



(5) Refuse to bargain collectively in good faith with an employee representative which is the exclusive representative of employees in an appropriate unit.<sup>[1]</sup>

On April 7, 2004, the District filed its Answer denying the charge and setting forth new matter. Paragraph 6 of the new matter alleges that PERB lacks jurisdiction in this matter because resolution of the unfair labor practice charge requires the interpretation of the parties' collective bargaining agreement.

On May 3, 2004, PCA filed its Response denying the new matter.

On or about May 25, 2004, the Principal Assistant of the PERB, held an informal conference with the parties. It was determined that the District's preliminary issue of PERB's jurisdiction would be the subject of responsive briefs to be filed by the parties prior to addressing the underlying substantive issue.

The District's opening brief was received on July 12, 2004. The Association's answer was filed on July 23, 2004. The District did not file a reply.

### **ISSUE**

Does the PERB have jurisdiction to hear and rule on the unfair labor practice charge which the District asserts requires the interpretation of the collective bargaining agreement?

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<sup>[1]</sup> The Charge alleges that contrary to established custom and practice the District unilaterally altered the status quo of a mandatory subject of bargaining in violation of 14 Del.C. §4007(a)(5) by eliminating the third shift of employees.

## **BACKGROUND**

The District and the PCA are parties to a collective bargaining agreement for the period July 1, 2002, through June 30, 2006. On or about September 17, 2003, Mike Kelley (“Kelley”), the District’s Building and Grounds Supervisor met with the custodial employees to inform them of a change in the work schedule.

The following memorandum from Kelley, dated September 16, 2003, was also distributed to all custodial employees at or about the same time.

### **Effective September 27, 2003**

Due to the changing school environment, we feel it is necessary to make schedule changes. The changes will be as follows:

- 10:00 p.m. to 6:00 a.m. shift will be eliminated- anyone assigned to this shift will report to work on 9/29/03 from 3:00 p.m. to 11:00 p.m.
- 6:00 a.m. to 2:00 p.m. shift will be changed- anyone assigned to this shift will report to work on 9/29/03 from 7:00 a.m. to 3:00 p.m.
- 2:00 p.m. to 10:00 p.m. shift will be changed- anyone assigned to this shift will report to work on 9/29/03 from 3:00 p.m. to 11:00 p.m.

These changes are intended to be permanent, so please make any necessary changes in your personal schedules. Dexter will be in contact with you concerning your new job assignments.

I apologize for any inconvenience this may cause, however we feel it will be a step in a positive direction.

Thank you in advance for your cooperation in these changes. If you have any questions or concerns, please don't hesitate to contact me.

At some later date and at the request of the Delaware State Education Association ("DSEA"), Kelley also met with representatives of the DSEA staff.

### **PRINCIPAL POSITIONS OF THE PARTIES**

District: The District argues that the resolution of the unfair labor practice charge requires the interpretation of the collective bargaining agreement between the parties which is exclusively within the province of the negotiated grievance and arbitration procedure. Consequently, the PERB lacks jurisdiction to process the unfair labor practice charge. It is the District's position that the language of the collective bargaining agreement, specifically Article 4, Rights of the Parties, Section 4.1, Board Rights, and Article 5, Hours of Work and Premium Rates, Section 5.1 controls the resolution of this matter.

Association: The collective bargaining agreement between the parties is silent as to "shifts". Therefore, in order to resolve the unfair labor practice charge the PERB is not required to interpret any provisions of the collective bargaining agreement.

By relying on "custom and practice" (asserting there has always been a third shift) the Association has availed itself of the only available forum in which to remedy the alleged statutory violation. By eliminating the third shift the District unilaterally altered the status quo of a mandatory subject of bargaining in violation of Title 14 Del.C §4007(a)(5).

## DISCUSSION

Although the subject of PERB's jurisdiction in matters involving both contract and statutory issues has been previously addressed, the issue periodically resurfaces as an affirmative defense. The fact that a dispute requires the interpretation of contract language does not remove a pending unfair labor practice from the jurisdiction of the PERB. In addressing this question, PERB has concluded:

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. While an unfair labor practice is statutory in origin and raises a question of statutory interpretation to be resolved by the Public Employment Relations Board, an alleged contract violation is proper subject matter only for the negotiated grievance procedure. The unfair labor practice forum is not a substitute for the grievance procedure and the Public Employment Relations Board has no jurisdiction to resolve grievances through the interpretation of contract language. **It may, however, be necessary for the Board to periodically determine the status of specific contractual provisions in order to resolve unfair labor practice issues properly before it.** (emphasis added) Brandywine Affiliate, NCCEA, DSEA, NEA v. Brandywine School District Board of Education. (Del. PERB, ULP No. 85-06-005, I PERB 131, 142-143 (02-05-86)).

