STATE OF DELAWARE

PUBLIC EMPLOYMENT RELATIONS BOARD

CAESAR RODNEY EDUCATION ASSOCIATION, DSEA/NEA,	)	
Charging Party,	)	**ULP No. 02-06-360**
v.	)	
BOARD OF EDUCATION OF THE CAESAR RODNEY SCHOOL DISTRICT,	)	
Respondent.	)	

Appearances
Jeffrey M. Taschner, Esq., DSEA, for CREA, DSEA/NEA
Catherine T. Hickey, Esq., Schmittinger & Rodriguez, for CR School District

BACKGROUND

The Caesar Rodney School District ("District") is a public employer within the meaning of 14 Del.C. Section 4002(n), of the Public School Employment Relations Act, 14 Del.C. Chapter 40 (1983) ("PSERA" or "Act"). The Caesar Rodney Education Association, DSEA/NEA ("Association") is an employee organization within the meaning of Section 1402 (h) of the Act and the exclusive bargaining representative of certain employees of the District within the meaning of Section 1402(i) of the Act.

Set forth below are the material facts chronicled in a series of communications between the parties:

By letter dated November 21, 2001, District Superintendent, Dr. David E. Robinson, informed District employee Michael Hoffman of the Board's intent to terminate his employment as a paraprofessional with the District effective ten (10) days from his receipt of Dr. Robinson's letter. The reason given was "misconduct in office, immorality, insubordination, and your providing false, incomplete and/or inaccurate information on and with your employment application."

The letter informed Mr. Hoffman that he could make a written request for a hearing before the Board if he so desired. Mr. Hoffman was placed on administrative leave with pay until the expiration of the ten (10) day period

referenced in Dr. Robinson's letter or until a disposition by the Board if Mr. Hoffman elected to request a Board hearing.

By letter dated November 30, 2001, Mr. Hoffman's counsel, Jeffrey M. Taschner, Esquire, requested a hearing before the School Board regarding the proposed termination. Mr. Taschner also requested that Superintendent Robinson provide certain documents concerning the charges against Mr. Hoffman and the names of the witnesses appearing before the Board on behalf of the District. Having received no response, counsel again wrote to Superintendent Robinson on December 18, 2001, requesting that the District promptly provide the information requested in the November 30 letter.

By letter dated December 20, 2001, Dr. Robinson informed Mr. Taschner that the Board hearing was to be scheduled for February 5 and/or 7, 2002, at which James Griffin, Esquire, would represent the Board and Catherine Hickey, Esquire, would represent the Administration. Ms. Hickey was responsible for providing information necessary for the Association to prepare its case on behalf of Mr. Hoffman. Mr. Griffin was to coordinate the details and procedures for the Board hearing.

Following the Board hearing on February 5 and 7, 2002, the following determinations were made by the Board:

> 2. The evidence does not support a conclusion that Hoffman is guilty of misconduct in office in that he did not commit unlawful behavior that was willful in character in relation to the duties of his office;
> 3. The evidence does not support a conclusion that Hoffman is guilty of willful and persistent insubordination which has been held to mean a constant or continuing intentional refusal to obey a direct or implied order, reasonable in nature and given by and with proper authority.
> 4. The evidence does support the conclusion that Hoffman is guilty of immorality . . . [Findings of Fact, pgs. 6 - 7]

This determination was based on the Board's finding that Mr. Hoffman omitted relevant information and falsified other information on his employment application and resume.

The School Board modified the proposed termination and offered to reinstate Mr. Hoffman, contingent upon his satisfying the following conditions:

> 1) Within thirty (30) days from the date of this decision, he submit an employment application and resume that are completely accurate;
> 2) Within 30 days from the date of this decision, he shall prepare and send, at his expense, a letter of apology to all CREA members containing the following information: (1) an apology for the inconsistency between the statement in his letter (Administration Exhibit 5) that "there was no question in my mind that I was answering honestly" and his hearing testimony that when he met with Mr. Perrington in October 2000 that he did not know whether his record included a Class A misdemeanor. AE-15; (2) an apology and admission that he should have determined

whether his record included a Class A misdemeanor before answering the question on the employment application or at least acknowledge that he should have informed the District that he did not know how to answer the question; (3) an apology and admission that his resume contained information that was inaccurate and false; (4) an apology for referring to the District's action as a "witch hunt"; (5) an apology for his attempt to link the District's investigation of his background to the fact that he and his wife were officers in CREA.

