. 763 (1962)) that an employer’s 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. Milford Ed. Assn. v. Bd. of Ed., et al., Del. Super., 811 C.A. 1976, Taylor, J. (Feb. 24, 1977); Caesar Rodney Ed. Assn. v. Bd. of Ed., et al., Del. Chan., C.A. No. 5635, Brown, V.C. (June 30, 1978).<sup>5</sup>

The PERB has previously determined that a public employer in Delaware may not unilaterally alter the status quo of a mandatory subject of bargaining at the time impasse is declared resulting in a request for mediation.

There is no statutory basis upon which to conclude that impasse, a prerequisite for mediation, also permits the employer to unilaterally alter the status quo. To the contrary, such a conclusion would be inconsistent with the declared policy of the State and the purpose of the statute which is to “. . . promote harmonious and cooperative

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<sup>4</sup> The fact that Mr. Zawislak used the word negotiation instead of ratification when explaining the intent of the document is irrelevant. The document was intended to extend the 1993-96 Agreement until a specific condition, ratification, occurred. This condition was never satisfied because of the Board’s decision to unilaterally implement its last, best offer.

<sup>5</sup> Both Delaware cases were decided prior to the enactment of the PSERA (14 Del. C. Chapter 40) which for the first time provided for the extended dispute resolution procedures of mediation and fact-finding.



relationships between reorganized public school districts and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public school system” 14 Del.C. Section 4001. New Castle County Vo-Tech. Ed. Assn. v. Bd. of Ed., Del. PERB, ULP No. 88-05-025 (PERB Binder I, p. 309 (1988)).

Whether a party may do so when fact-finding fails to achieve a settlement has never been addressed by the PERB and raises a question of first impression.

It is significant that the PSERA is silent concerning when, if at all, and under what circumstances, if any, the duty to bargain in good faith ends thereby permitting unilateral changes to the status quo of mandatory subjects of bargaining. Numerous provisions, however, bear upon this question:

Section 4001. Statement of Policy

It is the declared policy of the State and the purpose of this chapter to promote harmonious and cooperative relationships between reorganized public school districts and their employees and to protect the public by assuring the orderly and uninterrupted operations and functions of the public school system. These policies are best effectuated by:

- (1) Granting to school employees the right of organization and representation;
- (2) Obligating boards of education and school employee organizations which have been certified as representing their school employees to enter into collective bargaining negotiations with the willingness to resolve disputes relating to terms and conditions of employment and to reduce to writing any agreements reached through such negotiations; and
- (3) Establishing a public employment relations board to assist in resolving disputes between school employees and boards of education and to administer this chapter.

Section 4002 . Definitions

(e): “Collective Bargaining” means the performance the mutual obligation of a school employer through its

designated 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.

(j) “Fact-finding” means the procedure by which a qualified impartial third party shall make written findings of fact and recommendations for resolution of an impasse.

(k) “Impasse” means the failure of a public school employer and the exclusive bargaining representative to reach agreement in the course of collective bargaining.

(l) “Mediation” means an effort by an impartial third party confidentially to assist in reconciling an impasse between the public school employer and the exclusive bargaining representative regarding terms and conditions of employment

(p) “Strike” means a public school employee’s failure, in concerted action with others, to report for duty, or his or her willful absence from his or her position, or his or her stoppage or deliberate slowing down of work, or his or her withholding in whole or in part from the full, faithful and proper performance of his or her duties of employment, or his or her involvement in a concerted interruption of operations of a public school employer for the purpose of inducing, influencing or coercing a change in the conditions, compensation rights, privileges or obligations of public school employment; however, nothing shall limit or impair the right of a public school employee to lawfully express and communicate a complaint or opinion on any matter related to terms and conditions of employment.

Not only the policy statement set forth in Section 4001, but throughout the Act the overriding theme is resolving issues of paramount interest to both public school employers and employees through cooperation and negotiation. Where this fails, rather than leave the parties to their own devices the Act contains numerous methods for providing assistance. At Section 4006, Public Employment Relations Board (PERB), the legislature established an administrative body whose members “shall be knowledgeable in the area of labor relations” and whose purpose it is “to assist in resolving disputes between school employees and Boards of Education and to administer this chapter”. 14 Del.C. §4001(3) (1984).

