

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

CAPE HENLOPEN EDUCATION ASSOCIATION,	:	
DSEA/NEA,	:	
Charging Party,	:	
	:	<u>ULP No. 01-05-319</u>
v.	:	
	:	
CAPE HENLOPEN SCHOOL DISTRICT,	:	
Respondent.	:	

BACKGROUND

The Cape Henlopen School District (“District”) is a public school employer within the meaning of section 4002(n) of the Public School Employment Relations PSERA (“PSERA”), 14 Del.C. Chapter 40 (1982, 1989).

The Cape Henlopen Education Association, DSEA/NEA, (“Association”) is an employee organization within the meaning of 14 Del.C. §4002(h) and the exclusive bargaining representative of the District’s professional employees, within the meaning of 14 Del.C. §4002(i). The Association represents teachers, counselors, librarians, special assignment teachers and psychologists.

On May 1, 2001, the Association filed an unfair labor practice charge alleging the District’s refusal to process a complaint filed on September 18, 2000, constituted a unilateral change in a mandatory subject of bargaining in violation of §4007(a)(5) of the PSERA. ¹

¹ 14 Del.C. Section 4007 provides, in relevant part: (a) It is an unfair labor practice for a public school employer or its designated representative to do any of the following:(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.

The District filed its Answer on May 10, 2001, alleging under New Matter that the reassignment of Dr. Morris was previously resolved through the contractual complaint procedure and not subject to further review.

In its Response filed on May 21, 2001, the Association alleges that the complaint which the District refuses to process arises from circumstances which did not exist at the time of the School Board's initial decision and which the Association contends violate Board Policy No 409.

FACTS

At all times relevant to this matter, the District and the Association were parties to a collective bargaining agreement which term extends from July 1, 1998, through June 30, 2002. Article III, Grievance Procedure, of this agreement provides, in relevant part:

Definitions

3.1 A "grievance" is a claim by a Professional Employee(s) or by the Association that there has been a violation, misinterpretation, inequitable application, or misapplication of the terms of this Agreement.

3.2 Complaints involve subjects/issues not specified in the collective bargaining agreement. A "complaint" is a claim by a Professional Employee(s) or by the Association that there has been a violation, misinterpretation, inequitable application, or misapplication of School Board Policy.

3.8 CAPS (Collaborative Approach to Problem Solving) is a problem solving process where the parties, usually with the assistance of a facilitator, explore the problem, interests, and options, and attempt to craft the best solution from among the options.

General

3.15 If in the judgment of CHEA there has been a violation, misinterpretation, inequitable application, or misapplication of the CHEA rights (Article XV) of this contract, or there are grounds for a complaint involving CHEA rights and privileges, the CHEA may commence such grievance/complaint with the appropriate administrator at Level II using CAPS.

The material facts on which this charge is based are either admitted or documented by attachments to the Charge, and may be summarized, as follows:

May 26, 2000: Marvin Morris, a 5th grade teacher at Lewes Middle School was notified by Principal Margaret Peck of his reassignment to teach grade 8 for the 2000-2001 school year.

May 31, 2000: Dr. Morris wrote a letter to Principal Peck objecting to the reassignment. On June 20, 2000, Charles Shaffer, DSEA UniServ Director, filed a request with District Superintendent Dane A. Brandenberger to address the Board of Education (“Board”) concerning Dr. Morris’ reassignment. (Association Ex. 2)

July 27, 2000: Mr. Shaffer and Dr. Morris addressed the Board during its regularly scheduled meeting. (Association Ex. 3)

August 1, 2000: Superintendent Brandenberger informed Dr. Morris of the Board’s decision to uphold his reassignment to grade 8 for the school year 2000-2001. (Association Ex. 4)

August 9, 2000: Mr. Shaffer wrote to Superintendent Brandenberger concerning what he (Shaffer) perceived to be differing reasons for the reassignment of Dr. Morris. Mr. Shaffer also informed Superintendent Brandenberger, “ ... if the number of students at the 5th grade level rises to the level approaching last year, Dr. Morris will expect to be returned to his former 5th grade position for the 2000-01 school year. To do otherwise would be a violation of Policy 409.” (Association Ex. 5)

August 17, 2000: Superintendent Brandenberger responded to Mr. Shaffer:

This letter is in response to your letter of August 9, 2000, regarding the Marvin Morris complaint. Your interpretation of the information shared with the Board the evening of July 27 differs from the information that I heard and the information upon which the Board based its decision. Ms. Peck’s testimony at the hearing established that there was a change in program and/or enrollment that generated the need for the change. Together with everything else, including your observation that “... a list of instructional and demographic reasons was offered,” enrollment at Lewes Middle School has declined resulting in a reduction of six teachers from the faculty. The conditions at Lewes Middle School are exacerbated in that two experienced social studies teachers have left the faculty. One retired. The other went on a three-year leave of absence. Dr. Morris has the kind of experience and skill to “plug” that hole in the program at the school.