3) Within 30 days he shall prepare and submit letters of apology to the Superintendent and Director of Professional and Support Services for the false and inaccurate information contained in his employment application and resume;
4) Mr. Hoffman is hereby suspended, without pay, from the date of this decision until the date he is required to report to begin the 2002-2003 academic year.
5) Prior to reinstatement, he shall appear before the Board, in executive session, and issue an apology for his dishonesty and lack of candor in connection with his application for employment with the District.
6) Prior to his reinstatement, he shall provide documentary proof that he has paid and/or satisfied all outstanding capiases or bench warrants for his arrest for failure to pay fines and/or court costs in any state where the same may be outstanding.

J. In the event Hoffman is unwilling to accept and abide by all the terms and conditions of the discipline set forth above (Items 1-6), his employment is terminated effective 15 days from the date of this decision.

By letter dated March 20, 2002, Mr. Taschner wrote to the Board President, Dwight Meyer, and Superintendent Robinson informing them of the Association's intent to appeal the matter to arbitration and suggested that, given the procedural history, the grievance proceed directly to final and binding interest arbitration.

On March 25, 2002, Mr. Taschner provided the District with a copy of the CREA meeting minutes documenting the Association's vote to proceed to arbitration and the written endorsement by the CREA President, Valerie Hoffman.

By letter dated March 28, 2002, James D. Griffin, Esquire, counsel for the school board, informed the Association of the following:

1) By submitting to the jurisdiction of the Board, Mr. Hoffman waived any rights he would have to grieve the basis for the Board's decision;
2) Mr. Hoffman's only option was to appeal the decision of the Board to the State Board of Education, pursuant to 14 Del.C. §1508.
3) Because Mr. Hoffman failed to comply with the conditions set by the Board for his reinstatement, his termination became final effective March 26, 2002, or 15 days following the date on which the Board issued its decision.

On June 19, 2002, the Association filed the instant unfair labor practice charge alleging that by refusing to process this grievance to final and binding interest arbitration as provided for in Article II, Section D. 4, of the collective bargaining agreement, the District unilaterally altered the status quo of a mandatory subject of bargaining in violation of Section 4007 (a) (f) of the Act, which provides:

§4007. Unfair practices - Enumerated

(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 if employees in an appropriate unit.

On July 22, 2002, the District filed its Answer and New Matter. The Association filed its Response to New Matter on July 29, 2002. By agreement of the parties, the following decision is based upon the pleadings and a subsequent written position statement from Ms. Hickey.

ISSUE

Whether by refusing to process the March 20, 2002, grievance concerning the termination of Employee Hoffman the District violated 19 Del.C., §4007 (a)(5), as alleged?

PRINCIPAL POSITIONS OF THE PARTIES

District: The District cites Article II and Article XVII of the collective bargaining agreement in support of its position that no violation of Section 4007(a)(1) has occurred. The District also maintains that terminations are expressly removed from the grievance procedure by Article XIV, Part I. D, of the Agreement. According to the District, terminations have not heretofore been subject to the grievance procedure. The District maintains that to allow grievances regarding terminations would render the collective bargaining agreement ("Agreement") internally inconsistent and would produce an absurd and nonsensical result in that, as here, it would permit the processing of a grievance involving a matter already decided by the Board of Education.

The District contends that the Association's request to initiate the grievance at Level Four (binding arbitration), has no contractual foundation. The Agreement authorizes skipping steps of the grievance procedure only in matters involving suspension and transfer, in which case the grievances are to be initiated at Level Two of the grievance procedure.

The District contends that the exclusive remedy available to Mr. Hoffman was a full hearing before the Board with a right to appeal the Board's decision to the State Board of Education pursuant to 14 Del.C. §1508.

The District contends that the PERB lacks jurisdiction to resolve the unfair labor practice charge because doing so requires the interpretation of the collective bargaining agreement which is outside the PERB's authority.

Association: In its Response to the District's New Matter, the Association refutes the District's contention that the collective bargaining agreement specifically excludes terminations from the negotiated grievance procedure. The Association cites Articles II. D. 4, G.7. XIII and Article XIV in support of its position.

The Association maintains that, Article II of the collective bargaining agreement establishes a Grievance Procedure whereby employees or CREA can process grievances defined as:

> . . . 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.

The Association denies that processing a grievance on behalf of Mr. Hoffman starting at Level 4 is either illogical or inconsistent with the contractual grievance procedure. The Association contends it would be useless to process the grievance through the lower levels of the grievance procedure when the Board has already issued its decision which is Level Three of the contractual grievance and arbitration procedure.

The Association likewise rejects the District's assertion that the exclusive remedy available to employee Hoffman is a full Board hearing with a right to appeal the Board's decision to the State Board of Education. The Association maintains that the termination of employee Hoffman involves a contractual issue of "just cause" rather than a violation of a board rule or regulation which is required for the State Board of Education to assume jurisdiction.

