

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

)	
CAESAR RODNEY EDUCATION ASS'N.,DSEA/NEA)	
Petitioner,)	
)	
and)	<u>ULP No. 96-01-165</u>
)	
CAESAR RODNEY SCHOOL DISTRICT, BD. OF ED.,)	
Respondent)	
)	

INTERIM DECISION RE: JURISDICTION

BACKGROUND

The Caesar Rodney Education Association (hereinafter "Association" or "Petitioner") is the exclusive bargaining representative of the public school employer's certificated professional employees, within the meaning of §4002(i) of the Public School Employment Relations Act, 14 Del.C. Chapter 40 Supp. 1990, (hereinafter "Act"). The Caesar Rodney School District (hereinafter "District" or "Respondent") is a public employer within the meaning of 14 Del.C. §4002 (m).

The Association filed an unfair labor practice charge on January 23, 1996. The Charge alleges that by refusing to schedule a Level III grievance meeting for an employee who voluntarily resigned during the processing of her grievance, the District violated §1307(a)(1), (2) and (5), and §4003(2), of the Act.

On February 7, 1996, the District filed its Answer denying the allegations contained in the Charge and setting forth New Matter and a Counter-Charge.

On February 20, 1996, the Association filed a Response denying the allegations contained in the New Matter and the Counter Charge and setting forth New Matter with regard to the latter.

On February 8, 1996, the District filed a Response denying the New Matter set forth in the Association's Answer to the Counter Charge.

The following relevant facts are forth in the Stipulation of Facts submitted jointly by the parties: A written grievance was filed on September 11, 1995, by Bette Wells, a part-time art teacher. The grievance alleged that Dr. David Robinson, the Principal at Caesar Rodney High School, violated the terms of the collective bargaining agreement by not offering her the full-time art teacher position which was available at the beginning of the 1995-96 school year. The grievance requested she be awarded the position and receive the appropriate rate of pay retroactive to the start of the school year.

By letter dated September 12, 1995, Dr. Robinson denied the grievance. Ms. Wells filed a timely appeal to Level II where the grievance was heard by Dr. William J. Bach, the District Superintendent, on September 25, 1995. On October 2, 1995, Dr. Bach issued the Level II answer denying the grievance.

By letter dated September 26, 1995, prior to the date of the Level II answer, grievant Wells resigned (effective September 29, 1995) to accept full-time employment elsewhere.

On October 4, 1995, the grievant properly appealed the grievance to Level III. Also on October 4, 1995, Association President White wrote to Dr. Bach advising him of the Association's intent to pursue the matter until both it and the grievant received a satisfactory response.

By letter dated October 10, 1995, Superintendent Bach advised Association President White that the grievant's request for Level III Review would be considered by the Board of Education at its next regularly scheduled meeting.

By letter dated October 26, 1995, Dwight Meyer, Board of Education President, advised the grievant of the following:

Your notice of appeal for a Level III Board hearing on the grievance that you initiated on September 11, 1995, was presented to and considered by the Caesar Rodney District Board of Education at its meeting on October 17, 1995. Your requested resolution for the alleged grievance, i.e., "reassignment to a full-time art teacher at Caesar Rodney High School with retro-active seniority and pay to beginning of 1995-96 school year", as well as your resignation, effective September 29, 1995, to take a full-time position in another school district was noted. Under these circumstances, it is the decision of the Board that your grievance is moot and that further processing of it would violate the purpose of the grievance procedure as set out in the Collective Bargaining Agreement between the Board of Education of the Caesar Rodney School District and the Caesar Rodney Education Association, to wit. "...to secure, at the lowest possible level, equitable solutions to the problems which may from time to time arise affecting employees." Thus, the Board is unable to schedule a Level III Board Hearing on this matter.

No Level III meeting was ever held, no Level III answer was issued and the Association did not appeal the grievance to Level IV, which is final and binding arbitration.

RELEVANT CONTRACT PROVISIONS

ARTICLE II

GRIEVANCE PROCEDURE

A. Definitions

1. A “grievance” shall mean a complaint by an employee or the Association that there has been to the employee a violation or inequitable application of any of the provisions of this Agreement.
2. An “aggrieved person or grievant” is the person, persons or Association making the complaint.

B. Purpose

The purpose of this procedure is to secure, at the lowest possible level, equitable solutions to the problems which may from time to time arise affecting employees.