The Board’s decision is final, and Dr. Morris is assigned to 8th grade social studies in accordance with the building principal’s decision. (Association Ex. 6)

August 23, 2000: Mr. Shaffer again wrote to Principal Peck:

Dr. Marvin Morris just learned that Kelly Rodgers has been added to the 5th grade team of which he was a part last year, thus restoring it to its former complement. In investigating whether Marvin’s rights have been violated with regard to the contract or school board

policy, we need to know the area(s) of certification held by Kelly Rodgers. Pending receipt and analysis of that information a decision will be made whether to initiate the informal level of the complaint or grievance procedure. (Association Ex. 7).

September 1, 2000: Having received no response to his request of August 23, 2000, Mr. Shaffer sent a facsimile transmission to Principal Peck:

Since I haven't been notified that a response has been issued to my August 23, 2000, letter to you, we are providing notice to you pursuant to Article 3.23 of the new contract (CAPS). There is a potential violation of Article 10 and/or Policy 409. You may arrange for a date to convene a CAPS meeting with my office. I will collaborate with you on the selection of a facilitator. (Association Ex. 8)

September 5, 2000: Principal Peck responded to Mr. Shaffer's August 23 letter:

I am responding to your letter of August 23, 2000, as well as your fax of September 1, 2000 in reference to Charlie Shaffer on behalf of Marvin Morris. I did not respond to your letter of August 23rd because I had been informed that due process had occurred and that this was now a closed issue...

If you have further concerns regarding this mater, I would ask that you contact Dr. Dane Brandenberger, Superintendent, Cape Henlopen School District. ... (Association Ex. 9, in relevant part)

September 18, 2000: Mr. Shaffer initiated a Complaint pursuant to Article III, of the collective bargaining agreement, based upon Board Policy 409. (Association Ex. 11). His cover letter to Dr. Brandenberger provided:

Pursuant to 3.2 and 3.23 of the newly ratified contract, Dr. Marvin Morris would like to initiate a Complaint under the contractual procedure for doing so. The lowest level for such initiation is with the building administration. CAPS is to be used. You are being alerted to this Complaint at the direction of principal, Margaret Peck (see enclosed letter of 9/5). We would expect, however, that the CAPS session(s) would be with Ms. Peck.

The complaint is based upon the standards of justification for reassignment found in Policy #409. None of the standards listed in the policy under Employer-Initiated Changes in Assignment exist at this time and in remedy request Dr. Morris be returned to his 5th grade assignment he held for at least the last decade.

We would request that George Schenck be asked to act as facilitator. He is receiving a copy of this letter for his response to our request. We are open to suggestions on other facilitators if a conflict with George arises. (Association Ex. 10).

September 20, 2000: Superintendent Brandenberger responded to Mr. Shaffer's September 18 letter, "... the district considers the Marvin Morris complaint closed. Mr. Morris has had

his due process with respect to his complaint. As far as we are concerned, the issue is closed and there is no application of the newly ratified contract in this matter.” (Association Ex. 12)

September 29, 2000, Mr. Shaffer again wrote to Superintendent Brandenberger:

... I am, therefore, prepared on this date to issue on the draft form a grievance centered on 3.23, Level One, CAPS due to the employer’s refusal to process a Complaint filed on behalf of Marvin Morris on September 18th.

No employee organization can permit an employer to unilaterally determine whether an issue is grievable/complainable. The grievance/ complaint procedure during its earliest stages is established to do just that through honest and open dialog where all facts, rationale, interests, and options are explored. To refuse to engage in even the initial problem solving stages renders Article III meaningless, mocks the commitment you made in writing and publicly to solve problems at the lowest level, and arguably violates the Association’s rights under the labor law.

In one more effort to seek meaningful solutions to this and its appended issue, the elimination of Policy 409, I suggest that when Sarah Ross, you and I meet at the Liaison meeting on October 3rd at 3:45 we thoroughly discuss these matters. This discussion would be in concert with paragraph 3 of 3.23. Until that time, Mr. Morris’ complaint he has attempted to process will be suspended in time as well as the initial filing of the grievance to which I referenced in the first paragraph. (Association Ex. 13).

October 24, 2000: Mr. Shaffer filed a formal grievance with Dr. Brandenberger.

The “Nature of Grievance/Complaint” states:

A complaint was filed by Marvin Morris on 9/18/00. Superintendent Brandenberger refused to process the Complaint in a letter dated September 20, 2000. Brandenberger was notified in writing on September 29th of an Association grievance involving the refusal to process the Complaint. Timelines were suspended pending liaison discussions. The Superintendent continues to refuse to hold a CAPS, Level I meeting. CHEA is resuming the grievance due to the district’s refusal to implement the process of the grievance/complaint procedure. Article III. (Association Ex. 14).

October 30, 2000: Superintendent Brandenberger responded to Mr. Shaffer:

For the third time, I will repeat that Marvin Morris has had his due process with respect to this complaint. He elected to enter a complaint under the Board’s complaint procedure that ended with a hearing in front of the Board. A decision was rendered by the Board. There is no appeal or other avenue for Dr. Morris to continue pressing the issue.