See also Indian River Education Association and James Lobo v. Board of Education of the Indian River School District. Del.PERB, ULP 88-11-027, I PERB 375, 379 (1988). Seaford Education Association v. Board of Education of Seaford School District, Del.PERB, ULP No. 87-10-018, I PERB 233, 236 (1988).

The current state of the law in Delaware is clear concerning PERB's jurisdiction when conduct, if proven, could constitute a violation of both a contractual and a statutory provision.

Where there exists a negotiated procedure for resolving contractual issues which is necessary in order to resolve the underlying unfair labor practice charge, PERB retains jurisdiction. Where the employer agrees to waive procedural defenses, PERB jurisdiction is not immediately exercised pending a resolution of the contractual issue through the negotiated arbitration procedure.

The District's position that the PERB has no authority to interpret contract provisions leads to the illogical conclusion that where the bargaining representative has either failed to file a grievance alleging a contractual violation or where a grievance is dismissed for procedural or technical reasons unrelated to the underlying substantive issue, there would be no remedy available even though the disputed conduct may constitute a unilateral change in the status quo of a mandatory subject of bargaining, and thereby constitute a statutory violation.

### **DECISION**

PERB's jurisdiction over an unfair labor practice charge is not negated when the interpretation of contract language is required to resolve the alleged statutory violation.

### **PROBABLE CAUSE DETERMINATION**

Having established jurisdiction, PERB rules require a determination as to whether the pleadings establish probable cause to believe that an unfair labor practice may have occurred. Three (3) elements must be proven in order for the Association to prevail. The charge must provide a foundation that the District instituted a unilateral change in the status quo of a mandatory subject of bargaining.

It is undisputed that eliminating the third shift was a unilateral change made by the District.

The second element necessary for a Section 4007(a)(5) violation is to establish that the unilateral change altered the status quo. An essential determination, therefore, is what constitutes the status quo which the Association maintain was unilaterally changed by the District.

The Association charges that the District violated 14 Del.C. 4007(a)(5) when it unilaterally altered the status quo of a mandatory subject of bargaining (hours) when it eliminated the third shift. 14 Del.C. §4002(r) defines “terms and conditions of employment” which constitute mandatory subject of bargaining. The term “hours” is expressly included in the statutory definition of “terms and conditions of employment.” The question, therefore, is whether the elimination of a shift constitutes a change in hours with in the contemplation of Section 4002(r), of the Act.

Within this context, the pleading raise legitimate factual and legal issues which, when considered in a light most favorable to the Charging Party, establish probable cause to believe that an unfair labor practice may have occurred.

Having resolved the issue of PERB’s jurisdiction and finding probable cause to believe that an unfair labor practice may have occurred, it is necessary to consider the impact, if any, of the PERB’s pre-arbitral deferral policy upon the processing of this matter.

The Delaware Public School Employment Relations Act is patterned after the National Labor Relations Act (“NLRA”). The NLRA created the National Labor Relations Board (“NLRB”) as the administrative agency responsible for administering the NLRA. The Delaware Public School Employment Relations Act created the Public Employment Relations Board to

administer not only the Public School Employment Relations Act but also the Police Officers and Firefighters Employment Relations Act and the Public Employment Relations Act, both of which are also patterned after the NLRA.

In 1984, the PERB held:

In the absence of precedent interpreting the provisions of the Act, there is a natural and logical tendency to look to both the established federal law in the private sector and to the developing public sector law in other state jurisdictions as guidelines. As for private sector precedent, the Delaware Public Employment Relations Board stated in Seaford Education Association v. Board of Education of Seaford School District, Case No. 2-2-84:

While such decisions may provide such guidance, there are distinctions that exist between the public and the private sector. Experience gained in the private sector, while valuable, will not, however, necessarily provide an infallible basis for decisions in the public sector. Appoquinimink Education Association v. Bd. of Education of the Appoquinimink School District, Del. PERB, ULP No. 1-3-84-3-2A, I PERB 35, 40-41. (1985).