In order to address potential problems before confrontation occurs, the Public Employment Relations Board is authorized:

To provide by rule a procedure for the filing and prompt disposition of petitions for a declaratory statement as to the applicability of any provision of this chapter or any rule or order of the Board. Such procedures shall provide for, but not be limited to, an expeditious determination of questions relating to potential unfair labor practices and to questions relating to whether a matter in dispute is within the scope of collective bargaining. 14 Del.C. Section 4006(h)(4) (1984).

In addition to issuing declaratory statements, Section 4007, Unfair Labor Practices - Enumerated, authorizes the PERB to resolve issues allegedly involving prohibited conduct as set forth, therein. Section 4008, Disposition of Complaints, provides the procedure for resolving unfair labor practice allegations.

Where, as here, the parties are unable to reach agreement during collective bargaining, Section 4014, Mediation, provides for the assistance of a third part neutral. If mediation fails to produce agreement concerning the unresolved issues, Section 4015, Fact-finding, requires a public hearing after which the Fact-finder issues his or her findings of fact and recommended settlement.

Impasse in the private sector entitles the parties to initiate economic action to exert pressure upon the other. These include strikes, lockouts and the replacement of strikers. Impasse under the PSERA triggers the impasse resolution procedures of mediation and fact-finding. Unlike private sector employees,

public sector employees in Delaware are prohibited from striking or participating in other concerted conduct inconsistent with the full and faithful performance of their employment responsibilities. 14 Del.C. Section 4002(p).

The absence of the right of public employee's to engage in concerted activity in support of their positions during collective bargaining is a critical consideration. Unlike the private sector, public employees in Delaware have no meaningful leverage at the bargaining table and must rely upon the bargaining obligation imposed upon both parties to protect their collective interests.

Because of this distinction, the facts underlying the private sector decision in NLRB. v. Katz (Supra.), upon which the District relies, are clearly distinguishable from those underlying the current dispute. The PERB has recognized that because significant distinctions exist between the public and private sectors decisions issued by the National Labor Relations Board, while valuable, do not necessarily provide an infallible basis for decisions in the public sector. Seaford Ed. Assn. v. Bd. of Ed., Del. PERB, ULP No. 2-2-84 (PERB Binder I, p. 1 (1984)).

There is no reason why the rationale supporting the decision in New Castle Vo-Tech. Ed. Assn. v. Bd. of Ed. (Supra.) rejecting the right of a public employer to unilaterally alter the status quo when impasse is declared and mediation is requested should not apply to the current matter. There, the Executive Director determined:

The District's reliance on Katz (Supra.), to support such a right is misplaced. 14 Del.C. Section 4016, Strikes Prohibited, sub-section (a) provides that "No public employee shall strike while in the performance of his or her official duties." The integrity of the collective bargaining process is of crucial importance and, if it is to be maintained, the statutory prohibition on self help must necessarily impose upon the employer a correlative duty to refrain from altering terms and conditions of employment during the course of negotiations. The duty is greater in the public sector than in the private sector where employees have a means to balance the relative bargaining positions of the parties

by exercising their right to strike, a right expressly precluded by the Delaware statute.

A motivating factor contributing to successful bargaining under the Public School Employment Relations Act is the requirement to resolve issues by mutual agreement rather than forced implementation. To confer upon a public employer the absolute right to summarily and unilaterally alter the status quo of mandatory subjects of bargaining by implementing its last offer renders the statutory good faith bargaining requirement meaningless and frustrates the overriding purpose of the Act.

Contrary to the District's contention, the absence of such a right does not create the ability for an employee organization to hold the employer hostage interminably, if it so desires. The Association's position ultimately rests with the employees in the bargaining unit through either ratification or rejection of the tentative settlement and selecting and rejecting those who represent them. On the other hand, where the employer believes an employee representative is not bargaining in good faith, redress is available through the unfair labor practice provisions of the Act.

The PERB administers three (3) statutes, namely: Public School Employment Relations Act, 14 Del.C. Chapter 40 (1984), as amended in 1989 to cover all public school employees except administrators and confidential employees; Police Officers and Firefighters Employment Relations Act, 13 Del.C. Chapter 16 (1986), as amended in 1992; and Public Employment Relations Act, 14 Del.C. Chapter 13 (1994), covering nearly all of the State's remaining public sector employees. Since the enactment of these statutes in all cases the parties have successfully bargained to agreement. Even where the Factfinders recommended settlement was not accepted, it either formed the basis for settlement or the parties continued bargaining until a settlement was mutually and voluntarily reached. This is the first instance in which a public employer has attempted to unilaterally impose its last offer after the completion of fact-finding.