Finally, this is the last communication you or Dr. Morris will receive from me regarding this issue. (Association Ex. 15)

ISSUE

Whether the District, by refusing to process the September 18, 2000, complaint through the contractual grievance/complaint procedure, unilaterally altered the status quo of a mandatory subject of bargaining, in violation of 14 DeI.C. §4007(a)(5)?

OPINION

PERB Rule 5.6, Decision or Probable Cause Determination, provides:

- (a) Upon review of the Complaint, the Answer and the Response, the Executive Director shall determine whether there is probable cause to believe that an unfair labor practice may have occurred...
- (b) If the Executive Director determines that an unfair labor practice has, or may have occurred, he shall, where possible, issue a decision based upon the pleadings ...

The pleadings in this case provide the basis for a decision on the merits. The essential allegations of this charge are not disputed, and the record is composed primarily of correspondence between these parties concerning the conduct which constitutes the alleged unfair labor practice.

It is well established that the grievance procedure is a mandatory subject of bargaining. Indian River Ed. Assn. v. Bd. of Ed., Del. PERB, ULP No. 99-09-053, I PERB 667 (1991). The PSERA clearly includes under the definition of “terms and conditions of employment”, “... matters concerning or related to ... grievance procedures.”

The grievance procedure constitutes the heart of the continuous collective bargaining process. It is the primary vehicle through which the parties’ agreement is defined and refined during the life of the agreement. For a collective bargaining agreement as a whole to have real meaning, it is incumbent upon the parties to administer the grievance process consistently and in accordance with its contractual terms. Indian River (Supra. @ 674).

In this case, the contractual provisions of Article III of the parties’ agreement are clear and unambiguous. Professional employees and/or the Association can initiate a grievance or complaint, regardless of whether the District agrees with the filing of such grievance/complaint. The District has no right to unilaterally determine which grievances or complaints it will or will not process through the

contractually agreed upon procedure. Once a grievance/complaint is filed, sections 3.22 through 3.29 explicitly set forth the process which must be followed in resolving the issue presented.

The circumstances resulting in the complaint filed on September 18, 2000, are different from those existing at the time Dr. Morris' initial complaint was resolved by the Board in July, 2000. In September, 2000, an additional 5th grade teaching position had been created. The Union's request to review the grievant's rights, if any, to the newly created position pursuant to Board Policy 409 is not, on its face, unreasonable. The District's position, including that the issue was previously resolved, is properly addressed through the steps of the agreed upon procedure, as set forth in Article III, of the Agreement.

The threshold question of grievability is satisfied when either a bargaining unit employee or the Association files either a grievance or a complaint citing as a basis either a provision of the collective bargaining agreement or a Board Policy. Consistent with the PERB's holding in Indian River (Supra. @ 677), by refusing to process this complaint without affording the grievant and his representative their contractual right to present their arguments, the District altered the status quo of a mandatory subject of bargaining, in violation of 14 Del. C. §4007(a)(5).

CONCLUSIONS OF LAW

1. The Board of Education of the Cape Henlopen School District is a public employer within the meaning of §4002(n) of the Public School Employment Relations Act.

2. The Cape Henlopen Education Association is an employee organization within the meaning of §4002(h) of the PSERA.

3. The Cape Henlopen Education Association is the exclusive bargaining representative of the school district's certificated professional employees within the meaning of §4002(i) of the PSERA.

4. The grievance procedure is a "term and condition of employment" as defined at 14 Del.C. §4002(r) over which the public school employer and the exclusive representative are obligated to collectively bargain under 14 Del.C. §4002(e).

5. By refusing to process the complaint filed by Association on September 18, 2000, on behalf of employee Marvin Morris, the District unilaterally altered the status quo as it related to the grievance procedure.

6. By unilaterally altering the status quo of a mandatory subject of bargaining, the District violated 14 Del. C. §4007(a)(5), as alleged in the Charge.

WHEREFORE, THE PARTIES ARE HEREBY ORDERED TO TAKE THE FOLLOWING AFFIRMATIVE ACTIONS:

1. The Board of Education of the Cape Henlopen School District is ordered to cease and desist from engaging in conduct in dereliction of its duty to collectively bargain in good faith with the exclusive representative of its professional employees.

2. The District is hereby ordered to afford the grievant and his representative access to the dispute resolution procedure(s) provided for in Article III, of the collective bargaining agreement.

3. Within ten (10) calendar days from the date of receipt of this decision, post a copy of the Notice of Determination in each school within the District in places where notices of general interest are usually posted. This Notice shall remain posted for a period of thirty (30) days.

4. Notify the Public Employment Relations Board within thirty (30) calendar days from the date of this Order of the steps taken to comply.

IT IS SO ORDERED.

Date: 28 June 2001

/s/Charles D. Long, Jr.

CHARLES D. LONG, JR., Executive Director
Delaware Public Employment Relations Bd.