Furthermore, Section 4.3.2. of the State Board of Education Hearing Procedures and Rules, provides, in relevant part, that "Personnel actions covered by a collective bargaining agreement or are otherwise subject to adjudication by the Public Employment Relations Board" are not proper subjects for appeal to the State Board of Education.

DISCUSSION

Regulation 5.6, Decision or Probable Cause Determination, of the Delaware Public Employment Relations Board's Rules and Regulations 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 essential allegations of this charge are not disputed and the pleadings in this case provide the basis for a decision on the merits.

The Public School Employment Relations Act clearly establishes the grievance procedure as a mandatory subject of bargaining. Indian River Education Association v. Bd. of Education, Del. PERB, ULP 99-09-053, I PERB 667 (1991); Cape Henlopen Education Association v. Cape Henlopen School District, Del. PERB, ULP 01-05-319, III PERB 2239 (2001). "Terms and condition of employment", upon which the public school employer and the exclusive bargaining representative are required to "confer and negotiate in good faith", are defined as:

> . . . matters concerning or related to wages, salaries, hours, grievance procedures, and working conditions . . . 14 Del.C. §4002(r), (emphasis added.)

The grievance procedure is 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 that agreement." Cape Henlopen (Supra, p. 2245). For the collective bargaining process to be meaningful, it is important that the parties administer the grievance procedure consistently and strictly in accordance with the contractual terms. Indian River (Supra, p. 674).

The District argues that, ”Where, language in a contract is clear and unambiguous the language must be enforced, and a court or other tribunal may not consider parol evidence to interpret the contract or search for the parties' intentions.” (New Matter, para. 1) The District asserts that, “it is an elementary rule of contract construction that intent of the parties must be ascertained from [the] language of [the] contract, and if that language is unambiguous, [a] court may not look to collateral circumstances to ascertain [the] parties’ intent.” Both axioms are universally accepted principles of contract interpretation and provide the basis for resolving this matter.

The issue presented by this unfair labor practice involves whether the District is required to arbitrate Employee Hoffman’s arbitration. Stated otherwise, it questions whether Mr. Hoffman’s termination is subject to the jurisdiction of an arbitrator. Article II, of the collective bargaining agreement, GRIEVANCE PROCEDURE, provides:

> E. Arbitrability
>
> a. If the parties disagree as to whether a matter is subject to arbitrability, 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. (emphasis added)

The language of Article II, Section E. b., is clear and unambiguous. Issues of arbitrability are within the exclusive jurisdiction of the arbitrator. The PERB has no authority to conclude otherwise. Considering this provision, the District cannot unilaterally determine which grievances are subject to arbitration and which are not.

Here, the parties rely on numerous contractual provisions to support their respective positions concerning arbitrability. Consequently, resolving the issue of whether the Hoffman grievance is subject to arbitration requires the interpretation of the collective bargaining agreement which, as the District correctly points out, is the responsibility of an arbitrator rather than the PERB.

The District cannot on the one hand rely on a contractual provision to preclude arbitration while ignoring another provision which, on its face, is clear and unambiguous and requires that unresolved issues of concerning whether a matter is subject to arbitration is properly resolved by an arbitrator.

CONCLUSIONS OF LAW

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

2. The Caesar Rodney Education Association, DSEA/NEA, is an employee organization within the meaning of §1402 (h) of the Act.

3. The Caesar Rodney Education Association, DSEA/NEA, is the exclusive bargaining representative of certain employees of the District within the meaning of Section 1402(i) of the Act.

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

5. By refusing to process the grievance filed by the Caesar Rodney Education Association on behalf of employee Michael Hoffman, the District unilaterally altered the status quo as it relates to a mandatory subject of bargaining.

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

WHEREFORE, PURSUANT TO 14 DEL.C. §4006, THE CAESAR RODNEY SCHOOL DISTRICT IS ORDERED TO:

A. Cease and desist from engaging in conduct in dereliction of its duty to collectively bargain in good faith with the exclusive representative of its teachers and paraprofessionals;

B. Process grievances and to afford grievants and their representatives the hearings or procedures to which they are contractually entitled.

C. Take the following affirmative actions:

1. Submit the grievance concerning the termination of employee Hoffman to final and binding arbitration where the issue of arbitrability can be properly raised before the arbitrator selected pursuant to the Rules of the American Arbitration Association.

2. Within ten (10) calendar days from the date of receipt of this decision, post the attached NOTICE OF DETERMINATION at each location throughout the District where notices of general interest to bargaining unit employees are normally posted. The Notice shall remain posted for a period of thirty (30) days.

3. Within fifteen (15) calendar days from the date of receipt of this decision, provide the Board with written notice of the terms of the Award.

IT IS SO ORDERED.

Dated: 30 August 2002

/s/Charles D. Long, Jr.
CHARLES D. LONG, JR.,
Executive Director
Delaware PERB