This decision does not require that a public employer never make changes in the status quo of mandatory subjects of bargaining. It is foreseeable that extraordinary or compelling circumstances might arise during the collective bargaining process, or possibly during the term of an existing agreement, of sufficient gravity as to justify such changes.

Such circumstances, however, clearly do not exist here. In addition to the existence of a valid extension agreement extending the term of the 1993-96 Agreement, Mr. Zawislak perceived the District's urgency was motivated primarily by its desire to escape from what it considered the unfair and burdensome disability provision in the 1993-96 Agreement. Simply because the District was unhappy with the disability provision is not an extraordinary or compelling reason justifying the imposition of its last offer.

The District's dissatisfaction with the disability provision contained in the 1993-96 Agreement was not the sole motivation for its decision to reject the Fact-finder's recommended settlement and unilaterally impose its last, best offer. Board member Mr. Thomas testified, in relevant part:

I think the main focus of imposing was to get the contract done, so that the teachers could get their raises and that we could put all this behind us. We had a referendum coming up and we wanted to get things in order, so that we could have a lot of dissension and everything behind us. Because the teachers were coming to the Board meetings with signs and everything else. And we wanted to get all that behind. You give the teachers the raise they deserved and that was the main focus of our discussion in getting this thing settled.

By attending Board meetings the teachers were exercising their §4002(p) right to "lawfully express or communicate a complaint or opinion" on matters involving terms and conditions of employment. According to Board member Thomas, the Board was concerned that the contract dispute would negatively impact the approaching referendum. It, therefore, determined it was time to put the negotiations behind by unilaterally imposing its last, best offer.

Despite the District's allegation of bad faith by the Association, there was no recommendation or encouragement by the AEA officers or bargaining team to reject the tentative agreement. The E-mail of the morning of June 2, 1996, authored by one (1) individual, urged only that the AEA membership delay the ratification vote until the Association's internal procedures, including having all language written and signed by the authorized representatives and a copy of the completed contract available for review.

The Board's decision to unilaterally implement its last, best offer followed by only a few hours the AEA membership's failure to ratify the tentative agreement. The Board made no effort to determine the reason for the failed ratification or attempt to salvage the tentative agreement reached by the two (2) negotiating teams.

A public employer and the certified representative share a statutory duty to bargain in good faith over mandatory subjects of bargaining. The Board's action reflects that which the Act is intended to prevent. Except for the most compelling or extraordinary circumstances a public employer is not free to ignore its bargaining obligation and impose upon the bargaining unit terms and conditions of employment which it alone determines.

The District's contention that bargaining on behalf of retirees is a permissive subject of bargaining, although undisputed, is irrelevant. In the absence of a binding collective bargaining agreement the status quo of permissive subjects of bargaining may be unilaterally altered. Here, however, it is the terms of the 1993-96 Agreement rather than the operation of PSERA which binds the District to the disability benefit set forth, therein.

### **CONCLUSIONS OF LAW**

1. The Appoquinimink Education Association, DSEA/NEA is an employee organization within the meaning of §4002(h) of the Public School Employment Relations Act, 14 Del.C. Chapter 40, and is the exclusive bargaining representative of the Appoquinimink School District's certificated classroom teachers within the meaning of 14 Del.C. §4002(I).

2. The Appoquinimink School District is a public school employer within the meaning of Section 4002(n), of the Act.

3. Consistent with the foregoing findings and opinion, it is determined that:

By unilaterally imposing its last offer following the conclusion of the Fact-finding process, the District violated 14 Del.C. Section 4007(a)(5), as alleged.

**ORDER**

1. The District is to cease and desist from engaging in conduct in violation of 14 Del.C. Section 4007(a)(5).
2. The parties are to return to the *status quo ante* as it existed under the terms of the 1993-96 Agreement.
3. The Order is retroactive to June 2, 1998. Either party or any individual affected by the District's action is to be placed in the same position they would have been had the District not implemented its last offer.
4. Authorized representatives of the parties shall meet for the purpose of agreeing upon a prompt and equitable procedure for complying with this Order.
5. If within thirty (30) calendar days from the date of this decision there is no agreement establishing a procedure for complying with this Order either party may petition the Executive Director to direct the method of compliance.
6. Consistent with this decision and pursuant to the requirements of Section 4002(e), the parties are to resume bargaining until such time as a successor agreement is in place.

DATED: 14 December 1998

/s/Charles D. Long  
Charles D. Long,  
Executive Director