C. Procedure

3. LEVEL THREE - BOARD HEARING

- a. If the answer of the Superintendent is not accepted, the grievant, within five (5) days after receiving the Superintendent’s answer, may request that the grievance be heard by the Board of Education.
 - b. Appeals to the Board of Education shall be filed with the Superintendent by the grievant through the Association by completing the “Notice of Appeal” on the grievance form.
 - c. The hearing shall be scheduled within twenty-one (21) days of the filing of the appeal unless a later date is agreed to within five (5) days of the filing.
4. If the answer of the School Board is not accepted, the grievant within five (5) days from receiving

the School Board's answer may request that the grievance be submitted to final and binding arbitration. The grievance shall not proceed to arbitration without the written endorsement from the Association and representation of the Association.

E. Arbitrability

- a. If the parties disagree as to whether a matter is subject to arbitration, either party may request a conference with the other party to discuss the issue of arbitrability without jeopardizing the grievance process.
- b. If the disagreement over arbitrability is not resolved in the conference, the subject of arbitrability will be submitted to arbitration without jeopardy to the grievance at the point arbitrability was raised.

ISSUES

1. Whether the PERB lacks jurisdiction to consider the instant Charge because to do so requires the interpretation of the collective bargaining agreement?
2. Whether by failing to appeal the Wells grievance to arbitration the Association has waived its right to file the instant unfair labor practice charge with the PERB?

PRINCIPAL POSITIONS OF THE PARTIES

Issue No. 1: Relying upon Article II, Section B, of the collective bargaining agreement, the District argues that following her resignation grievant Wells lacked standing to pursue a grievance seeking her assignment to a full-time position which she has no intention of accepting.

Since the Association disputes the School Board's interpretation of Article II, Section B, a resolution of the dispute necessarily requires the interpretation of the disputed contract language. According to established Delaware case law, the PERB's jurisdiction is limited to resolving statutory issues which does not include issues involving the interpretation and application of contract language. Indian River Education Ass'n. v. Bd. of Ed., Del.PERB, ULP No. 85-06-005 (Dec. 16, 1998).

In addition to the established case law, the District argues that Article II, Section E, of the collective bargaining agreement requires that unresolved issues concerning arbitrability be submitted to an arbitrator without prejudice to the grievance at the point the issue of arbitrability was raised.

The District argues the prior decision issued by the PERB in Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine Bd. of Ed., Del. PERB, ULP No. 85-06-005 (Feb. 5, 1986), in which the PERB accepted jurisdiction, has no bearing upon the current dispute. Unlike Brandywine case, there is no existing past practice definitively establishing the status quo in this matter.

The Association maintains the PERB has routinely accepted jurisdiction over issues involving alleged unilateral changes in the status quo of mandatory subjects of bargaining, holding that contract language which is clear and unambiguous effectively establishes the status quo. Id. at 674. In the absence of an express contractual exception excluding a subject from the scope of the grievance process, only the most forceful evidence of an intent to exclude the matter from the negotiated grievance procedure can prevail. Id. at 677.

The Association disputes the District's contention that the Brandywine decision (Supra.) requires the presence of a valid prior practice before PERB can assume jurisdiction to determine whether an improper unilateral change in the status quo of a mandatory subject of bargaining has occurred.

The Association contends that because the requested remedy includes retro-active back grievant Wells has standing to pursue her grievance through the contractual grievance procedure.

Issue No. 2: Article II, Section 4.a., provides that a grievance can proceed to arbitration only with the written endorsement and representation of the Association. Accordingly, the District argues, when Ms. Wells and the Association declined to appeal the grievance to arbitration following the Board's refusal to schedule a Level III meeting, the Association waived all right to complain of the Board's actions before the PERB.

The District contends that when the Association filed the instant unfair labor practice charge rather than appeal the grievance to arbitration, it committed an unfair labor practice by attempting to alter the status quo between the parties.

The Association argues that by failing to hold a Level III meeting and issue a Level III decision the District removed arbitration as a forum available to the Association to resolve the dispute. More importantly, the Association contends that Level IV, the final step of the contractual grievance procedure, is not involved here, the only issue being whether or not the District's refusal to schedule a Level III Board hearing violates the Act.