Over its twenty (20) year history, the PERB consistent with the practice of the NLRB and other state agencies similar to the PERB, has developed a discretionary policy of deferring to the parties' negotiated arbitration procedure unfair labor practice charges requiring the interpretation of a specific contractual provision or provisions. FOP, Lodge No. 1 v. City of Wilmington, Del. PERB, ULP No. 98-02-226, III PERB 1695 (1998). PERB's policy reflects a well-established line of private sector cases decided by the NLRB. In the case of Collyer Insulated Wire v. IBEW Local 1098, 192 NLRB 837, 77 LRRM 1931 (1971), in the private sector, the National Labor Relations Board held:

Without prejudice to any party and without deciding the merits of the controversy, we shall order that the compliant herein be dismissed, but we shall retain

jurisdiction for a limited purpose. . . . In order to eliminate the risk of prejudice to any party we shall retain jurisdiction over this dispute solely for the purpose of entertaining an appropriate and timely motion for further consideration upon a proper showing that either (a) the dispute has not, with reasonable promptness after the issuance of this decision, either been resolved by amicable settlement in the grievance procedure or submitted promptly to arbitration, or (b) the grievance or arbitration procedures have not been fair and regular or have reached a result which is repugnant to the Act. Collyer supra. 77 LRRM at 1938.

In support of its decision, the National Labor Relations Board opined:

The long and successful functioning of grievance and arbitration procedures suggests to us that in the overwhelming majority of cases, the utilization of such means will resolve the underlying dispute and make it unnecessary for either party to follow the more formal, and sometimes lengthy, combination of administrative and judicial litigation provided for under our statute. At the same time, by our reservation of jurisdiction, *infra*, we guarantee that there will be no sacrifice of statutory rights if the parties' own processes fail to function in a manner consistent with the dictates of our law. Id. at 1937.

In 1978, the Delaware Supreme Court in City of Wilmington and Department of Public Safety v. Wilmington Firefighters Local 1590 and International Association of Firefighters, 385 A.2d 720, 98 LRRM 2375 (1978) adopted the deferral concept adopted by the NLRB in Collyer (Supra.)

The Court phrased the issue as:

The ultimate question before us concerns the action Which should be taken by a Delaware Court when it is asked to award relief on grounds that allegedly violate both a State statute and a labor relations contract in which the parties established a binding and final settlement procedure for disputes. 385 A. 2d at 722.

Citing Collyer, the Court observed:

First, as to the Federal precedent: Section 10 of the National Labor Relations Act (Act), 29 U.S.C. s 151, et seq., authorizes the NLRB to adjudicate statutory violations constituting

unfair labor practices arising under the Act. However, the existence of a claimed contract violation and the availability of a contract remedy arbitration, for example, does not divest the NLRB of jurisdiction to adjudicate an alleged statutory violation for the same conduct. NLRB v. Acme Industrial Co., 385 U.S. 432, 87 S. Ct. 565, 17 L.Ed.2d 495 (1967). NLRB jurisdiction continues but, if the labor dispute involves both allegations, (that is, statutory as well as contract violations) and if it is at a pre-arbitral stage, the NLRB will defer to the contractually agreed-upon arbitration procedures when the issue is a refusal to bargain. Collyer Insulated Wire, 192 NLRB 837, 77 LRRM 1931 (1971). City of Wilmington, 385 A. 2d at 723.

...

When the NLRB does defer, it retains jurisdiction to consider an application for additional relief on a showing that either: (1) the dispute has not been resolved or submitted to arbitration with reasonable promptness, or (2) the arbitration procedures have been unfair or have rendered a result repugnant to the Act.

The Court held:

It follows that the Court of Chancery was correct in accepting jurisdiction while ordering the parties to arbitrate . . . City of Wilmington Supra, at 723-724, 725 citing Collyer Insulated Wire supra.

Where there exists a negotiated procedure for resolving contractual issues and the public employer agrees to waive procedural defenses, PERB jurisdiction attaches but is not immediately exercised pending a resolution of the relevant contractual issue pursuant to the negotiated arbitration procedure. Wilmington Firefighters (Supra.). Here, the exclusive procedure for resolving issues requiring the interpretation or application of the collective bargaining agreement is found at Article 14, of the Agreement, Grievance Resolution Procedure.

In matters involving both statutory and contractual issues, the PERB will defer to the parties' negotiated arbitration procedure while retaining jurisdiction for the purpose of reconsidering the matter, on application by either party, for any of the following reasons: 1) that

the award failed to resolve the statutory claim; 2) that arbitration has resulted in an award which is repugnant to the [statute]; 3) that the arbitral process has been unfair; and/or 4) that the dispute is not being resolved by arbitration with reasonable promptness. Fraternal Order of Police, Lodge No. 1 v. City of Wilmington, ULP No. 89-08-040, I PERB 449, 455 (1989).

At this point, a decision must be rendered as to whether this charge is appropriate for deferral to arbitration as set forth in the parties' collective bargaining agreement. In order to expedite the processing of this matter a conference will be held within the next thirty (30) days for this purpose.

August 16, 2004  
(Date)

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