

STATE OF DELAWARE
PUBLIC EMPLOYMENT RELATIONS BOARD

AFSCME COUNCIL 81, LOCAL 1607,)	
Charging Party,)	
and)	<u>ULP No. 01-01-306</u>
NEW CASTLE COUNTY,)	
Respondent.)	

BACKGROUND

New Castle County, Delaware, is a public employer within the meaning of 1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994) (“Act”).

AFSCME Council 81, Local 1607 (“AFSCME” or “Union”) is an employee organization within the meaning of §1302(i) of the Act. AFSCME is the exclusive bargaining representative of certain civilian employees, including paramedics in the Emergency Medical Services Division (“EMS Division”) of the Police Department of New Castle County (“County”), within the meaning of §1302(j) of the Act.

On January 18, 2001, AFSCME filed the instant unfair labor practice charge alleging that on January 4, 2001, the County issued Administrative Policy No. 308, Outside Employment, which establishes procedures for securing approval of outside employment by paramedics and restricts such outside employment to 20 hours per week. By issuing the Revised Policy without giving the Union the opportunity to bargain over changes in affected terms and conditions of employment, the County violated section 1307(a)(5), of the Act. [1]

On January 29, 2001, the County filed its Answer denying the material allegations set forth in the Complaint and setting forth New Matter:

On January 30, 2001, the Union filed its Response denying the New Matter.

On March 14, 2001, the Executive Director of the Public Employment Relations Board issued a finding of probable cause to believe that an unfair labor practice may have occurred and reserved for argument prior to the close of the record the issues raised in the County's Answer under New Matter.

Thereafter, on March 30, 2001, the County filed an Amended Answer alleging for the first time that the Petition should be dismissed because the claim is barred by the statute of limitations and/or laches and that the Union waived its right to bargain over, or has previously acquiesced to, the terms set forth in the outside employment policy.

On April 5, 2001, the Union filed its Response to Amended Answer denying the allegations set forth, therein. The Union moved to strike the Amended Answer as there is no right to amend after a responsive pleading has been filed and no special right was granted by the Executive Director. Concluding that the Amended Answer raised legitimate issues the Executive Director accepted the filing, consistent with the intent of PERB Rule 5.8.

A hearing was held on April 12, 2001, for the purpose of receiving evidence concerning the issues raised by the Respondent in its Answer as New Matter and the Amended Answer. Argument was presented in the form of written post-hearing briefs the last of which was received by the Executive Director on June 26, 2001.

Following a review of the record, the Executive Director determined that additional evidence was necessary to address the question of whether the twenty (20) hour weekly limit on outside employment constituted a term and condition of employment and, therefore, a mandatory subject of bargaining or an inherent managerial policy which constitutes a permissive subject of bargaining.

[1] §1307. Unfair labor practices. (a) It is an unfair labor practice for a public 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, except with respect to a discretionary subject.

On November 20, 2001, the Executive Director issued an Interim Decision denying the defenses raised by the County in its Answer and Amended Answer.

A second day of hearing was held on December 17, 2001. Argument was again provided in the form of written post-hearing briefs, the last of which was received by the Executive Director on February 25, 2002. The following discussion and decision result from the record thus compiled.

ISSUE

Did New Castle County violate 19 Del.C.§1307(a)(5) by unilaterally revising and implementing the policy on outside employment for paramedics by limiting outside employment to twenty (20) hours per week?

DISCUSSION

The subject of outside employment touches the interests of both the County and the individual employees.

The PERB has previously held:

Where a subject in dispute concerns or is related to wages, salaries, hours, grievance procedures and working conditions, and also involve[s] areas of inherent managerial policy, it is necessary to compare the direct impact on the individual teacher in wages, salaries, hours, grievance procedures and working conditions as opposed to its probable effect on the operation of the school system as a whole. If its probable effect on the school system as a whole clearly outweighs the direct impact on the interest of the teachers, it is to be excluded as a mandatory subject of bargaining; otherwise, it shall be included within the statutory definition of terms and conditions of employment and mandatorily bargainable.

Appoquinimink Ed. Ass'n. v. Bd. of Ed. Del. PERB, ULP No. 1-3-84-3-2A, I PERB 35, 50 (1984). [2]

The issue of outside employment restrictions is a case of first impression before the PERB. It is unnecessary to reach a broad conclusion concerning whether all restrictions on outside employment constitute either a term and condition of employment (a mandatory subject of bargaining) or an inherent managerial policy (a permissive subject of bargaining). It is foreseeable that some restrictions on outside employment may be so integrally related to the mission or operation that negotiations are not required. In re State of New Jersey and Communications Workers of America, Docket No. SN-93-11; P.E.R.C. No. 93-55 (December 18, 1992).

This decision is limited to the Union's primary objection to Policy No. 308, the limitation on outside employment of twenty (20) hours per week.