DISCUSSION

Issue No. I: In Brandywine Affiliate, NCCEA/DSEA/NEA v. Brandywine School District Bd. of Ed., (Del.PERB, ULP No. 85-06-005 (01/05/86)), the PERB observed:

It is important to understand the issue here is not whether the disputed action taken by the District was in violation of the labor agreement. What is at issue is whether or not the District's action constituted a unilateral change in the status quo sufficient to violate section 4007(a) of the Act, as alleged. In an

unfair labor practice proceeding it is of no consequence
that the disputed conduct may also constitute a violation of
the collective bargaining agreement.

In Brandywine, in order to establish the status quo the Association relied upon a provision of the collective bargaining agreement which, it maintained, gained its meaning from a long-standing practice between the parties. In dismissing the unfair labor practice charge, the PERB concluded the alleged practice did not exist. Consequently, the Association failed to establish the existence of the status quo upon which it relied.

Although in Brandywine, the Association relied upon an existing practice to give meaning to specific contract language, the presence of a valid past practice is not necessary to establish the status quo of a mandatory subject of bargaining. Where, as here, the parties are bound by a collective bargaining agreement contractual language which is clear and unambiguous on its face effectively establishes the status quo. Local 1590, IAFF, et.al. v. City of Wilmington, DEL. PERB, ULP No. 89-09-041 (1/23/90), P. 469.

In the case of Indian River Ed. Ass'n. and James Lobo v. Bd. of Ed., (Del. PERB, ULP No. 88-11-027 (1988)), relied upon by the Respondent, the Indian River School District declined to schedule a Level III grievance meeting because the grievance was not appealed within the five day period required by the negotiated grievance procedure. Based upon the express and unambiguous language establishing the five day period, the PERB dismissed the Charge concluding there was no probable cause to believe the District's action constituted a unilateral change in the status quo of a mandatory subject of bargaining or, in the absence of bad faith, otherwise violated the Act, as alleged.

In a subsequent but unrelated case, the Indian River School District declined to schedule a Level II with the Superintendent or a Level III meeting with the Board of Education. The rationale for the District's decision was that the underlying incident involved a reduction-in-force,

a subject not addressed in the collective bargaining agreement and, therefore, not a proper subject for the grievance procedure. The Union disputed the District's characterization of the incident as a reduction-in-force, claiming it violated the involuntary transfer provision in the collective bargaining agreement and, therefore, constituted a proper subject for resolution through the negotiated grievance procedure.

The PERB held that the language of the contractual grievance procedure requiring the District to hold a Level II and Level III grievance meeting was clear and unambiguous. Because the District's conduct was inconsistent with the contract language, the PERB accepted jurisdiction to determine whether the District's action constituted a unilateral change in the status quo of a mandatory subject of bargaining and, therefore, a violation of Section 4007(a)(5), of the Act. had occurred. case Indian River Ed. Ass'n. v. Bd. of Ed., (Del. PERB, ULP No. 90-09-053 (1989),

Like the Indian River School District in ULP No. 90-09-053, the Caesar Rodney School District bases its refusal to process the Wells grievance upon a substantive provision in the contract unrelated to the procedure for processing grievances. As was the case in Indian River (ULP. No. 90-09-053) the language of the contractual grievance procedure requiring the Caesar Rodney School District to hold a Level III meeting is clear and unambiguous on its face. Consequently, consistent with established case law, it is clearly within the jurisdiction of the PERB to determine whether the District's refusal to schedule a Level III meeting constitutes a unilateral change in the grievance procedure, a mandatory subject of bargaining, in violation of Section 4007(a)(5), of the Act.

ISSUE No.2: Nor does the record support a finding that by failing to appeal the grievance to arbitration the Association waived its right to file the Charge with the PERB. The contractual grievance procedure provides: "Within five (5) days of the hearing, the aggrieved person(s) and all parties in interest including the Association's Grievance Chairperson shall

receive a written decision.” . . . “If the answer of the School Board is not accepted, the grievant within five (5) days after receiving the School Board’s answer may request that the grievance be submitted top final and binding arbitration.”

Because the District refused to schedule the Level III meeting there was no Level III answer which the grievant and the Association were contractually entitled to appeal to arbitration. As alleged in the Charge, the critical conduct is not the Association’s failure to request arbitration but the District’s refusal to schedule a Level III meeting.

DECISION

Issue No. 1: The PERB does not lack jurisdiction to process the instant unfair labor practice charge.

Issue No. 2: By not appealing the grievance to Level IV, the Association did not waive its right to file the instant unfair labor practice charge.

September 9, 1998

(Date)

/s/Charles D. Long

Charles D. Long,
Executive Director