In support of its unilateral implementation of Revised Policy 308 the County raises three (3) basic arguments:

1. The need to cover vacancies resulting primarily from a lack of employees to fill all budgeted positions;
2. Fitness for duty concerns;
3. Consistency throughout the Police Department.

The County provided no evidence that the twenty (20) hour limitation is necessary to assure proper staffing levels. To the contrary, not one (1) instance was cited where a vacancy was not adequately filled either by a volunteer or the application of the mandatory overtime provision in the collective bargaining agreement.

Nor is there evidence that the twenty (20) hour limitation is necessary to assure that paramedics are fit for duty and able to perform their responsibilities in a satisfactory manner. Not one performance issue related to fatigue was cited by the County. Concerning the County's fitness for duty argument, the

[2] Relevant provisions of the Public Employment Relations Act, (19 Del.C. Chapter 13), The Police Officers and Firefighters Employment Relations Act, (19 Del.C. Chapter 16 and the Public School Employment Relations Act, 14 Del.C. Chapter 40 are identical so that decisions issued under one Act serve as precedent for similar issues arising under another of the Acts.

policy is inherently inconsistent insofar as it applies exclusively to outside employment without taking into consideration the nature of the employment. For example, Commander Tan, who is responsible for supervising the paramedic operation, testified that if a paramedic's spouse owned a daycare service and the paramedic answers the phone for pay and he/she is compensated for performing that service, the paramedic is subject to the twenty (20) hour limitation. Commander Tan further testified that volunteer activity, education courses, sports participation or any other off-duty conduct is not subject to the twenty (20) hour limitation. Clearly, it is not an off-duty paramedics activity and time involved that are regulated but rather the receipt of compensation for engaging in that activity.

It is apparent that the County's desire for consistency within the Police Department was the driving force behind the County's decision to enforce the twenty (20) hour restriction. Commander Tan testified that prior to issuing his March 4, 1998, memorandum, the Department of Public Safety had been reorganized into the Police Department. Commander Tan testified that the Emergency Medical Services Manager informed him that there would be a consolidation of policies which was one of the purposes of the reorganization.

Shortly after the reorganization, the Chief of Police requested that management update the outside employment status records for all departmental employees. Thereafter, the Chief of Police included in every approval a statement that outside employment was to be limited to twenty (20) hours per week.

Despite the desire for consistency, Commander Tan was uncertain as to whom, or if, the twenty (20) hour restriction applied other than police officers and paramedics. The County concedes that the Communications Unit of the Police Department is not covered.

The County's justification for the twenty (20) hour limit on outside employment must be weighed against the freedom of the individual paramedic to use his/her off-duty time as he/she determines. Revised Policy No. 308 clearly extends the employment relationship to an employee's personal off-duty time and directly affects the economic circumstances of that employee by limiting an available source of outside income. Local 2413, AFSCME v. Town of St. Johnsbury, Vt. Labor Relations Bd., Docket No. 89-40 (1990) For this reason, the evidence of record clearly establishes that the impact of the limitation is

greater upon the individual employee than upon the public employer. Consequently, under the circumstances presented here, this policy which restricts an employee's employment opportunities outside of their workday is a mandatory subject of bargaining.

CONCLUSIONS OF LAW

1. New Castle County is a public employer within the meaning of Section 1302(n) of the Public Employment Relations Act, 19 Del.C. Chapter 13 (1994).
2. The American Federation of State, County and Municipal Employees, Council 81, Local 1607 is an employee organization within the meaning of Section 1302(i) of the Act and the exclusive bargaining representative of certain employees of the County within the meaning of Section 1302(j) of the Act.
3. The twenty (20) hour limitation contained in Revised Policy No. 308 issued January 4, 2001, is a term and condition of employment and a mandatory subject of bargaining
4. The County is required to bargain over the limitations placed upon the outside employment of its paramedics to the extent such limitations constitute a term and condition of employment.
5. The Union's request for compensation for all paramedics who lost work because of the twenty (20) hour limitation is denied. The affected employees voluntarily agreed to the limitation without attempting to formally pursue the matter. The County is not financially responsible for the judgement exercised by these employees.

PURSUANT TO 19 DEL.C. SECTION 1306, NEW CASTLE COUNTY IS HEREBY

ORDERED TO:

A. Cease and desist from enforcing the twenty (20) hour limitation on outside employment contained in Revised Policy No. 308.

B. Take the following affirmative action:

1. Issue a notice advising all paramedic employees that Revised Policy 308 dated January 4, 2001, has been rescinded insofar as it applies to mandatory subjects of bargaining, specifically the twenty (20) hour limitation on outside employment.

2. Within ten (10) calendar days from receipt of this decision provide PERB with a copy of the notice referenced in paragraph one (1), above.

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

IT IS SO ORDERED.

Dated: April 25, 2002

/s/Charles D. Long, Jr.

Charles D. Long, Jr.,

Executive Director